**DONALD MULLENS,**

**Grievant,**

**v.** **Docket No. 03-DEP-233**

**DEPARTMENT OF**

**ENVIRONMENTAL PROTECTION,**

**Respondent.**

## DECISION

Donald Mullens ("Grievant") filed this grievance directly at level four on August 1, 2003, following termination from his employment as an Environmental Inspector for the Department of Environmental Protection ("DEP"). A level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on April 30, 2004, and July 9, 2004. Grievant was represented by counsel, Daniel Dotson, and Respondent was represented by Ronald Reece, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on September 27, 2004. (See footnote 1)

The following findings of fact are made based upon a preponderance of the credible evidence of record.

## Findings of Fact

1. Grievant was employed by DEP as an Environmental Inspector.

2. Grievant's job duties consisted of inspecting various waste facilities and landfills in Webster and Braxton Counties, in order to ensure compliance with federal andstate environmental standards and regulations. Grievant was also responsible for enforcement of those regulations, by issuing notices of violations ("NOVs") and administrative penalty orders ("APOs"), which are used by DEP to document a history of violations and attempts to correct them, which may later be used if legal action

must be brought to bring the facility into compliance. Approximately 10-20% of the facilities inspected will get NOVs during inspections. Grievant had about 80 facilities in his territory, which was the lowest number of facilities of any other DEP inspector.

3. In 1998, hearings were held regarding potential closure of the Webster County landfill, which Grievant was responsible for inspecting. Although Grievant issued numerous inspection reports indicating that the landfill was in compliance, other inspectors found ground water contamination near the site, due to seepage from the landfill. Grievant had not documented any seepage. Because Grievant had given the landfill good reports, it was allowed to stay open.

4. On August 19, 1999, Grievant received a traffic citation while on duty and driving a state vehicle. He also appeared at two hearings regarding that offense wearing his DEP uniform. The officer who issued the citation described Grievant's behavior as rude and unprofessional.

5. For the calendar year 1999, Grievant received a “meets expectations” evaluation. However, it was noted that Grievant needed to do a better job of documenting his work, such as more detailed reports and pictures of sites which had needed to be cleaned up. Listed under “performance standards and expectations” was the requirement that Grievant bring the Webster County landfill into compliance.

6. On February 29, 2000, Grievant received a written reprimand for using hisstate vehicle and wearing his uniform to hearings challenging his traffic citation and for failing to report annual leave used on the days of those hearings. Grievant was admonished for violating DEP's policies regarding use of state vehicles, wearing of uniforms, and leave.

7. For the period of January through June of 2000, Grievant received an interim evaluation rating of “does not meet expectations.” Deficiencies were noted in the areas of documentation and communication skills. Problem areas noted by Grievant's supervisor, John Fredericks, included Grievant's issuance of only five inspection reports in six months; Grievant had initiated no NOVs, APOs or criminal complaints for the year; and he had submitted no accomplishment reports or documentation of accomplishments, as had been requested by Mr. Fredericks. Also, the Webster County landfill continued to have serious compliance problems, which Grievant had ignored or overlooked. Grievant had been advised to check in with the office twice daily, which he was not doing. Finally, Grievant's computer skills were not good, and he was advised that they needed to improve.

8. In conjunction with the June, 2000, evaluation, Grievant was placed on an improvement plan for 90 days. Included in the plan was the requirement that Grievant arrange to work one day per week with inspectors in other parts of the state in order to learn better organization, documentation, thoroughness and quantity of inspections, dealing with violations, and enforcement. Grievant was also directed to work one day per week in the Oak Hill regional office (Grievant's assigned office) in order to take advantage of the computers and assistance available there. Finally, Grievant was required to allow Mr. Fredericks to accompany him to inspections on at least four occasions during the improvement period. 9. By memorandum dated October 26, 2000, Grievant was advised that he was not complying with the improvement plan requirements in these areas:

> Grievant had worked with other inspectors only three times, as opposed to once per week, as required.
>
> He had worked in the district office only twice, instead of once per week, as recommended to learn computer and documentation skills.
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> He had failed to set up four days upon which Mr. Fredericks could accompany him to inspections.

Mr. Fredericks, therefore, extended Grievant's improvement period through the end of January, 2001, to allow Grievant the opportunity to fulfill the conditions of the plan. He also advised Grievant that failure to improve as set forth in the plan could result in disciplinary action up to and including termination.

10. Grievant's performance appraisal for the first half of 2001 resulted in a “does not meet expectations” rating. It was noted that Grievant had failed to comply with the provisions of his improvement plan and continued to suffer deficiencies in the areas of documentation of activities and communication with superiors. In addition, the activity reports Grievant had submitted to the regional office did not correspond with those listed on his monthly activity report. Although he still did not meet expectations in the documentation area, it was noted that there had been some improvement at the end of the year.

11. Although Grievant received a “meets expectations” rating for the interim evaluation period

of January through June of 2002, continued problems were noted with regard to documentation and communications.

12. In September of 2002, the Webster County landfill was shut down, because it had run out of space. Tons of exposed garbage were piled extremely high and could notbe covered, allowing debris to blow around, and also allowing access by animals, rodents, and insects. Although the landfill had been running out of space for several months, a new disposal cell was being built. However, DEP officials were taken by surprise regarding the extreme condition of the landfill by September, because Grievant had not documented any violations at the facility.

13. By memorandum dated September 27, 2002, Mr. Fredericks advised Grievant that he was failing to meet the minimum expectations for his position, including failure to enforce DEP regulations at sites he inspected, failure to keep his supervisor informed of activities, failure to document numerous violations (specifically at the Webster County landfill), and continued failure to produce the quantity of inspection reports and violation notices expected. A new improvement plan was implemented, with the requirements that Grievant report to Mr. Fredericks or his office twice daily concerning his specific activities, keeping a daily log of activities and submitting it weekly to Mr. Fredericks, and checking email daily.

14. On October 10, 2002, Mr. Fredericks advised Grievant, in writing, that he was not complying with the new improvement plan. Grievant had not submitted a weekly report of activities, and had failed to make any contact with Mr. Fredericks. Mr. Fredericks advised Grievant that his failure to comply with the plan constituted insubordination, which would be documented in his personnel file and referred to Mr. Fredericks' superiors, Assistant Chief Inspector Hill and Chief Inspector Zeto, for further action.

15. By memorandum dated October 31, 2002, Mr. Fredericks advised Grievant he was still not in compliance with the improvement plan, specifically with regard to his failure to submit weekly reports of activities and his failure to maintain daily contact with hissupervisor. Mr. Fredericks again advised that this information would be passed on to his superiors, and he recommended immediate compliance.

16. On November 12, 2002, Mr. Fredericks advised Grievant, by memorandum, that the activity reports/logs he had submitted were not supported by corresponding reports of the specific incidents noted, including numerous inspections performed, complaints investigated, NOVs and clean-up

activities at dumps. Grievant was advised to submit the requested documentation by November 15, 2002.

17. Grievant's annual performance evaluation for the calendar year of 2002 resulted in a rating of “does not meet expectations.” The various problems with Grievant not documenting his work, failing to communicate with his supervisor, and his submission of inconsistent reports and activity logs were all noted as the basis for the rating. It was also noted that Grievant had failed to meet the conditions of his improvement plans.

18. Beginning February 24, 2003, Grievant was suspended for five working days for negligence in the performance of his assigned responsibilities. Specifically, Grievant was admonished for issuing good reports for the Webster County landfill, even though it was grossly out of compliance and had to be shut down on an emergency basis. In addition, Grievant was reprimanded for his discrepancies in work documented versus work performed. As to Grievant's inadequate performance, the suspension letter stated:

> Additionally, of the approximately 80 permitted facilities within your assigned area, Agency records reflect you have submitted inspection reports for only eight (8) of these facilities during the January-September 2002 time frame. . . .
>
> In calendar year 2002 you reported on time and activity forms you spent twenty-five (25) work days at abandoned structures, but you have failed to submit any further inspections or other reports documenting this activity. It is reported that you advised your supervisor you encouraged local fire departments within your assigned area to burn such structures under thebonafide fire training rule without first securing the authorization of the State Fire Marshall and the Division of Air Quality (DAQ).
>
> Between the first of May and the end of July 2002, you submitted seven (7) one-page inspection reports. This number is well below what many inspectors submit for a single day of activity even though you report four (4) days doing files and reports in this time period. The thirty (30) work days reflected in your time and activity reports for the calendar year 2002 that were spent in your Webster office (residence) working on files and reports do not correlate with the amount of inspection reports, [NOVs] and complaint investigations submitted to your supervisor.

19. Upon his return to work, on March 6, 2003, Grievant was placed on another plan of improvement. The conditions of the plan were that Grievant phone his supervisor's office twice daily to report his activities, keep a daily log of his work performed at each facility inspected, and check

email daily. In the memorandum implementing the improvement plan, Mr. Fredericks noted that Grievant had not submitted his daily log for at least three months, and had not submitted a monthly accomplishment report. Grievant was advised to submit 20 inspection reports per month.

20. On March 28, 2003, Larry Betonte, Assistant Chief Inspector implemented a revised and detailed improvement plan, which was to last 90 days. This improvement plan was promulgated following a meeting between Grievant, Mr. Fredericks, and Mr. Betonte on March 21, 2003. Specific details of the plan included the following:

> Grievant was to immediately review the Environmental Enforcement Employee Handbook.
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> Grievant was directed to develop a daily log format to facilitate weekly reports.
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> Grievant was to complete 20 inspection reports per month, with specific instructions regarding how those inspections were to be conducted and the contents of the reports.
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> Grievant was directed to implement specific work practices, including development of an appointment calendar reflecting his inspection activities,seeking assistance from designated staff, developing a system to catalog NOVs and follow-up, organize his field files, document photographs, contact the office twice daily, and submit his daily work logs at the end of each week.

21. During the March meeting regarding the revised improvement plan, Mr. Betonte asked Grievant what assistance he needed to improve his performance. Grievant mentioned that he had been experiencing problems with his computer, so he was provided a new one.

22. Mr. Betonte's improvement plan also advised Grievant to contact him at his office, residence, or cell phone at any time regarding any questions or clarification regarding the requirements. It also included three progress reviews of Grievant's compliance with the plan, to be conducted at one-month intervals (with specific dates included). Grievant was further advised that further failure to resolve his inadequate job performance would result in disciplinary action, including dismissal.

23. In May of 2003, Grievant, Mr. Fredericks, and Mr. Betonte met to review Grievant's

progress. During the meeting, Grievant and Mr. Fredericks had a heated exchange and he “talked over” Mr. Betonte. Grievant admitted that he was not doing good work and knew that he could do better. In a follow-up letter dated May 27, 2003, Mr. Betonte noted that Grievant had made some improvement, but some areas were not at an acceptable level. He set forth specific suggestions for Grievant to improve his inspection reports and follow-up. Mr. Betonte reminded Grievant of several areas which would be reviewed on June 30, 2003, at the end of the improvement period, to determine whether Grievant had complied with the plan.

24. A final review of Grievant's progress was conducted by Mr. Betonte on July 9, 2003. Grievant had begun keeping an appointment calendar, but it only contained hisdaily accomplishments, not appointments at facilities. Grievant's field files for 2003 had not been updated to reflect any activities for the year, and his photo log only had five photographs in it. Grievant continued to fail to issue NOVs for violations.

25. On June 19, 2003, Grievant visited the residence and business of Marty Casto, who operates a small scrap recycling business in Webster County. Grievant wanted Mr. Casto to haul away some scrap metal for a church group, and Mr. Casto refused. During the exchange, Grievant used vulgar language and threatened to take complaints against Mr. Casto more seriously in the future. Mr. Casto used vulgar language during the exchange, also.

26. On June 26, 2003, Grievant went to the Nicholas County landfill to dump some personal garbage on “free day,” during which customers are not charged for dumping up to 700 pounds of garbage. A dispute ensued, because the landfill's 700 pound limit is less than what DEP regulations allow, and Grievant believed he should have been entitled to go over the limit without being charged. Grievant was in uniform, identified himself as a DEP inspector, and was rude to landfill employees during the dispute.

27. The June altercation at the Nicholas County landfill resulted in criminal complaints against Grievant, which were later dismissed.

28. Grievant lives approximately 80 miles from the Oak Hill office, so he found it cumbersome to go to that office to work, as required in his various improvement plans.

29. Grievant had requested that Mr. Betonte accompany him to the various sites he inspected, so Mr. Betonte could “see how he works.” (Gr. Test., L. IV). Grievant preferred to allow people the opportunity to clean things up voluntarily, before he issued citations, and he did not believe it was

important to document minor violations. Hebelieved that his style was more conducive to establishing good working relationships with the facility operators. Mr. Betonte refused to comply with Grievant's request.

30. By letter dated July 24, 2003, Grievant was suspended immediately, pending an investigation into his “conduct, performance, . . . and allegations that [he] misused [his[ position . . . by intimidating members of the community you regulate in order to solicit services.” Resp. Ex. 18.

31. On August 14, 2003, Mr. Zeto, Chief Inspector, advised Grievant in writing that the investigation had substantiated that Grievant had failed to demonstrate the capability to perform his assigned duties, as evidenced by his failure to comply with his improvement plans and the various requirements contained in them, that he had been insubordinate by failing to comply with his supervisor's requirements, as evidenced by his repeated refusal to document inspections and violations, along with not communicating as directed to by his supervisor. Also, Mr. Zeto found that Grievant had abused his regulatory authority by soliciting favors and making threats, had used lewd and abusive language toward others, and had violated DEP's uniform policy. Mr. Zeto advised Grievant that he believed termination of his employment was necessary, but he provided Grievant the opportunity to respond to these charges, prior to a final determination.

32. Mr. Zeto met with Grievant on August 22, 2003, to discuss the charge against him. Grievant offered very little during the brief meeting and did not address most of the areas in which problems had been found.

33. By letter dated August 25, 2003, Grievant's employment was terminated. The stated reasons for the dismissal included his “unwillingness or inability to effectively perform your job, continuing failure to meet the performance standards of your position,. . . insubordinate behavior toward your supervisors, misuse of your regulatory authority by soliciting favors for personal gain and rudeness to the public.” The letter continued for seven pages, citing the specific incidents described in the findings of fact, above, along with attachments documenting the various improvement plans and Grievant's failure to improve his performance.

## 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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance & 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). ___In the instant case, Respondent has more than amply justified its dismissal of Grievant, chiefly for his repeated failure to improve his job performance and comply with specific directives of his superiors. Grievant's only defenses to the action taken againsthim are that he should not have been terminated on the basis of criminal charges which were ultimately dismissed, and that he should not have been required to conform to the same standards as inspectors in other regions who had more facilities to inspect. Clearly, Grievant's assertions are completely outweighed by the overwhelming and unrefuted evidence of his failure to comply with the requirements of his position over a period of several years. Moreover, it is clear that the criminal charges themselves were not the basis for Grievant's termination, so their dismissal is irrelevant. Respondent's overwhelming volume of evidence regarding Grievant's poor job performance is more than enough to justify his termination on that basis alone.

Respondent's evidence establishes that Grievant's superiors displayed the utmost patience and determination in attempting to assist him with his inadequacies. Nevertheless, Grievant consistently refused to perform the tasks he was directed to, which were undisputedly within his job description. Grievant's attempt to justify his actions as his own style of using “gentlemen's agreements” to accomplish his job is simply an excuse, and it certainly does not justify his repeated refusal to perform the duties of his position. In this regard, Respondent has charged Grievant as being insubordinate. Grievant has been charged with insubordination, defined as 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). In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." Butts v. Higher Educ. Interim Governing Bd.,212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). See Santer v. Kanawha County Bd. of Educ., Docket No. 03-20-092 (June 30, 2003); 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).

"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). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. Maxey v. W. Va. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). Grievant has failed to prove that his superiors' directives were unreasonable, and, in fact, he was continually directed to perform the functions of his position and given specific instructions regarding how to do so. Unfortunately for Grievant, his “style” was not getting the job done, and it was not his prerogative to decide how to conduct the business of DEP's inspection division. Grievant repeatedly ignored instructions, and his conduct was insubordinate.

With regard to some of the specific events which took place, Grievant testified that others involved have been dishonest. He contends that he was advised by his supervisor to wear his uniform to contest the traffic citation, and that the supervisor then lied to Mr. Zeto in order to “cover himself.” Grievant also stated that he did not use any vulgar language during his discussion with Mr. Casto regarding the disposal of scrap metal, and denies that he misused his authority on that occasion or during the dispute at the Nicholas County landfill.

In situations where the existence or nonexistence of certain material facts hingeson witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., 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 & Human Res./Huntington State Hosp., Docket No. 93- HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess 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 footnote 2) See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

The evidence presented does not support Grievant's version of events. Of course, Grievant has an obvious motivation to deny that he behaved inappropriately, because he is contesting his termination. On the other hand, Respondent provided numerous witnesses who gave similar versions of Grievant's conduct, both during the landfill incident and at Mr. Casto's residence. Indeed, even Grievant's own superiors have described him throughout this proceeding as having a tendency toward rude and abrasive behavior. Grievant also contends that he suffered numerous problems with his computer and was not provided a new one until shortly before his termination, despite previous requests. No other witnesses in this case have corroborated this allegation. In fact, Grievant also testified that he was reluctant to relay his problems to Mr. Fredericks, who he alleged had lied to him on numerous occasions; however, no details of these allegations were provided. Accordingly, Respondent's version of events is accepted as the accurate one.

Moreover, Grievant has admitted to many of the issues which resulted in his termination, such as his knowledge that it was a violation of DEP's policy to appear in uniform while conducting personal business, along with his admission that he knew throughout his various improvement plans that his work was not good and could be better. Yet, amazingly, despite the assistance repeatedly offered and the explicit instructions given, Grievant failed to improve his work in accordance with his employer's expectations. Respondent has more than justified Grievant's termination for all of the reasons set forth herein.

Consistent with the foregoing, the following conclusions of law are made.

## 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).

2. 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 technicalviolations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance & 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).

3. Respondent has proven by a preponderance of the evidence that Grievant was dismissed for good cause.

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.

**Date: October 6, 2004** _____

**DENISE M. SPATAFORE**

**Administrative Law Judge**

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*Footnote: 1*

*Due to Mr. Reece's resignation from his position after the level four hearing was concluded, Assistant Attorney General Robert D. Williams represented DEP during the post-hearing submissions period.*

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*Footnote: 2*

*The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as 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).*