**THE WEST VIRGINIA PUBLIC EMPLOYEES**
**GRIEVANCE BOARD**

**DAVID WORKMAN,**
**Grievant,**

**v.** **Docket No. 06-DOL-253**

**DIVISION OF LABOR,**
**Respondent.**

## DECISION

Grievant David Workman filed this grievance directly to level four on July 25, 2006, following the termination of his employment with the Division of Labor ("Respondent").[1] His Statement of Grievance asserts that such action was "in violation of W. Va. Code § 29-6A-2 (l) and W. Va. Code § 29-6A-2 (p)." Grievant seeks relief by way of, "Reinstatement immediately, receive all back pay from illegal suspension and termination, all negative statements removed from personnel file. Immediate disciplinary action taken against DOL Commissioner, Dep. Commissioner, Wage & Hour Dir., Supervisor & Personnel Dir. All legal fees paid." Grievant modified his relief requested at the level four hearing by eliminating his request for reinstatement.

A level four hearing was conducted before the undersigned on December 12, 2007, at the Board's Charleston Office. The hearing was recessed at the request of Grievant

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[1]In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. VA. CODE §§ 18-29-1 to 18-29-11 and W. VA. CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA. CODE §§ 6C-2-1 to 6C-2-7 and W. VA. CODE §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. VA. CODE §§ 18-29-1 to 18-29-11, for education employees, and W. VA. CODE §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. *See* Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

before presenting his case-in-chief. The level four hearing was reconvened on June 10, 2008, pursuant to the parties' mutually agreed upon date. Neither Grievant nor anyone on his behalf appeared for the hearing. No request to continue the hearing was made by Grievant. The undersigned issued an Order to Show Cause on June 12, 2008, why this matter should not be considered mature for decision. No response was filed by Grievant to this Order to Show Cause. The undersigned issued a subsequent Order on July 17, 2008, allowing the parties until August 8, 2008, to file fact/law proposals. Grievant did not file fact/law proposals. Grievant was represented by Barbara Schamberger, Esquire. Respondent appeared by Elizabeth Farber, General Counsel. This matter became mature for decision following the receipt of Respondent's fact/law proposals submitted on August 11, 2008.

**Summary**

Grievant began his employment with Respondent in October 1998 as a Labor Inspector II. Beginning in December 2004, the agency started an investigation into the veracity of Grievant's time and activity reports. In addition, Grievant was given a written reprimand in 2004 for personal cell phone charges on his state issued cell phone. This written reprimand also brought to Grievant's attention that on many occasions the cell phone invoices indicated he was on the phone for extended periods of times, but his time and activity reports indicated he was checking contractors at various job sites at the same time. Grievant was suspended without pay for twenty-one working days in May 2006. The reasons for the suspension were Grievant's improper use of a state issued cell phone, misuse of his state issued vehicle, and failure to reimburse the Respondent for the cell

phone charges that were of a personal nature. A predetermination conference was held on June 16, 2006, to review the findings of the agency's investigation into Grievant's work activities. By letter dated June 26, 2006, Grievant's employment was terminated for repeatedly falsifying documents, and improper personal use of state property. Respondent has proven by a preponderance of the evidence that Grievant's employment was terminated for good cause. This grievance is denied.

Based upon a detailed review of the record in its entirety, the undersigned makes the following Findings of Fact.

## Findings of Fact

1. Grievant was employed by Respondent as a Labor Inspector II from October 1998 until his termination in June 2006.

2. Employees in the Labor Inspector II classification, also known as compliance officers, are responsible for both contractor licensing investigations, and wage and hour investigations. Compliance officers are expected to split their time equally between the two programs. Compliance officers work from their homes, they are assigned a state vehicle, and they are issued a state cell phone for work use.

3. The Respondent makes an annual report to the Contractor Licensing Board concerning contractor licensing activities. In mid 2005, while preparing the annual report, Deputy Commissioner Fran Cook discovered that the number of contractor licensing investigations had dropped by 70% when compared to previous years. All compliance officers' work was reviewed, including the number of investigations completed by each compliance officer.

4. In late 2005, Deputy Commissioner Cook received a communication from an individual who informed her that a state vehicle assigned to Grievant was parked in a church parking lot, and had not been moved for a period of time. Deputy Commissioner Cook reported that she had received other calls concerning this same vehicle being parked in places it did not belong. Deputy Commissioner Cook asked Administrative Services Manager Denise Brown to check monthly mileage reports on Grievant's vehicle, and his fuel purchases.

5. Deputy Commissioner Cook directed Grievant to seize a contractor's license from an individual and Grievant, for more than three months, did not comply. Grievant ultimately refused to seize the license, stating that he thought it was unprofessional.

6. Due to concerns, Deputy Commissioner Cook directed Grievant's supervisor, Mike Sams, to work with Grievant for one week. Deputy Commissioner Cook instructed Mr. Sams to review the number of contractors working in Grievant's assigned area, and to ascertain if Grievant needed assistance with doing his job.

7. Grievant was resistant to the directive requiring that he work with his supervisor, and wanted an explanation. Deputy Commissioner Cook explained to Grievant that he had conducted only twenty-four contractor licensing investigations in the past nine months. Further, he was to follow directives to answer his state-issued cell phone, and to work with his supervisor.

8. At the end of the week after working with his supervisor, Grievant was directed to review all his cases with his supervisor, and Wage and Hour Director Larry Walker. Grievant walked out of the meeting before its completion.

9. Commissioner James R. Lewis decided to conduct an in-depth review of Grievant's work. Weight and Measures Director John Junkins was assigned to conduct the review because he was familiar with both wage and hour, and contractor licensing investigations.

10. Administrative Services Manager Brown noticed in late 2003/early 2004 that the Respondent's cell phone bills were increasing. She prepared a summary comparison for three months of twenty compliance officers' and supervisors' bills. She determined that the average usage ranged from 185 to 280 minutes per month per employee.

11. Grievant's cell phone usage for the month of December 2003 to January 2004 totaled 1,699 minutes, and for the month of January 2004 to February 2004 totaled 5,071 minutes. A review of Grievant's portion of the phone bill made it apparent he was spending excessive amounts of both work time, and after-hours time on his state-issued cell phone for personal use.

12. Numerous contractors that Grievant reported he visited on his contractor licensing investigation reports between December 2003 and February 2004 provided affidavits to the Respondent stating that they had not met with Grievant on the date he reported; that they had no work in the reported location on that date; and that they did not have the number of employees reported. In one particular instance, the contract person Grievant reported he met with had been deceased since 1961.

13. Administrative Services Manager Brown met with Grievant in February and December 2004 to discuss the excessive cell phone use, and his falsified activity logs. Grievant agreed to enter into a repayment plan to reimburse the Respondent $2,114.80

for personal calls charged to his state-issued cell phone.

14. Grievant did not make scheduled payments per this agreement. One late payment check was returned to Respondent due to insufficient funds. Grievant completed the agreed restitution payments in April 2006.

15. An investigation of Grievant's work for January through March 2006 was conducted. This investigation included a review of his daily activity reports, his case files, computer files, and his travel logs.

16. Grievant reported significant amounts of time working at his home when there was no documentation in his case files or computer files to support or account for the hours or tasks he reported. Likewise, no documentation in his case files or computer files existed to support or account for claimed contractor licensing investigations. Grievant reported travel mileage in conducting contractor licensing investigations when no investigations were made or documented.

17. Numerous instances existed when Grievant reported that he was entering information into his computer and the dates did not match with the computer's date created and/or date modified properties file. For example, computer files for case numbers 06-008 and 06-0011 were created on February 14, 2006; however, Grievant reported both cases were entered into his computer on January 25, 2006.

18. Commissioner Lewis suspended Grievant without pay for twenty-one days pending further investigation into his work activities. Grievant was notified by letter dated May 11, 2006, of his suspension. The letter explained the specific circumstances and incidents (improper use of cell phone, improper use of state vehicle, and failure to follow

the directives of his supervisor) that warranted the suspension, and relieved Grievant of his state vehicle. Grievant was offered the opportunity to be heard in response to the decision to impose the suspension. Grievant did not respond.

19. Upon the completion of the investigation into Grievant's work activities, the Commissioner scheduled a predetermination conference with Grievant for June 16, 2006. Grievant was advised by the Commissioner that he was considering disciplinary action, but would not make any decision until he heard Grievant's response. Grievant stated he was not willing to discuss any matters with him, and that all questions concerning his work activities were to be directed to his attorney. The Commissioner advised Grievant that if he chose not to respond, he would have to make a decision based on the results of the internal investigation. Grievant responded that he had nothing to say.

20. By letter dated June 26, 2006, Grievant was notified of his dismissal. The instances of misconduct set out above were recited to Grievant as a detailed explanation of the reasons. In addition, from January through March 2006 Respondent provided daily detailed documentation that supported the allegation that Grievant falsified his time, activity reports, and investigative reports to give the appearance he was performing his Labor Inspector II duties.

## 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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *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.*

Permanent 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 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). "The 'term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees.' *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002)." *Jaggers-Green v. Bur. of Empl. Programs*, Docket No. 03-BEP-026 (July 30, 2004).

Grievant presented no challenge to the overwhelming evidence which supported his termination at either the predetermination conference or the level four hearing.[2]

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[2]Grievant's Statement of Grievance makes a general reference to harassment and reprisal. No evidence was presented to the undersigned at level four supporting his allegation of harassment and reprisal. The Grievance Board has long held that elements

Respondent's dismissal letter stated that the internal investigation into Grievant's work activities established that he was not performing his duties as a Labor Inspector II. The investigation substantiated that Grievant falsified his time sheets, activity reports, and his investigation reports to give the false appearance he was performing his duties. This was demonstrated by a methodical and systematic weekly review of Grievant's reported work activity with the hours charged by Grievant, and the amount of time which could reasonably be justified.

More specifically, the investigation of his work activities for the period of January through March 2006, established the following:

> •Many times you indicated you were reviewing RFA's (request for assistance), yet did not identify the RFA numbers to document the activity.
> •On more than one occasion, you indicated that you were checking code compliance, yet no investigations were documented or reported.
> •You exceeded what would be considered a justifiable amount of time for travel.
> •On several occasions you spent several hours preparing week ending paperwork that could not be justified.
> •On many occasions you made notations on your time and activity reports and the investigation reports of work performed, yet your computer verifies the actions were not taken on the dates you reported.
> •On many occasions you reviewed and re-reviewed records, yet no action was taken or no new records had been received to review.
> •On many occasions you made entries and documented hours for activities that were not justified.[3]

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or allegations of the grievance which are raised, but not pursued or developed, will be considered abandoned. *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987).

[3]These allegations were detailed in an attachment to the termination letter that outlined the activities as shown on Grievant's time, activity, and investigation reports. Grievant's reported activities and time amounts are in sharp contrast to the results of the internal review and investigation.

Taking into consideration that Grievant's position is one of public trust, the public interest is best served by removing him from that position. The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which does not reflect discredit on the abilities and integrity of their employees. Respondent has met its burden of proof and established by a preponderance of the evidence that Grievant demonstrated gross misconduct of a substantial nature, directly affecting the rights and interest of the public, the Respondent, and the State of West Virginia. Grievant was dismissed for good cause.

The following Conclusions of Law support the decision reached.

**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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Permanent 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 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).

3. “The 'term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees.' *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).” *Jaggers-Green v. Bur. of Empl. Programs*, Docket No. 03-BEP-026 (July 30, 2004).

4. Respondent has proven by a preponderance of the evidence that Grievant’s employment was terminated for good cause.

Accordingly, this grievance is **DENIED**.

Any party 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 (2006) (*See* fn. 1 above). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) (2006) 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: September 4, 2008**

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**Ronald L. Reece**
**Administrative Law Judge**