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SANDRA DAVIS

v.

DOCKET NO. 89-DMV-569

WEST VIRGINIA DEPARTMENT OF MOTOR VEHICLES

D E C I S I O N

The grievant, Sandra Davis, was terminated from employment, effective immediately, by a memorandum dated September 27, 1989, from the Commissioner of the West Virginia Department of Motor Vehicles (DMV), on the grounds that she had failed to follow a specific order of her supervisor and had acted negligently in the handling of funds. Grievant, who was employed in the Resident Violators Section of the Safety and Enforcement Division of DMV, challenges the legality of her discharge from the classified service on three primary grounds: (1) DMV violated Section 13.02 of the Rules and Regulations of the Civil Service System (CSS) which requires fifteen days advance notice of dismissal be given in most instances; (2) the reasons stated in the termination notice do not provide sufficient justification for her dismissal; and (3) DMV failed to prove good cause or gross misconduct necessary for the dismissal of an

employee protected by the civil service laws.¹ The substantive issue of whether DMV presented sufficient evidence to warrant grievant's dismissal will be addressed first, followed by a discussion of grievant's procedural arguments.

I.

DMV contends grievant was properly terminated for gross misconduct involving the negligent mishandling of funds and that the evidence is sufficient to show that grievant's conduct amounted to a theft offense or a civil conversion of funds justifying her dismissal. Grievant relies heavily on the fact that shortages of funds had occurred in the past involving several employees but not one of them had been disciplined or discharged.

DMV presented the testimony of several witnesses who played a role in the events leading to grievant's discharge. Their testimony will be reviewed in some detail. DMV's principal witness was Ms. Cyndy Hunt, who worked in the Enforcement and Safety Division with the grievant and occasionally performed the same duties as grievant.

Ms. Hunt explained that three employees, Ms. Kristi Abdalla, grievant and herself, all had been provided individual money bags with separate locks and keys that were not

¹ The grievance was filed on September 28, 1989. The case was set for hearing on October 16, 1989, but was continued upon request of an AFSCME representative who had recently agreed to represent the grievant. The matter was rescheduled and heard on November 13, 1989, and proposed findings of fact and conclusions of law were filed by both parties by December 6, 1989.

interchangeable. On Friday, September 22, 1989, at about 4:35 p.m., after everybody else had left, she saw grievant remove money from her money bag. Sitting at her desk only six or eight feet away, she observed grievant take money attached to two receipts, put the receipts back in the bag, and place the money into her pocket. She told grievant that she had better put the money back, because Ms. Abdalla might discover the missing funds when, in accordance with office procedures, she rang up the fees grievant had collected on a cash register. Grievant responded that she would replace the money on Monday. In response to the suggestion that grievant or her boyfriend might not have the money then, grievant said she would leave her key to the money bag at home if she did not have the money. Grievant then placed her bag in the vault and the two of them left.

On Monday morning, Ms. Hunt, after carefully considering the matter over the weekend, informed her supervisors about what had occurred on Friday afternoon even though she considered grievant to be her best friend. She explained that when a shortage had occurred previously she and the other employees had been thoroughly questioned and in order to protect herself she reluctantly advised her superiors of grievant's conduct. Later that morning, when she started to obtain her money bag from the vault, grievant asked her to pick hers up too. She was instructed, however, to tell grievant that her bag had been lost. Upon being advised of this, grievant expressed concern that one of her

supervisors, Mr. Greg Vasiliou, the Director of Safety and Enforcement, may have discovered somehow that she had taken the money.

The next morning an unannounced audit was conducted in the Resident Violator Section at the direction of the Commissioner. The receipt book was reviewed and reconciled against deposits and the receipts and monies contained in the money bags assigned to the three employees. The findings of this audit are contained in a September 27, 1989 memorandum submitted to the Commissioner. It states that the money assigned to grievant contained two cash receipts of fifteen dollars each for which no monies were attached.²

Ms. Hunt stated that after this audit was announced grievant said she needed to come up with the money quick. Grievant then made some phone calls and said she was going to leave and pay a utility bill and stop by her house to retrieve the key to her money bag. Upon her return with her key, she said she had obtained the money to replace the missing thirty dollars and that she had arranged for her boyfriend to pay the utility bill, because her supervisor

² These receipts were removed from the bag during the audit and were given to Mr. Vasiliou for further inquiry. The audit also revealed cash which had been collected nearly a month earlier and some checks and money orders that were about to become void because they had not been remitted and deposited in a timely fashion. The auditor stated in his report that even though resources are limited, collections should be properly remitted no later than seventy-two hours after receipt and, ideally, on a daily basis. It appears from the audit report that all three employees audited had not made deposits in a timely manner.

told her to bring back a receipt of the utility bill paid. Grievant said that she was going to place the money in an envelope and tell her supervisor, Mr. Vasiliou, that she had made change from her own personal money and had simply forgotten to put the money back with the receipts.³

On cross-examination, Ms. Hunt admitted that money had been missing from her bag on one occasion and may have been missing from Ms. Abdalla's bag on two occasions. On each occasion all three employees had been questioned thoroughly. At first she said that at the time of the two previous shortages, the money bags were frequently left unlocked and anybody in the section, even a customer, could possibly have taken money from the bags, but later she said money bags were not assigned to each employee until the second incident in June 1989. Before that the money was kept in envelopes.

Ms. Agnes Kawash, grievant's immediate supervisor, confirmed Ms. Hunt's testimony about her reporting the incident and explained that she had retrieved grievant's

³ Ms. Hunt testified that grievant had telephoned her on Tuesday evening on the day before the level IV hearing and stated that if she lost her job her boyfriend and his friends would take care of her supervisor, Mr. Vasiliou, and DMV's internal investigator on the case, Mr. J. R. Rogers, after hours. Finally, she said she had received many threatening phone calls and had received a call shortly before the level IV hearing and was told that if she testified at the hearing it would be the last thing she ever did. This evidence of threats made by unidentified persons after grievant's dismissal, although not objected to at the hearing, is considered incompetent and will not be considered in this case in determining whether DMV had good cause for the dismissal at the time the termination decision was made.

locked money bag from the vault, determined no master key existed, and transferred the bag to Mr. Vasiliou, who in turn locked it in his desk. She explained in general terms how the overall investigation and audit was conducted. She corroborated the fact that grievant had requested and taken leave shortly after the unannounced audit was commenced. The application-for-leave form grievant signed was introduced in evidence reflecting her departure at 9:00 and her return at 9:50 a.m. Upon her return Ms. Kawash directed her to give the key to the auditor.

Ms. Kawash was also present at a meeting in which grievant was questioned about the missing thirty dollars. Grievant had explained that she had placed the money in a crossword puzzle book in her desk; however, a subsequent search for the money by Mr. Vasiliou, and a later search by Ms. Kawash and grievant did not produce the missing money. The Commissioner of DMV, Mr. George T. Sidiropolis, then met with Mr. Vasiliou and decided grievant should be discharged. Grievant was advised of the dismissal by Mr. Vasiliou and was informed of her right to challenge the dismissal by filing a grievance.

Ms. Kawash also explained on cross-examination that for several months during the first part of 1989 there had been only one money bag with three keys. In June, after a shortage had occurred, she changed the procedure and each individual employee had her own bag and key and as responsible for her own money.

Ms. Kawash, who appeared to have a particularly good memory of the events, said that when the grievant was asked about the shortage she suddenly said, "oh, I remember it now, I had to get change for these two customers who each had twenty dollar bills" and, not having time to put the money in the bag, she had put it in a crossword puzzle book. She also recalled that when grievant left shortly after the unannounced audit she had said she needed to pay an electric bill, but when she returned she said she had paid a gas bill.

Mr. James R. Rogers, an employee of DMV whose duties include the investigation of internal matters, testified that at the direction of the Commissioner he interviewed Ms. Hunt and grievant concerning the missing money in the presence of Mr. Vasiliou and Ms. Kawash. The grievant was asked to give her account concerning the shortage and basically stated that she had made change for two individuals from money in her purse, not having the change in her money bag for the twenty dollar bills presented by two customers. She later took the two twenties to the Titles and Registration Division and obtained five dollar bills in change and placed two fives back in her purse to account for her own money she had previously given to the two customers as change. She replaced the remaining thirty dollars in a book inside the top right hand drawer of her desk, explaining that she had not put it in the money bag because she did not have time. The two of them then checked to her desk and

found no money. She expressed surprise when the money was not in the book and said that someone must have taken it.

On cross-examination, Investigator Rogers testified that he had previously conducted an investigation of this section which produced inconclusive information concerning what happened to the money or who was responsible for it. He also corroborated Ms. Kawash's testimony that she was present when a search was conducted to locate the money in grievant's desk. Based upon the results of the investigation, he concluded that grievant was responsible for the missing thirty dollars.

Mr. Vasiliou testified that he recommended grievant's discharge based on the eyewitness testimony of her co-worker and the grievant's story, which he characterized as not "holding water." On cross-examination, Mr. Vasiliou pointed out that when the unannounced audit was begun, grievant did not mention the money not being in the bag as it should have been, and emphasized that it was not until after she was advised of the audit that she offered the story about the money being in a book in her desk. Considering all the circumstances, he concluded grievant's version of the facts was not credible and opined that the difference between the present case and the prior incidents of cash shortages was there had not been an eyewitness and the prior investigations had proved inconclusive.

He further stated that although no disciplinary sanction was imposed in connection with the June 1989 shortage

because of the lack of solid evidence, all three employees including the grievant were made very much aware that cash shortages would not be tolerated and could result in dismissal. The individual bag system was implemented in order to ensure accountability and to avoid the type of problem that had earlier occurred. The employees were instructed to keep their money bags locked at all times, even when it was in their presence, and to keep their keys with them at all times.

The Commissioner testified that he thought grievant's conduct warranted dismissal rather than a lesser form of punishment based upon the results of the audit and his discussion with the members of his staff concerning the facts of the case. When questioned on direct examination concerning why grievant was discharged for the negligent mishandling of funds constituting gross misconduct rather than "flat out old theft," the Commissioner stated that, upon reflection he could have terminated her on that basis, but he supposed that he had tempered the grounds set out in the termination notice out of concern for the employee. The Commissioner also stated that he had met with the grievant and afforded her the opportunity to explain her version of the facts but found her statements unpersuasive. On cross-examination, the Commissioner explained that grievant had simply attempted to convince him that she neither needed nor took the money.

Grievant testified that she had been working in the Resident Violator Section of DMV since February, 1989, and had formerly worked with the Department of Health and the Department of Motor Vehicles from 1980 until sometime in 1984.⁴ She reiterated the explanation for the missing funds testified to by DMV's witnesses, stating that she had made change for two customers during the day from her own funds, rather than go to the vault for change as she had to do over and over every day, and later in the day when she had time she took the two twenties she had received from the customers and got change. When she returned to her desk she decided to put DMV's money in a book inside her drawer because she had a customer waiting. In the course of her work, she then forgot about the money.

At the end of the day, she had been on the phone and Ms. Hunt kept telling her to hurry up because there was a hurricane warning in effect. Consequently, when she got off the phone she hurriedly took her money bag to the vault and left. On Tuesday morning, when she was asked about her key, she left to go home and get it and to pay a utility bill, and while there she arranged for her boyfriend to pay the gas bill. When she returned to work, she turned the key over to the auditor. Later that day she attempted to telephone the auditor to tell him that she had thirty

⁴ It is not clear from this testimony precisely how long grievant has been a State employee.

dollars in her desk and had forgotten about it but was told that he had already gone for the day.

Still later that day she was called into an office where Mr. Rogers, in the presence of Mr. Vasiliou and Ms. Kawash, questioned her about the missing money. They accused her of lying after giving her their version of what had occurred and called her stupid and badgered her for a long time. After she told them where the money was located, Mr. Vasiliou left the office and returned shortly saying the money was not there. She and Ms. Kawash then went to look for the money but it was not there. She alleged that Mr. Vasiliou would not let her go to look for the money when he went to look for it and only Ms. Hunt was in the office at that time. She also denied having any knowledge that Mr. Rogers looked for the money.

On cross-examination she admitted responsibility for the missing money and said she had offered to repay it, since she had forgotten to put the money in the bag and it had turned up missing. She explained that the reason she left the office on the morning of the audit was to obtain the key to her money bag and to pay a utility bill and denied having left in order to obtain thirty dollars to cover the shortage. She asserted that DMV's story was fabricated by Ms. Hunt, Ms. Kawash, Mr. Vasiliou and Mr. Rogers and said she believed Ms. Hunt had probably made up the story to get her into trouble. She also testified that

Mr. Vasiliou had threatened to discharge her shortly after she was involved in some type of Federal Court proceedings.

II.

The question that must be decided initially is one of credibility, i.e., whom to believe-the grievant or DMV's eyewitness, Ms. Hunt. After carefully considering the evidence, the undersigned finds the testimony of DMV's principal witness to be more worthy of belief than the grievant's. Grievant's departure from work immediately after the audit was announced, her failure to have the key at work and the other circumstances shown by the evidence, provide substantial circumstantial evidence of the eyewitnesses credibility. The eyewitness had no apparent motive to testify falsely. There was no evidence that employees used their own funds on occasion to make change for customers and this too tends to make grievant's version of the facts improbable. It is further found that grievant fabricated an exculpatory story in an attempt to conceal the fact that she took money belonging to DMV in the mistaken belief that DMV's eyewitness, her friend, would not come forward and testify against her.

Grievant's allegation of disparate disciplinary treatment is fallacious. The evidence of record shows DMV had no knowledge of the person or persons responsible for the prior shortages of funds. The documentary evidence introduced simply shows DMV had experienced accounting and administrative problems in several areas in the recent past in which

monies collected in connection with the reinstatement of licenses previously suspended or revoked could not be properly accounted for by DMV. The February 1989 audit report encompassing an audit of the receipt books of the Resident Violators Section identified a number of administrative problems that needed to be addressed, noted that monies had been found in a desk drawer and in case files, which might suggest improprieties and might lead to false accusations, and recommended that strong controls be applied to guard against similar incidents occurring in the future.

The evidence, nonetheless, clearly does not support DMV's contention that the grievant intended to keep the money permanently or possessed the criminal intent necessary for a larceny conviction. DMV's own witness stated that grievant had expressed an intent to replace the funds in the near future.

Grievant's contention that she did not engage in gross misconduct warranting dismissal, however, cannot be sustained. Although the evidence strongly suggests that if the audit had not been conducted the money taken would not necessarily have been deposited any sooner and thus DMV may well not have incurred any monetary loss, the undeniable fact remains that grievant's misconduct is serious in nature. It is beyond argument that taking money that belongs to the State must be regarded as a most serious offense, even if the employee intended to replace it. It is

grossly improper for an employee to take money he or she is responsible for collecting from the general public on behalf of the State.

The fact that only thirty dollars was involved does not lessen the seriousness of the grievant's misdeed. In these circumstances at least, the seriousness of the misconduct cannot be judged by the amount taken, as the conduct itself by its very nature is clearly improper. This is not a case involving an employee who inadvertently takes state property, such as an ink pen or other commodity, then forgets to return it. This is a case involving the intentional taking of money in a situation where the employee believed she could replace it later without being detected.

The conclusion is inescapable that DMV satisfied its burden of showing good cause for dismissal, meaning "misconduct of a substantial nature directly affecting the rights and interests 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. West Virginia Dep't of Finance and Admin. ___ W.Va. ___, 264 S.E.2d 151 (1980). See also, Guine v. Civil Serv. Comm'n, 149 W.Va. 461, 141 S.E.2d 364 (1965). In determining whether good cause exists "Each case must be determined upon the facts and circumstances which are peculiar to that case." Thurmond v. Steele, ___ W.Va. ___, ___, 225 S.E.2d 210, 213 (1976).

The nature of the misconduct involved here, the taking of public funds, as proven by the testimony and surrounding circumstances, cannot be regarded as trivial or inconsequential in nature. This case is distinguishable in several respects from Blake v. Civil Serv. Comm'n, ___ W.Va. ___, 310 S.E.2d 472 (1983), in which clothing taken by two hospital employees that had been donated for patients was found worthy of discipline, but not good cause for dismissal. Not only is the nature of the property taken fundamentally different but the overall circumstances are markedly dissimilar. There it appears the employees took the property for the purpose of giving it to patients as Christmas presents, and employees had been permitted to take donated goods in the past for their own use.

Furthermore, shortly after it was discovered that the clothing was missing, the employees admitted what they had done and returned the clothing. Here, in contrast, grievant not only did not admit her misconduct but also fabricated an exculpatory explanation, and DMV management had previously stressed in no uncertain terms that cash shortages could result in dismissal. It also does not appear that grievant had been a civil service employee as long as the employees in Blake. This is a factor in determining whether dismissal is the appropriate disciplinary measure. See, Buskirk v. Civil Serv. Comm'n, ___ W.Va. ___, ___, 332 S.E.2d 579, 585 (1985).

III.

The next issue is whether DMV violated the fifteen-day notice requirement of section 13.02.⁵ Grievant apparently contends that the reasons stated in the termination notice, particularly negligent mishandling of funds, do not constitute gross misconduct. DMV contends fifteen days notice was not required because summary dismissal is authorized in cases of gross misconduct. It also points out that Section III of the DMV employee handbook expressly permits immediate dismissal of an employee for certain enumerated reasons, including theft of departmental property, the failure to

⁵ Section 13.02 provides in its entirety:

13.2. Dismissals. -- The appointing authority, fifteen (15) calendar days after notice in writing to a permanent employee stating specific reasons therefor, may dismiss any employee for cause. The employee shall be allowed a reasonable time to reply thereto in writing, or upon request to appear personally and reply to the appointing authority or his deputy. The reasons for dismissal and the reply shall be filed with the Director of Personnel. Fifteen (15) days notice shall not be required for employees in certain classes when the public interests are best served by withholding such notice, and shall be at the discretion of the appointing authority for employees in any class when the cause of dismissal is gross misconduct. (Emphasis supplied.)

The civil service regulation at issue is codified in the Code of State Regulations at 143-1-13.2.

follow a specific order of a supervisor and other forms of gross misconduct.⁶

Grievant's argument improperly focuses on the label DMV placed on grievant's actions rather than nature of the underlying misconduct. DMV certainly had a rational basis for concluding that grievant had engaged in conduct constituting gross misconduct and did not abuse its discretion or violate section 13.02. Under the clear and unambiguous language of section 13.02, State agencies are vested with the discretionary authority to dismiss an employee without a fifteen day notice if the cause for the dismissal is gross misconduct. An employer ordinarily cannot be found to have violated the fifteen-day notice requirement,⁷ unless the underlying conduct forming the basis for the dismissal plainly does not constitute gross misconduct. In the event, however, that the employer is ultimately unable to carry its burden of proving grievant committed the alleged offense,

⁶ The employee handbook does not list an effective date, but the first page of the handbook lists L. W. Bechtold as the Commissioner and Arch A. Moore, Jr., as the Governor.

⁷ No allegation of a procedural due process violation based upon a failure to afford grievant a pre-termination hearing has been made. As was recognized in Syl. Pt. 12 of Queen v. W. Va. Univ. Hospitals, ___ W.Va. ___, 365 S.E.2d 375 (1987) and Syl. Pts. 2 and 3 of Fraley v. Civil Serv. Comm'n, ___ W.Va. ___, 356 S.E.2d 483 (1987), some kind of hearing prior to termination must be afforded to a civil service employee. Such a claim may not have been asserted here because the grievant, prior to termination, was advised of the conduct leading to the dismissal and was given an opportunity to tell her side of the story.

the employee would generally be entitled to reinstatement with back pay from the date of dismissal.

IV.

The next issue involves the sufficiency of the termination notice, i.e., whether specific reasons were given for the dismissal. Contrary to grievant's apparent assertion, the question is not whether the failure to follow a specific order of a supervisor or the negligent mishandling of funds, as stated in the termination notice, constitutes gross misconduct. It is not the label the employer attaches to the conduct of the employee that is determinative. The critical inquiry is whether the conduct of the employee that formed the basis for the dismissal is such that, if proven by the evidence, constitutes gross misconduct. Any other rule would elevate form over substance. There is no question what conduct prompted DMV's dismissal action.

The grievant, citing a number of decisions by the West Virginia Supreme Court of Appeals, makes the argument that the stated reason for grievant's discharge, i.e., negligent mishandling of funds, is in the nature of a conclusion, and does not constitute a sufficiently specific reason for grievant's dismissal. Grievant relies on Mackin v. Civil Serv. Comm'n, 155 W.Va. 139, 181 S.E.2d 684 (1971), and Yates v. Civil Serv. Comm'n, 154 W.Va. 696, 178 S.E.2d 798 (1971), as authority. Neither case, however, supports the contention that the reasons DMV gave for grievant's dismissal were not sufficiently specific.

In Yates, a classified employee was terminated by telephone call from his superior and was given no reason for his dismissal, either orally or in writing. Several months after his discharge both the employee and his employer were advised that he had failed the civil service examination necessary to be qualified for the position.

The Court concluded the employee had been dismissed without proper notice in violation of W.Va. Code §29-6-8(11)⁸ and a then-existing CSS regulation which required, like section 13.02 presently requires, that "specific reasons" for a dismissal be given in writing. The Court also ruled that when an employee covered by the civil service laws is discharged, good cause must have been shown to have existed at the time of the dismissal, and the reasons establishing good cause must be given to the employee at the time of termination, not later on appeal at a civil service hearing.

Yates is obviously distinguishable. No reasons for dismissal were given there. Here grievant was given written notice of the reasons for her discharge. The record also reflects that during DMV's investigation grievant was given some factual information and that DMV did not rely on facts that arose after the dismissal.

⁸ The civil service statute has since been amended and the current version of this particular statutory provision does not contain any "specific reasons" requirement.

In Mackin, a correctional officer at the West Virginia Penitentiary was terminated after a prisoner, who apparently committed suicide, had been found hanging by his neck at the rear of his cell. The original notice of dismissal simply alleged the guard was dismissed for "negligence in duty, inefficiency in duty, and dereliction of duty," without any further specification of reasons. Over a month later, the notice was amended to change the reason for dismissal to "gross misconduct," again without any articulation of the factual basis for the disciplinary action. At the civil service hearing evidence that the correctional officer had not looked inside the cell to check on the prisoner until after the prisoner had failed to answer the call for both breakfast and lunch was presented for the first time.

The Supreme Court reversed the Civil Service Commission's order sustaining the prison guard's discharge and concluded in the syllabus points 1 and 2, as follows:

Article XI, Section 2 of the Rules and Regulations of the Civil Service Commission, promulgated under the authority of Code, 1931, 29-6-8, as amended, requires that specific reasons for dismissal be given in writing to any employee in the covered service who is dismissed.

Charges of negligence in duty, inefficiency in duty and dereliction of duty, as well as gross misconduct, when given to an employee in the covered service as the reason or reasons for his discharge, amount to conclusions and without further explanation do not constitute specific reasons for dismissal as contemplated by the civil service law and the rules and regulations promulgated thereunder.

DMV did not violate the teachings of Mackin. DMV did not allege mere conclusions. The notice of dismissal was

reasonably specific. In it the Commissioner stated that an unannounced audit had been conducted on September 26, 1989, which revealed that the canvas bag assigned to grievant contained two receipts for fifteen dollars each, without the accompanying monies; that receipts were removed from the bag during the audit and an investigation was undertaken to determine the reason for the missing funds; that a meeting was conducted during which grievant was questioned concerning the missing cash and admitted she had removed the money from the bag and, being too busy to replace the money, had put it in an envelope in a book on her desk; that Mr. Vasiliou made a brief, fruitless search for the money and then grievant and Ms. Kawash, her immediate supervisor, also searched unsuccessfully for the money; and that grievant was unable to account for the missing funds.

The termination notice also relates that a similar incident had occurred slightly more than three months ago in the unit where grievant was employed and, at that time, Mr. Vasiliou had given each employee a verbal warning concerning the mishandling of funds and had issued a policy memorandum concerning the submission of daily receipts stating that "all employees will reconcile their daily receipts with the cash and checks received by them that day." Finally, it states that as a result of the investigation it was apparent that grievant "failed to follow a specific order of her supervisor and acted with negligence in the mishandling of funds. These actions constitute gross

misconduct on her part as an employee of the Division of Motor Vehicles. The Division will not condone or allow this conduct."

This notice is sufficiently specific as to the reasons for grievant's discharge to satisfy the purpose of the notice requirement. The notice must be specific enough that the employee can understand the basis for the dismissal and respond thereto without having to file a grievance to determine the reason(s) for the termination. See, Yates, supra. From the dismissal notice and the investigatory interview, grievant did not have to file a level IV grievance to learn what the charges were against her, although she apparently did not know of the damaging eyewitness testimony against her until the level IV hearing. It should be noted that this is not a case where the employer has attempted to justify a dismissal based upon offenses not alleged in the termination notice. It is, therefore, concluded that DMV complied with section 13.02 by giving specific reasons for the dismissal.

The following findings of fact and conclusions of law are made in addition to the findings and conclusions contained in the foregoing analysis.

Findings of Fact

1. On the Friday afternoon of September 22, 1989, at approximately 4:35 p.m., the grievant's co-worker, Ms. Cyndy

Hunt, saw her take money attached to two receipts, place the money in her pocket, and replace the receipts in the bag.

2. On Monday, September 25, 1989, Ms. Hunt notified her supervisors of what she had seen and an investigation ensued.

3. At approximately 9:00 a.m. the next day an unannounced audit was commenced at the direction of the Commissioner of DMV. Grievant shortly thereafter requested leave to pay an electric bill and went home to retrieve the key to her money bag. Upon return to her office grievant signed a leave form saying she had gone to pay a gas bill.

4. When all the facts and circumstances are considered, Ms. Hunt's testimony is found to be more credible and more worthy of belief than the grievant's.

5. The grievant fabricated a false exculpatory story to conceal the fact that she had taken the money.

6. The evidence does not establish that the grievant intended to keep the money permanently or possessed the criminal intent necessary for a larceny offense. DMV's own witness stated that grievant had expressed an intent to replace the funds in the near future.

Conclusions of Law

1. Under the provisions of W.Va. Code §29-6A-6 (1988), the burden of proof in disciplinary matters rests on the employer. The standard of proof is by a preponderance of the

evidence. The employer must prove the acts relied upon for the imposition of a penalty by the preponderance of the evidence.

2. DMV proved by the preponderance of the evidence that grievant committed the underlying conduct that formed the basis for her dismissal. Grievant's proven gross misconduct constitutes just cause for dismissal.

3. Under the clear and unambiguous language of section 13.02, State agencies are vested with the discretionary authority to dismiss an employee without a fifteen-day notice, if the cause for the dismissal is gross misconduct. An employer ordinarily cannot be found to have violated the fifteen-day notice requirement, unless the underlying conduct forming the basis for the dismissal plainly does not constitute gross misconduct.

4. It is not the label the employer attaches to the the conduct of the employee in the termination notice that is determinative. The critical inquiry is whether the conduct of the employee that formed the basis for the dismissal is such that, if proven by the evidence, warrants dismissal. Any other rule would elevate form over substance.

5. DMV gave grievant sufficient factual information concerning the reasons for her dismissal to satisfy the "specific reasons" requirement of CSC regulation 13.02.

The grievance is, therefore, **DENIED**.

Either party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.



C. RONALD WRIGHT
ADMINISTRATOR/HEARING EXAMINER

Date: January 22, 1990