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BEN D. WAMSLEY, III

v.

DOCKET NO. 91-FMC-333

WEST VIRGINIA FARM MANAGEMENT COMMISSION

DECISION

Grievant, Ben D. Wamsley, III, filed a grievance directly at level four on July 24, 1991, in which he alleged that he had been terminated from his employment with the Farm Management Commission (FMC or Respondent) without due cause.¹ An evidentiary hearing was conducted on September 26, 1991, and proposed findings of fact and conclusions of law were submitted by both parties on November 8, 1991. Neither party exercised its right to file a response to the other's proposals.

¹The FMC was legislatively created in 1976 under the provisions of W.Va. Code §§19-12A-1, et seq. Although the West Virginia Commissioner of Agriculture serves as the Chairman of the FMC, Respondent herein assured the undersigned that it is a separate agency and that Grievant was not an employee of a Constitutional officer and was, therefore, eligible to file a grievance under the provisions of W.Va. Code §§29-6A-1, et seq.

The facts of this matter are as follows. Grievant was first employed by the FMC in September 1977 and shortly thereafter became Manager of the Huttonsville Farm, the position he held at the time of his dismissal. On May 15, 1991, Grievant was suspended, with pay, through June 3, 1991, pending the results of an investigation of improper management practices, abuse of his position of responsibility, and disregard of a generally acceptable standard of behavior toward an employee and the employee's spouse. Cleve Benedict, West Virginia Commissioner of Agriculture and Chairman of the FMC, advised Grievant, both orally and in writing, that throughout the period of suspension, he should not be on any property operated by the FMC or have contact with the employees for whom he had supervisory responsibility. The Respondent subsequently requested that Joe E. Smith, Assistant Director of the Employee Relations Unit of the West Virginia Division of Personnel, investigate the charges against Grievant. Pending the completion of Mr. Smith's investigation the suspension was extended until 8:00 a.m. on June 10, 1991.

By letter dated June 13, 1991, Commissioner Benedict notified Grievant that he was suspended effective June 17, 1991, for thirty days, without pay, annual or sick leave benefits. Grievant was again advised to refrain from any contact with FMC employees, or members of their families, who might be involved with the ongoing investigation. Shortly thereafter Mr. Smith concluded the investigation and

submitted his report to Commissioner Benedict, who, after evaluating the information presented, notified Grievant of the termination of his employment by letter dated July 11, 1991. That letter set forth the basis for Grievant's discharge and stated in its entirety:

You are hereby discharged from your duties with the West Virginia Farm Management Commission. Your termination is effective July 11, 1991. As you may be aware, the investigation into alleged wrongdoing on the part of employees of the Huttonsville Farm has been concluded. The report was finalized and delivered to me on July 3, 1991, by Mr. Joe E. Smith, Assistant Director, Division of Personnel, Employee Relations.

This discharge is based on the following facts:

A. You used your position as Manager and Supervisor of a Huttonsville Farm employee to cultivate and convenience the development of an improper relationship with the spouse (Valinda Pritt) of your employee (Mark Pritt). This activity violates the most fundamental obligation of an employer/manager to provide employees a workplace free of sexual intimidation for themselves and members of their families. No manager may violate this basic responsibility without penalty. Your conduct regarding the spouse of an employee supervised by you has caused irreconcilable differences between you and the referenced employee, which no doubt would seriously effect [sic] the operation of the Huttonsville Farm.

B. You acknowledge that you have from time to time commingled cattle owned by you (or your father) and cattle owned by the Farm Management Commission for the purpose of transporting those cattle from sale barn to the Huttonsville Farm. You have never reimbursed the State for the cost or value of this service. You have, therefore, enriched yourself at the expense of the State of West Virginia. Further, the commingling of your own cattle with State owned cattle provides opportunity for confusion or outright fraud at the time your cattle are removed from State property. No prudent manager could take part in such activity.

C. You have not kept accurate leave slips and attempted to destroy an inaccurate leave slip for the month of April, 1991, after your suspension of May 15, 1991.

D. You did violate instructions in my letter of suspension, dated May 15, 1991, by contacting the clerk at the Huttonsville Farm office on the afternoon of May 15, 1991, and requesting her to destroy your April leave slip.

E. You did join with Tom Carson and Truman Wolfe in August or September, 1990, to purchase a Holstein bull. You devised a deception so that it appeared the bull was purchased at auction at Crites' Terra Alta Livestock Market when in fact it was purchased directly from Russell Linger and delivered to the Huttonsville Farm. These activities included the preparation of a false invoice from Crites' Terra Alta Livestock Market in order to secure payment for the bull by the Farm Management Commission in the amount of \$1,817.00. Mr. Linger apparently received \$1,500.00 from Crites' Terra Alta Livestock Market in full payment for his bull.

Furthermore, you were dishonest in the statements of June 5 and 6, 1991, regarding your knowledge of the purchase of the Holstein bull in August or September of 1990. By your own statement you were clearly involved with the transaction in August 1990. Your statement that you just learned of the transaction on June 4, 1991, is not compatible with your earlier statement. This fundamental dishonesty violated all acceptable management practices.

The state and its agencies have reason to expect its employees to observe a reasonable standard of conduct which will not bring discredit upon the state and its employees or will not create suspicion with reference to state employees' integrity in discharging their duties and responsibilities. By your conversion of services purchased by the state to your personal use, your misuse of the authority of your position, colluding with another to restrict competition or give preference to one over another and your utterance of false statements under oath are all sufficient to conclude that you have not met a reasonable standard of conduct warranting your dismissal.

For any appeal rights you may have refer to West Virginia Code, §29-6A-1, et seq., Grievance Procedures for State Employees. If you choose to exercise your appeal rights, you must submit your appeal to your immediate supervisor within ten (10) working days of the effective date of this action. Copies of your appeal should be forwarded to the Chief Administrator and the Director of Personnel.

Your dismissal is effective immediately to protect the interest of the public as your continued employment creates a threat to the effective and efficient operation of the Huttonsville Farm.

Should you wish to discuss this matter further, please do not hesitate to contact me.

In support of its contention that Grievant's dismissal was warranted Respondent offered the witness statements from both Mark and Valinda Pritt obtained by Mr. Smith during his investigation. The Pritts also testified at the level four hearing in reference to Charge A, that Grievant used his position with the FMC "to cultivate and convenience the development of an improper relationship" with Mrs. Pritt. The Pritts' testimony given in their statements and at the level four hearing is summarized herein.

Mark Pritt, then employed as Assistant Manager of the Huttonsville Farm, stated that through conversing with Grievant he knew that Grievant's wife had left him in January. Mr. Pritt suggested that Grievant should start going out with other women and had even offered to baby-sit Grievant's children in order to facilitate that objective. Mr. Pritt also suggested that his wife might be able to arrange a date for Grievant with one of her friends, an idea which Grievant approved and encouraged. Mrs. Pritt did

attempt to schedule a date for Grievant; however, her friend was otherwise involved and declined the offer. Mr. Pritt stated that he knew Grievant spoke with Mrs. Pritt on the telephone several times while the date was being arranged and he later became suspicious of the relationship between Grievant and his wife on May 3 when he was sent to Beckley to castrate and vaccinate cattle, even though Grievant is the FMC beef specialist. When he returned early from this assignment he found Grievant at the C&J Restaurant where Mrs. Pritt worked. Mr. Pritt further observed that after Mrs. Pritt's friend declined to go out with Grievant his wife and Grievant spoke on the telephone with increasing frequency. His suspicions led him to install a recording device on his home phone. From a taped conversation between Grievant and Mrs. Pritt on or about May 8, Mr. Pritt learned that they had engaged in sexual intercourse on May 7. Mr. Pritt stated that he confronted his wife directly about the matter and she admitted to the affair with Grievant.

On or about May 10 Mr. Pritt discussed the matter with Tom Carson, Acting Director of FMC, because of concern for his job security. Mr. Pritt stated that his fear was that due to the situation Grievant might try to "get rid of him." Mr. Pritt stated that he confronted Grievant on two occasions shortly after learning of Grievant's affair with his wife and that Grievant assured him that he would end his relationship with Mrs. Pritt. Mr. Pritt did not recall his

wife ever saying that she had felt compelled to have intercourse with Grievant in order to save his job.

Valinda Pritt stated that her relationship with Grievant began when, at her husband's instigation, she attempted to arrange a date with him and her friend. She found talking to Grievant on the phone enjoyable and that eventually led to her accompanying him to Canaan Valley on May 7 where they engaged in sexual intercourse. Mrs. Pritt stated that she traveled to Canaan Valley on her own accord and that she was not forced to participate in sexual relations with Grievant from whom she was seeking some comfort in that her own marriage was troubled at that time. On cross-examination Mrs. Pritt inconsistently claimed that she was under the impression that she must have sex with Grievant so that Mark could keep his job but she could not recall any statements Grievant made to create this impression.

Respondent additionally submitted a partial copy of the Farm's May telephone bill for long-distance calling. That document established that numerous calls were made to Mr. Pritt's home. Mr. Pritt identified himself as the caller on six occasions; he added that Grievant had placed four of the calls and that he did not know who made one of them. Those calls which Mr. Pritt attributed to Grievant were placed on May 1 at 8:10 a.m. (21 minutes) and May 2 at 8:14 a.m. (11 minutes), 8:32 a.m. (27 minutes) and 10:47 a.m. (3 minutes).

In support of Charge B, that Grievant had commingled his and/or his father's cattle with those of the FMC for transportation purposes, Respondent offered an invoice from the Pocahontas Producers Cooperative Association indicating a purchase by the FMC on October 30, 1987, of several head of cattle with a combined weight of 27,285 pounds. Respondent also submitted a freight invoice dated October 31, 1987, from Burns Motor Freight, Inc., for the transportation of 52,631 pounds of livestock from Marlinton to Huttonsville.

An application for leave slip completed by Grievant and dated May 15, 1991, was submitted in reference to Charge C, that he had failed to keep accurate leave slips and had attempted to destroy an inaccurate slip for the month of April 1991. On that document Grievant claimed that he had taken two days of annual leave on April 11 and 29. FMC offered a second document consisting of a list of dates Grievant provided Mr. Smith during his investigation for those days Grievant was absent from work in March, April and May. This listing also indicates that Grievant used annual leave on April 16 and that he had used two days of leave in March for which he had not submitted leave slips.²

² Respondent submitted the Leave Policy for the West Virginia Department of Agriculture; presumably this policy is applied to FMC employees. The propriety of subjecting FMC employees to these policies was not raised and will not be addressed. It is noted that this policy requires that
(Footnote Continued)

The testimony of Beverly Hammons, clerk at the Huttonsville Farm, was offered in support of Charge C and Charge D, that Grievant had contacted a subordinate employee after he was suspended, contrary to Commissioner Benedict's direction. Ms. Hammons stated that Grievant had indeed called her on May 15, the day he was notified of his suspension, and advised her that he had left a leave slip on her desk which contained incorrect information. Grievant asked Ms. Hammons to destroy the document, stating that he would complete another upon his return.

FMC submitted an invoice from Crites' Terra Alta Livestock Market, Inc., to establish Charge E, that Grievant and two other FMC employees deceptively purchased a bull directly from an individual rather than through public auction. That invoice documented that the FMC purchased one bull on September 14, 1990, at a cost of \$1,817.00. Respondent asserts that the Grievant participated in securing this false invoice from Crites' in order to secure payment for the animal and that the seller apparently received only \$1,500.00 as his full payment.

Truman Wolfe, Manager of the FMC farms at Hopemont and Pruntytown and dairy expert for the Lakin farm, testified that he had needed a bull for the dairy operations and learned through Grievant that Russell Linger had one for

(Footnote Continued)
sick leave forms be submitted the first day the employee returns to duty.

sale. Mr. Wolfe stated that he knew the asking price was \$1,800.00 and was aware that the animal would not be going through the stock sale but, because he had never bought animals for the farm before, he did not know that the sale was being incorrectly processed. Mr. Wolfe stated that to his knowledge there had never been any question about the price for the bull and learned of the possible \$300.00 discrepancy from Mr. Smith during his investigation. Mr. Wolfe understood that Crites' may have received the \$300.00 to substantiate that the sale of the animal had been through the stockyard. However, he had inquired at the stockyard himself and had been advised that Mr. Linger received \$1,800.00 for the bull.

As Acting Director of FMC, Mr. Carson had some knowledge and was able to provide information relating to all of the charges brought against Grievant. He recalled that it was on or about May 10, 1991, that Mr. Pritt had told him of Grievant's affair with Mrs. Pritt. Mr. Carson knew that he had granted Grievant sick leave for May 7 and 8 for the purpose of his having exploratory surgery. Perceiving the possibility that Grievant had abused the sick leave Mr. Carson discussed the allegations with Grievant who admitted to having been to Canaan Valley with and making phone calls to Mrs. Pritt. Mr. Carson advised Commissioner Benedict of the situation which led to his and Grievant's meeting with the Commissioner on May 15. Mr. Carson recalled that at that time Grievant denied having an affair with Mrs. Pritt.

Mr. Carson proceeded to the Huttonsville Farm directly after the meeting to explain Grievant's suspension to the other employees. Upon his arrival he found a note suggesting that he ask the clerk about Grievant's leave slip. He also learned that Grievant had called and asked that Mr. Pritt deliver his paycheck.

Mr. Carson's knowledge of any commingling of cattle was limited to the information provided on the invoices which listed different weights for the livestock. Mr. Carson stated that he had no reason to disbelieve Grievant's explanation that the transit company charged a flat rate not based upon weight particularly since an employee at Burns had verified that a flat rate may be charged for some shipping.

Like Mr. Wolfe, Mr. Carson stated that he was unaware of any improprieties in the purchase of the dairy bull until after Grievant's suspension. Mr. Carson acknowledged that they had not followed the proper procedure in purchasing the animal and noted that he and Mr. Wolfe had been suspended because of the incident.

Mr. Smith offered extensive testimony regarding his investigation of Grievant. Mr. Smith stated that during the course of his investigation he interviewed Mark Pritt, Valinda Pritt, Tom Carson, Truman Wolfe, Beverly Hammons and Grievant. Based upon the statements of Mark and Valinda Pritt and a transcript of the May 8 telephone call from Grievant to Mrs. Pritt, Mr. Smith determined that Grievant

had engaged in an affair with Mrs. Pritt and that he had used the authority of his position and services of the FMC's telephone in his pursuit of her.

Mr. Smith stated that Grievant indicated that he had at times transported cattle which he had bought for personal use with cattle which he had bought for the FMC and that he had not reimbursed the FMC for any of the costs associated with the transit of his personal livestock.

Commissioner Benedict and Mr. Carson made Mr. Smith aware of the leave slip issue. When he questioned Grievant regarding the document Grievant stated that he requested it be destroyed because he had failed to include one day he was absent. During this conversation Mr. Smith ascertained that Grievant had also used two days leave in March for which no leave slip had been submitted.

The purchase of the bull was brought to Mr. Smith's attention by Grievant, who advised him that Crites' had supposedly received \$300.00 for processing the invoice as a sale through that entity. Further investigation led to the conclusion that the invoice had been falsified in that the animal had not been bought at auction and that \$300.00 had been paid for the transaction.

Mr. Smith stated that upon the conclusion of his investigation he recommended that Grievant be dismissed because Mr. Pritt had indicated that he did not believe that he could work with Grievant again, leading to Mr. Smith's determination that Grievant's involvement with Mrs. Pritt

had created an irreconcilable rift between the two men. Second, he found that Grievant engaged in conversion of services when he made the telephone calls. Third, Grievant secured unjust enrichment when he was off work without reporting leave time. Fourth, Grievant had exercised poor judgement in the commingling of cattle and while there was no proof that any cattle were ever switched, Grievant may have again used the services of the State for his personal gain. Fifth, Grievant blatantly disobeyed Commissioner Benedict's directive to not correspond with farm staff during the period of his suspension. Sixth, he did not believe Grievant had been truthful in all respects.

Grievant admits there is evidence to support the allegations of Charge A but asserts that Respondent has failed to prove the allegations contained in Charges B, C, D, and E. At the level four hearing Grievant responded to each of the charges.

Charge A: Grievant stated that he had been separated from his wife since January 1991 and talked with Mr. Pritt at work regarding his difficulties. Mr. Pritt suggested that Grievant should get himself a girl friend and Mrs. Pritt was to arrange a date for him with a friend of hers. However, the friend declined to go out with him. Grievant stated that while discussing these matters with Mrs. Pritt they became friends and when he later became ill Grievant recalled that she stopped by his home on several occasions to check on him and his children.

Grievant stated that he requested two days' leave in May when he was scheduled for exploratory surgery. Since he was released from the hospital on the day of the surgery he invited Mrs. Pritt to ride over to Canaan Valley with him on the following day. Grievant testified that they drove around, talked, and spent the day together but unequivocally denies having sexual intercourse with Mrs. Pritt. Grievant denies that he threatened Mrs. Pritt that her husband's job was dependent on the provision of sexual favors or that he in any other manner coerced her into a relationship. Grievant stated that when Mrs. Pritt had visited him with the news that Mr. Pritt had learned of their relationship he advised her to go home and save her marriage but if she decided to leave Mark she knew his (Grievant's) telephone number. Grievant recalled that Mr. Pritt visited him three times after learning of his wife's involvement with Grievant. The first two times Grievant described Mr. Pritt as being reasonably upset but on the third visit he found Mr. Pritt to be his usual self, even inquiring about Grievant's health. Grievant told Mr. Pritt that he cared for Mrs. Pritt but assured him that he would never see her again.

Grievant also denied that he used either his position or the office telephone to pursue Mrs. Pritt. He stated that to the best of his knowledge he did not call her from the office although he would sometimes call Mr. Pritt at home on his day off. Grievant further denied that he had

sent Mr. Pritt to Beckley on May 3 so that he might promote the relationship with Mrs. Pritt. Grievant stated that he could not make the trip himself because he had to attend a meeting with the Commissioners that day and that he could not schedule the work in Beckley on any other day because it was the only day that week that the Farm Manager could work the cattle which needed to be turned out to pasture because the feed supply was running low. Grievant admits that he had lunch at C&J's Restaurant but stated that he did not see Mrs. Pritt alone that day.

Charge B: Grievant denies that any cattle bought for personal use were commingled with those he purchased for the Respondent. He explained that the transporter may have insisted that the cattle be shipped together since that was more efficient but that the animals were hip-tagged with a number corresponding to that on the shipping invoice, providing easy identification as to their ownership. Although Grievant previously explained to Mr. Carson that a flat rate was charged in reference to the 1987 invoice, at the level four hearing he stated that there could have been separate billing even if the animals were on the same truck.

Charges C and D: Grievant admits to calling the clerk at the farm and asking her to tear up the leave form and concedes that he was "walking a fine line" but stated that he believed that it was permissible for him to do so because the suspension letter said only that he "should not" contact any subordinate employees, rather than stating "shall not."

Grievant characterized his completion of paperwork as a weakness and stated that his leave slips were consistently filed late. Grievant stated that during this particular period of time he had been suffering from marital and health problems and had worked without a secretary from December through May. He stated that he thought he was asking the clerk to throw away the March slip which he needed to revise because he could not determine what days he had taken off work in March until he received certain records from his children's school.

Charge E: Grievant stated that he raised this issue during Mr. Smith's investigation in an effort to discredit the Respondent's witnesses. Grievant testified that his involvement in the purchase of the bull was minimal, but for some reason thought that the purchase price was to be \$1,500.00. When he was advised that Respondent paid \$1,817.00 for the animal he concluded that the additional money had to go somewhere and presumed it was to Crites'.³

Reviewing the charges, Grievant asserts that there is a lack of evidence to prove charges B-E and that it is unfair to discharge an otherwise good and responsible employee with a commendable record based upon an isolated offense

³ Respondent later provided, at Grievant's request, copies of the invoice establishing that the FMC paid \$1,817.00 for the animal and the cancelled check to Mr. Linger in the amount of \$1,800.00. The remaining \$17.00 was for the stockyard's commission (\$16.00) and the beef promotion campaign (\$1.00).

involving personal, off-duty conduct.⁴ Grievant further argues that even if the allegations against him were true, dismissal was inappropriate in light of Respondent's failure to notify him of any deficiencies and allowing him an opportunity to improve.⁵

Because this grievance involves a disciplinary matter, the employer bears the burden of proving, by a preponderance of the evidence, that the action taken was proper. W.Va. Code §29-6A-6, Davis v. W.Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990). During the grievance process Respondent maintained that its decision to dismiss Grievant was within its discretion based upon his at-will employment status and was appropriate given the proof of Grievant's gross misconduct. Because Respondent's position appears to consist of a dual reliance on both issues, each will be addressed.

A review of the record reveals that Grievant's employment status was not mentioned in Commissioner Benedict's letter of July 11, 1991, in which he advised Grievant of his

⁴In support of this contention Grievant cites Rovello v. Lewis Co. Bd. of Educ., 381 S.E.2d 237 (W.Va. 1987); however, Rovello bears virtually no similarity to the present matter because Mr. Rovello was a public education employee with very different rights from those of an at-will state employee.

⁵Grievant also relies upon the Policies of the Department of Agriculture, specifically that which addresses disciplinary action and the progressive discipline concept. For reasons addressed later in this decision this policy is not applicable.

dismissal and was not raised at the level four hearing. Respondent's only reference to Grievant's employment status was set forth in its Proposed Finding of Fact Number Two in which it stated that the Division of Personnel's Rules and Regulations define

a class-exempt position as one which satisfies the definitions of "class" and "classify" but which is not covered under the State Merit System; thus, Grievant, in his position as Farm Manager for the Huttonsville Farm, is an at-will employee who serves at the will and pleasure of the West Virginia Farm Management Commission.

In its Conclusion of Law Number Two Respondent argued that based upon Grievant's at-will employment status he could be "terminated without notice for any reason not violative of public policy or for no reason at all."

This evidence of record simply does not substantiate the allegation that Grievant held a classified-exempt or at-will position and such determination cannot be made as a matter of law based upon pertinent provisions of State law. See W.Va. Code §29-6-4⁶. Respondent has thus failed to prove Grievant could be summarily dismissed from his employment.

Independent of Grievant's employment status, Respondent cites Morrison v. W.Va. Division of Health, Docket No. 90-H-013 (Apr. 30, 1991); Horton v. W.Va. Dept. of Health

⁶W.Va. Code §29-6-4(a) addresses general categories of individuals and positions specifically exempt from the classified service.

and Human Resources, Docket No. 90-H-515 (June 31, 1991), and W.Va. Code §29-6A-6, in its Proposed Conclusion of Law Number One which stated that it must establish, by a preponderance of the evidence, the validity of the basis for its actions against Grievant. Respondent additionally refers to the West Virginia Division of Personnel's Rules and Regulations, Section 13.02, in support of its argument that Grievant's misconduct was such that his immediate termination was necessary to serve the best interests of the public.⁷ Accordingly, the charges will be reviewed to determine whether Respondent has proven that Grievant engaged in gross misconduct.

Charge A: It is clear from the testimony offered by Mrs. Pritt and the transcript of her telephone conversation with Grievant that they had developed a personal relationship which culminated in their having had intercourse on May 7. Grievant's and Mrs. Pritt's testimony is consistent as to how the relationship started when she, at Mr. Pritt's suggestion, was going to arrange a date for Grievant. Both indicated that while discussing this plan they found that they enjoyed talking to each other and found they had a

⁷Section 13.02, Dismissals, requires that fifteen days' notice be given to a permanent employee to be dismissed for cause. An exception to this rule applies to employees in certain classes when the public interests are best served by withholding such notice and is discretionary for employees in any class when the cause for dismissal is gross misconduct.

common background in that they had each been previously divorced. It is also undisputed that on May 7 they met in Elkins and drove over to Canaan Valley. While Mrs. Pritt's recollection of the day's events was that they rented a hotel room and engaged in sexual activities, Grievant vehemently denies that any such thing happened, explaining that he could not have had sex even if he wanted to because he was still uncomfortable from the exploratory surgery he had had undergone the day before.

During the level four hearing Mrs. Pritt was obviously uncomfortable and embarrassed while testifying yet she answered the questions regarding her relationship with Grievant in a sincere, forthright and complete manner. Her testimony established that she had become involved with Grievant on her own accord and had never been forced or coerced to have sex with him but indicated that she was seeking some comfort from him because her own marriage was not too stable at that time. The only weakness in Mrs. Pritt's testimony was her statement that her decision to be with Grievant on May 7 was partially out of concern for her husband's job security. She could neither recall Grievant making any threats about Mr. Pritt's job being in jeopardy nor did she provide any other reason for concern of this nature. Because that part of her testimony was contradictory to the bulk of her statement it will be discounted.

By comparison, Grievant insisted that he had not engaged in intercourse with Mrs. Pritt, even when confronted

with her testimony and the transcript of the telephone call. Grievant made a point to differentiate between making love and engaging in sexual intercourse and denies having intercourse with Mrs. Pritt although he admits that the contents of the transcript are accurate and that they did engage in hugging, kissing, petting and caressing. Grievant also appeared to be uncomfortable during this testimony; however, unlike Mrs. Pritt, his demeanor was less open. The undersigned also perceived to be some deception by Grievant in denying that he had intercourse through an attempt to distinguish it from making love although in substance his differentiation was nonexistent. That portion of the transcript read into the record by Respondent's counsel leaves little question about what actually occurred:

Pritt: Oh. I'm glad I'm not working. That would embarrass me to death after being with you.

Wamsley: Why?

Pritt: It just would.

Wamsley: Didn't you like being with me?

Pritt: You know I did.

Wamsley: Well I don't know whether you did or not.

Pritt: Didn't it show. I told you. Before wasn't as bad as afterwards. You know just -.

Wamsley: Well I thought you wanted me.

Pritt: I did.

Wamsley: And then after you had me and I felt bad cause I didn't think you wanted me anymore.

Pritt: Yes I did. But it just - I don't know. It's just hard. Like I said if I done it before it would have been different but I know you - I told Christie - you know - you think I done stuff like that before.

Wamsley: No I don't.

Pritt: Yes you did.

Wamsley: I did, but I don't now.

Pritt: Yeah.

Wamsley: Either that or I was so poor that you wanted the hell out of there.

Pritt: Are you kidding me?

Wamsley: I'm not very good at making love.

Pritt: Why? What was wrong with it?

Wamsley: Nothin. I'm just not very good at it.

Pritt: Yes you are.

Wamsley: No I'm not.

Pritt: Yes you are. Don't worry about that.

Wamsley: I forgot how to handle it.

Pritt: No, you haven't.

Wamsley: I used to know how. You'll relax and I will - I was nervous too.

Pritt: Yeah.

Wamsley: Very nervous.

Accordingly, based upon the testimony of Mrs. Pritt and the transcript, and in consideration of Grievant's demeanor and less than forthright manner, it is determined that his testimony was incredible as to this issue. Having determined that Grievant did engage in a sexual relationship with Mrs. Pritt who, it is also found, participated of her own

accord and without any intimidation by Grievant, it remains to be decided whether Grievant used his position to cultivate and convenience the development of the relationship.

Respondent's evidence for this issue consisted of the May telephone bill from the Huttonsville Farm and Mr. Pritt's assertion that Grievant intentionally and needlessly sent him out of town on May 3. While the telephone bill does show approximately ten calls made from the farm to the Pritt home between April 26 and May 28, Mr. Pritt identified himself as the caller five times and Grievant as the caller four times; one call was attributed to neither. Grievant stated that he sometimes called Mr. Pritt at home on his day off but that to the best of his knowledge he had never called Mrs. Pritt from his office. He did admit to making one personal call to an individual named Becky for which he had apparently not reimbursed the agency in the amount of \$11.05.

Grievant also submitted copies of the Farm's phone bills from January 28, 1991, through April 28, 1991. These records show four calls made to the Pritt home in January 1991 of six, two, nine and two minutes, respectively. In February seven calls were made lasting four, three, four, eight, forty-eight, one, and five minutes each. In March five calls lasting ten, five, two, four, and four minutes were made to the Pritt home. Ten calls were made in April for four, three, eight, forty-one, one, one, one, one, eight and twenty-two minutes in duration. The seven calls made

between April 28 and May 15 were for six, twenty-one, eleven, twenty-seven, three, four, and two minutes each. Although there is no definitive linking of Grievant with any of these calls, and while some of them may have been his calling Mr. Pritt on his day off, Grievant's previously established lack of credibility, together with the personal call to Becky which indicates that he did use the office phone for such calls, raises questions particularly about those calls of forty-eight, forty-one, twenty-one and twenty-seven minutes in duration. While possible, it does not seem probable that Mr. Pritt would find it necessary to talk with his wife for such a long period of time during the work day or that Grievant would have needed such lengthy conversations with Mr. Pritt on his days off.

In reference to the May 3 assignment in which Mr. Pritt was directed to go to Beckley, there is no indication that it was for any deceptive purpose to allow Grievant to spend time with Mrs. Pritt. It was confirmed that Grievant did attend a meeting with Mr. Carson and others and, although Mr. Pritt found Grievant having lunch at the restaurant where his wife worked, there is no indication that Grievant saw Mrs. Pritt alone that day. The weakness of this evidence does not affect the basis of the charge, that Grievant entered into a relationship with the spouse of an employee under his supervision and, as a result of that relationship, his ability to continue working with that employee has been damaged and could adversely affect his ability to

successfully manage the operation of the Farm. Mr. Pritt has stated that he does not believe that he can work with Grievant again. Because Grievant is Mr. Pritt's immediate supervisor and because Mr. Pritt was the Assistant Manager they would be required to work together extensively. It is understandable that Mr. Pritt would find it difficult to continue working with Grievant. In summary, FMC has established that Grievant's own actions have rendered him unable to continue working with his subordinate employee in performing his duties as Farm Manager.

Charge B: Grievant conceded that he had purchased cattle for both the Respondent and himself at the same auction and that these cattle were at times transported back to Huttonsville on the same truck. Grievant's explanation that the transit company charges a flat rate not based on the number of cattle or their weight seems to have been confirmed by Mr. Carson who called a company to check if this was standard procedure. Respondent did not prove that Grievant had enriched himself by having his cattle transported at its expense nor did it establish that any cattle had been switched; however, its concern as to the possibility of either occurring is reasonable. By purchasing personal and FMC cattle at the same auction Grievant at minimum created an appearance of possible impropriety which indicates that as a Manager he exercised less than reasonable judgment in that situation.

Charge C: By his own admission Grievant left an inaccurately completed leave slip on his clerk's desk on May 15 before leaving for his meeting with Commissioner Benedict. Grievant had neglected to report one day he was absent in April and had apparently not filed a leave slip for March. Grievant explained this faulty record keeping on his natural tendency to dislike and avoid this type of work and his having to wait for the receipt of school records since he could not recall the days his children were ill. Grievant also reported all days as annual leave even though nearly all of the days were identified as having been taken due to his own or his children's illnesses.⁸ Finally, Grievant reported May 7 as sick leave presumably due to recovery from the exploratory surgery he had undergone on May 6, although it has been established that he accompanied Mrs. Pritt to Canaan Valley on May 7. Notwithstanding Grievant's aversion to paperwork, his failure to file leave slips and the omission of days taken as leave on slips which were completed resulted in an unjust enrichment for him and incurred an additional cost to the State.

Grievant offers little explanation for his attempt to destroy the inaccurate leave slip after he was suspended on May 15. A sudden recollection that he had taken another day

⁸There was some implication by Respondent that this was contrary to policy defining annual and sick leave but the issue was not pursued.

of leave which he had failed to report is not beyond the realm of possibility; however, considering the timing of his request to the clerk, that being immediately after he was suspended, together with his lack of credibility raises a question of whether Grievant's omission might have been intentional, and knowing that he was about to be investigated, attempted to have the document destroyed. All state employees are required to completely and accurately report their use of leave. Grievant offered no acceptable reason for his failure to do so.

Charge D: Immediately after being advised by Commissioner Benedict to refrain from contacting any subordinate employees, Grievant called the clerk at the Farm and requested that she destroy the leave slip. She had not yet been advised of his suspension and complied with her supervisor's directive. Grievant admitted that he knew that he was placing himself in possible jeopardy if he contacted anyone at the Farm but stated that he did not interpret the suspension letter to forbid the call inasmuch as it stated in advisory language that he "should not" contact his subordinate employees rather than utilizing the mandatory "shall not" directive. Although Grievant's argument regarding advisory versus mandatory language is technically correct his testimony establishes that he understood Commissioner Benedict's intention was that he not contact the employees and that he did so anyway. This action, contrary to the Commissioner's direction, supports the inference that

Grievant felt it was imperative to quickly destroy the inaccurate leave slip. Further, because he understood the Commissioner's intent, the call might be interpreted as a direct act of insubordination.

Charge E: The issue relating to the purchase of the Holstein bull was raised by Grievant himself in an effort to either discredit his accusers or to show that others were equally guilty of wrongdoing. The ensuing investigation revealed that the appropriate procedures for the purchase of livestock had not been followed; however, there was apparently no intentional deception in processing the sale through the Livestock Market. Instead the error was the result of a misunderstanding by Mr. Carson and Mr. Wolfe as to how the purchase was to be completed. Copies of the sale invoice and check to Mr. Linger establish that he received the full \$1,800.00 for the bull. There apparently was no money missing or paid under the table to anyone for cooperation in the alleged deception. Indeed, it appears that the missing \$300.00 was a fabrication, intentional or otherwise, by the Grievant. Grievant's role in this scenario was very limited. When he learned that Mr. Wolfe was looking for a dairy bull he advised him that Mr. Linger had such an animal for sale. Grievant, who had bought a considerable amount of livestock for the FMC, knew or should have known the correct procedure for making the purchase. According to Mr. Wolfe, Grievant was aware that the animal was not going through a stock sale yet did not advise the two less experienced

employees that the process which they were following was contrary to FMC policy. As a top administrator in the agency Grievant failed in his duty to insure that the sale was in compliance with the appropriate regulations.

Individually and cumulatively the charges establish just cause for Grievant's dismissal. In summary, the evidence has established that Grievant engaged in conduct with a subordinate employee's spouse which has rendered it impossible for them to continue to work together affecting the management of the Respondent's farm operation, that Grievant has pursued private and State business interests simultaneously in the transportation of cattle creating the opportunity and appearance of impropriety when such interests were not separately itemized, that he neglected to accurately report leave usage, that he was insubordinate in his disregard of Commissioner Benedict's instruction to not contact his subordinate employees and that he failed to advise his co-workers of the correct procedure to be followed when purchasing livestock.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. Grievant was employed by the West Virginia Farm Management Commission as Manager of the Huttonsville Farm.

2. Grievant was notified by Commissioner Cleve Benedict of his dismissal by letter dated July 11, 1991. This letter stated that the action was based upon five charges of misconduct.

Conclusions of Law

1. Under the provisions of W.Va.Code §29-6A-6, the burden of proof in disciplinary matters rests on the employer. Davis v. W.Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990).

2. When an employer relies on the classified-exempt or at-will status of an employee in a dismissal action the Respondent bears the burden of establishing that status by a preponderance of the evidence.

3. In the present matter the evidence does not establish, and the undersigned cannot conclude, that Grievant was an at-will employee as a matter of law.

4. Based upon the evidence presented relating to the charges set forth in the dismissal letter, Respondent has proven just cause for Grievant's termination.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," 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 Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATED

March 25, 1992

Sue Keller

SUE KELLER
SENIOR ADMINISTRATIVE
LAW JUDGE