ROCKY B. SCARBERRY

v. **Docket No. 94-BEP-625**

BUREAU OF EMPLOYMENT PROGRAMS/FISCAL

AND ADMINISTRATIVE MANAGEMENT DIVISION

D E C I S I O N

Grievant, Rocky Scarberry, grieves a ten-day suspension (See footnote 1) from his position as an Office Assistant I ("OA I") in the Bureau of Employment Programs ("BEP"), Fiscal and Administrative Management Division ("FAMD"). Grievant sought not only to over turn his suspension and back pay, but multiple other forms of relief as well. (See footnote 2) Respondent suspended Grievant for "failure to work asscheduled" including excessive use of leave, constant tardiness, and a failure to follow leave request regulations. Level III Hearing, Grievant's Exh. 7. This grievance was denied at all lower levels and appealed to Level IV on October 26, 1994. A Level IV hearing was scheduled for November 28, 1994 and rescheduled to December 7, 1994 upon the agreement of the parties. A Level IV hearing was held on this latter date, and the case became mature for decision on January 11, 1995 when findings of fact and conclusions of law were to be submitted by the parties. (See footnote 3) The following findings of fact are undisputed.

Findings of Fact

1. Grievant works as an OA I in BEP's FAMD, Administrative Support Section. He sorts mail, processes forms, and delivers mail in the "state house area."

2. On May 18, 1994 he was hand-delivered a suspension notice from Commissioner Richardson which stated he would be suspended from May 19, 1994 to June 1, 1994 for continuing failure to work as scheduled. Identified problems were repeated abuse of leave, excessive tardiness, and failure to properly request leave.

3. This suspension letter followed repeated discussions and numerous memorandums between Grievant and his supervisor, Mr. Terry Pauley.

4. The suspension letter briefly reviewed Grievant's attendance record and indicated he had been absent or tardy from work 85 times in 1992, 84 times in 1993, and 25 times so far in 1994 at the time of the suspension.

5. Mr. Pauley verbally discussed Grievant's repeated lateness and failure to call in at each evaluation and on at least two other occasions with the Grievant. Level III Trans. at 9-10. No changes occurred in Grievant's behavior.

6. Grievant received his first written warning on July 9, 1992 stating his use of leave was unacceptable. Grievant's Level III Hearing Resp. Exh. 4.

7. On November 15, 1993 Mr. Pauley wrote his supervisor Mr. Bess and requested his assistance in dealing with Grievant's continual lateness and excessive use of sick leave. Attached to this letter was a four-page, single-spaced report detailing Grievant's leave history. A copy of this letter and the attachment was sent to Grievant.

8. On January 14, 1994 Grievant met with Mr. Pauley and Mr. Stephens, Mr. Pauley's assistant. Grievant was told his use of leave was not satisfactory and that past letters and discussions have achieved no results.

9. Respondent sent Grievant a letter dated January 18, 1994 summarizing the meeting of January 14, 1994. The rules and regulations regarding use of leave were attached to this letter.

10. On January 22, 1994 Mr. Pauley wrote Grievant stating new requirements for requesting and granting leave would be in placefor Grievant. Starting on February 1, 1994 Grievant was required to present a doctor's statement for all sick leave before it would be approved, and Grievant had to request annual leave twenty-four hours in advance, except in cases of extreme emergency, or it would not be approved. Grievant was informed that any further infractions of these directives would result in disciplinary action, up to and including termination. The letter included an updated version of Grievant's leave history from January 8, 1992 to January 20, 1994.

11. On May 5, 1994 Grievant received another written warning about his abuse of leave. Mr. Pauley again requested Grievant to follow leave policies. Attached was a copy of Grievant's leave history from January 31, 1994 to May 2, 1994. The record demonstrated the Grievant had been late to work ten times in this three month period, had three sick days, took annual leave one day without prior request, and had taken annual leave four other days for a total of fourteen hours.

12. On May 18, 1994, a Thursday, Grievant received a suspension letter from Commissioner

Richardson suspending him from May 19, 1994 to June 1, 1994. This suspension was for "failure to work as scheduled." The Grievant's leave history and the numerous written warnings were reviewed.

13. Grievant complained to Mr. Thomas Rardin, Personnel Administrator, that his suspension violated Section 12.03 of WVAR because he did not receive the eight day prior notice. Mr. Rardin stated that he did not have authority to change the suspension andnothing could be done because Commissioner Richardson was out of town. Grievant met with Commissioner Richardson on Monday, May 23, 1994 and Mr. Rardin called Grievant on Tuesday, May 24, 1994 to tell him he could return to work on May 25, 1994 thus decreasing his suspension to rectify the failure to follow the notice requirements of the above-cited section. Grievant responded that he was unwilling to accept this decision and did not return to work on May 25, 1994. A letter summarizing this series of events was written by Commissioner Richardson on May 25, 1994 and hand delivered to Grievant on that same day. This letter further stated that Grievant's failure to return to work on May 25, 1994 indicated Grievant's willingness to accept the full ten-day suspension. Grievant returned to work on May 26, 1994, apparently without further administrative response.

14. Unrebutted testimony identifies the failure to follow 12.03 as a "clerical error."

Discussion

Grievant's response to these accusations was that he had never abused leave in any way and that he was being treated unfairly. Grievant did admit he had not requested much of his annual leave prior to taking it, admitted he was frequently late, and admitted he has not followed the directives required by the May 15, 1994 written warning letter. He also stated he has had multiple family problems which have caused him to take sick and annual leave suchas a sick mother, (See footnote 4) appointments with his son's teachers, illness with another son, and taking his wife to doctor appointments.

Grievant explained his repeated lateness was caused by taking his son to school. A review of the record reveals Grievant was late to work when his starting time was 6:30 a.m. and continued to be late when his time was changed to 8:00 a.m. Also the record demonstrates the Grievant was late to work during the summer when school was not in session. Grievant never discussed his personal problems with his supervisor and did not tell him why he had difficulty getting to work.

Additionally, Grievant argued that since his supervisor approved all his leave, whether submitted

before or after it was taken, there was no abuse of leave. Grievant's supervisor testified and his supervisor confirmed that he was "kind-hearted" and always went the extra mile for his employees, and that he approved leave slips that did not follow the regulations. When asked why his supervisor approved his leave when he had not followed the required procedures, Grievant stated that he guessed it started as a favor, and later someone told him it was to keep from "messing up" payroll.

Grievant also argued he could not be abusing sick leave if his evaluations rated him as "very good". On his evaluation from 1990-91 Grievant received a "very good overall" but received his lowest mark, a 7, on his use of time. His supervisor noted "he needs some improvement in the use of his leave time." Grievant agreed withthis evaluation. In his 1991-92 evaluation Grievant still received a "very good" rating overall but his rating on use of time was a 5. Again, Mr. Pauley noted the problem with use of leave continued, and he had talked with Grievant with little success. Again Grievant agreed with this evaluation. The rating of 1992-93 was essentially the same as the previous year. Grievant's supervisor testified that although these forms said a 5 was at the lower end of "good" it was a very low mark for him to give an employee. (See footnote 5)

Grievant also argued Respondent's failure to give him due process and follow Section 12.03 of WVAR requires his suspension to be overturned and all requested relief be granted. This regulatory section states:

> Suspension: The appointing authority, eight (8) calendar days after oral notice confirmed in writing or by written notice, may suspend an employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a job related adverse impact. The suspension must be for a specific period of time, except where an employee is a subject of an indictment or other criminal proceeding. The person being suspended shall be allowed a reasonable time to reply thereto in writing, or upon request to appear personally and reply to appointing authority or deputy. The eight (8) calendar day notice is not required for employees in certain cases when the public interests are best served by withholding the notice. The appointing authority shall file the statement of reasons for the suspension and the reply, if any, to the Director of Personnel.

In testimony, Grievant did not disagree that the failure to follow this regulation was anything other than a clerical error and was unable to identify any harm caused to him by the error. It is clear from Commissioner Richardson's May 25, 1994 letter toGrievant that he felt the grounds for the suspension were still valid, but agreed to decrease his suspension to four days to rectify the procedural error.

The first issue to address is whether Respondent met its burden of proof and demonstrated by a preponderance of evidence that the Grievant failed to work as scheduled. The evidence of record, plus Grievant's own testimony, demonstrates the he did not follow the established guidelines in requesting leave, was frequently late to work, and failed to follow the requirements established in the May 15, 1994 warning letter. Additionally, Respondent demonstrated a pattern of progressive discipline was instituted to no avail. Grievant received numerous verbal warnings, two or three written warnings, and continued his pattern of leave abuse. Grievant's testimony clearly reveals that even after these warnings and reprimands he did not think he was abusing his leave and thought only that he was being treated unfairly. (See footnote 6) Respondent has met its burden of proof and demonstrated that Grievant abused his leave and that the disciplinary action of suspension was warranted in this case.

The second issue to address is the Grievant's due process claim. Does Respondent's failure, due to clerical error, to follow the requirements of Section 12.03 of WVAR mandate a suspension be declared null and void, especially when an attempt to rectify thefailure results in a decrease of this warranted suspension from ten to four days? The case of Vosberg v. Civil Service Comm'n, 275 S.E.2d 640 (W. Va. 1981), while not directly on point, is instructive in this regard. In Vosberg the employee was dismissed from his position for failure to report absences from work properly. Vosberg asked to be reinstated with back pay because the state agency violated the State Personnel Grievance Procedure. The West Virginia Supreme Court held:

> Where a state employee, covered by civil service W.Va. Code ch. 29, art. 6, has instituted a grievance pursuant to a state personnel grievance procedure and the employee's supervisor violates the grievance procedure, such violation will not result in the reversal of an order by the West Virginia Civil Service Commission affirming the employee's dismissal from employment, where such violation of the grievance procedure is merely technical, following substantial compliance with the procedure, and there has existed between the employee and his supervisors ongoing communications concerning the employee's employment problem.

Id. at Syl. Pt. 1.

Applying the reasoning in Vosberg to the instant case, the suspension should be upheld. Grievant had "on-going communication concerning [his] employment problems," with the Respondent. The failure to give him the eight day notice required by regulation resulted from a clerical error. When notified of the violation, Commissioner Richardson attempted to rectify the situation by decreasing

the suspension from ten to four days. Certainly, Commissioner Richardson could have declared the first suspension null and void, made proper restitution to the Grievant, and then, because the suspension was warranted, given the Grievant proper notice and suspended him for the full ten days. Since the Grievantwas in a better position through Respondent's attempt to rectify the error, than he would have been if the suspension was redone, no harm to the Grievant has been demonstrated. Thus, the Grievant's suspension cannot be overturned on these grounds. The above discussion is supplemented by the following conclusions of law.

Conclusions of Law

1. In a disciplinary case Respondent has the burden of proving the case by a preponderance of the evidence. Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-663 (Mar. 31, 1989).

2. Respondent has met this burden of proof and established by a preponderance of the evidence that the Grievant had a long history of leave abuse, and a warranted suspension was imposed only after progressive disciplinary measures went unheeded.

3. "Where a defense is raised by a grievant in a discipline-based claim[,] it is his burden to establish the validity of that defense." Young v. W. Va. Dept. of Health and Human Resources, Docket No. 90-HHR-541, at 12 (Mar. 29, 1991). Grievant failed to establish a valid affirmative defense.

4. Respondent did not follow the notice requirements of Section 12.03 of WVAR because of a clerical error.

5. Where a procedural violation of a regulation occurred through clerical error, was rectified as soon as possible with a resulting benefit to Grievant, and the Grievant had been repeatedly reprimanded about the behavior which resulted in a suspension, such violation will not result in reversal of the suspension. Accord, Vosberg, supra, Syl. Pt. 1.

Accordingly, this 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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: January 31, 1995

Footnote: 1*Commissioner Andrew Richardson decreased Grievant's original ten-day suspension to four days to rectify a clerical error regarding the beginning date of his suspension. Grievant was suspended on the date of notification without the eight day notice required by Section 12.03 of the West Virginia Division of Personnel Administrative Rules ("WVAR").*

Footnote: 2*(1) I wish to have my back pay for the five day suspension (May 19, 1994 through May 25, 1994) paid to me for this period of time. (2) I wish to have all annual and sick leave (accrual) reinstated to me for this five day period. (3) I am asking that all original documents that pertain to my suspension, plus any photocopies, be delivered to me from all files, then I can destroy them (including letters about my use of leave, etc.). (4) I am asking that no reprisals be taken against me for this grievance procedure. (5) I am asking that all annual leave be reinstated to me that was taken from me on BEP4-600 because of improper posting on this form, I am estimating approximately ten hours. (6)Physician Statement for use of any sick leave be withdrawn and copies in my files given to me. (7) All steps used against me in this suspension be null and void and the grievant be made whole. (8) Include no harassment about my secondary job in any form.*

Footnote: 3*Grievant elected to submit no further information.*

Footnote: 4*Grievant's mother died in July 1992.*

Footnote: 5*On all three of these evaluations Grievant's ratings were almost all in the exceptional range, or 9.*

Footnote: 6*The issue of unfair treatment was not brought before this Board as a portion of the grievance, but was a familiar theme in Grievant's testimony. No examples of unfair treatment were cited and no expansion on this theme was made; thus this issue was not considered by the undersigned.*