RUFUS MOORE, .

Grievant, .

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v. . Docket Number: 95-RS-165

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WEST VIRGINIA DIVISION OF .

REHABILITATION SERVICES, .

Respondent. .

D E C I S I O N

Rufus Moore (hereinafter Grievant) filed this grievance pursuant to West Virginia Code §§29-6A-1, et seq., against his employer, the West Virginia Division of Rehabilitation Services (hereinafter Rehab), on April 25, 1995. By letter dated April 14, 1995, William Dearien, Director of Rehab, notified Grievant that he was dismissed from employment as a Rehabilitation Counselor, effective April 10, 1995, for alleged neglect of duty. Grievant challenges his termination as being unfair. A level four evidentiary hearing was held on June 7, 1995, at this Grievance Board's Charleston, West Virginia office. The parties were given until July 1, 1995, to submit briefs in this matter, and the case became mature for decision on that date.

The majority of the facts in this case are not in dispute. Grievant was a Rehabilitation Counselor in Rehab's Logan office for approximately four years. He filed a grievance against Rehab sometime in late 1994, challenging his classification. According to Grievant's unrebutted testimony, as a result of the filing of this grievance, Grievant became very emotionally upset, to the point that he began

suffering from various physical conditions which required him to take leave from work, on a regular basis, starting on or around January 23, 1995. On this date, Grievant did not appear for work. Shortly thereafter, Grievant's wife called his office and asked that Grievant be placed on annual leave. Subsequently, she again called and asked if Grievant could be granted sick leave because he was ill and had seen a physician. Rehab initially understood that Grievant would be off work for only a few days; however, it was later notified by Grievant's wife that Grievant would be off work, until further notice, due to his condition. Grievant's wife informed his office that he had seen a physician and could provide excuses for his absence. Grievant returned to work on March 13, 1995.

Upon Grievant's return to work, he informed his supervisor, Judy Reed, District Manager, that his physician had released him to work on a gradual, part-time basis. Ms. Reed then met with Grievant in his office and went over the events leading up to that date. Grievant presented Ms. Reed with physician's statements addressing the time he had been off work. He was then allowed to fill out and sign the appropriate leave slips covering the timeperiod of January 23, to March 10, 1995. The two then discussed Grievant's need to work part-time, and what part-time schedule would be appropriate or possible. Grievant was then given annual leave for the following two days. Grievant did not return to work after March 13, 1995, but at no time was Grievant ever placed on unauthorized leave.

According to Ms. Reed, Grievant and she participated in a phone conference with Mr. James Quarles, Assistant Director of Human Resources, on February 16, 1995, wherein Grievant was told that he needed to follow procedures for requesting and taking leave from that point on. Ms. Reed stated that Grievant was told he could report to his office on every Friday and inform them if he was able to come to work the following week. Rehab contends that Grievant failed to follow the normal and proper procedures for requesting leave, and also, he failed to phone in every Friday to request leave after February 16, 1995.

By letter dated March 24, 1995, Mr. Dearien requested that Grievant provide Rehab with his intentions to continue employment. Mr. Dearien referred to Grievant's failure to appear for work on March 16, 17, 20, 21, 22, 23 and 24, 1995, and his failure to apply for approved sick or annual leave. He further stated that he expected Grievant to return to work immediately or notify Ms. Reed of the reasons for his absence. He concluded by stating that failure to comply with this request would be considered abandonment and would result in his dismissal.

Grievant met with James Jones, Deputy Director, on April 5, 1995. Rehab contends that Grievant

discussed, in general, the reasons for his absences but still did not assure Mr. Jones of his plans to resume employment. Thereafter, Mr. Jones prepared a summary memorandum of the substantive communications of this meeting and sent it to Mr. Dearien. Grievant was then dismissed by Mr. Dearien by letter dated April 14, 1995. James Quarles testified at the hearing concerning his understanding of the decision-making which led to Grievant's termination. He stated that he believed the overriding reason for Grievant's dismissal was that Rehab did not know when he was coming back to work; therefore, it was concerned as to whether Grievant had abandoned his position. He concluded that Grievant was not dismissed for abusing leave, but for failing to follow the appropriate procedures for taking leave.

Grievant contends that he did not abandon his position. He asserts that he made efforts to notify Rehab as to his intention, to the best of his ability, to return to work. He testified that he believed his dismissal was retaliatory for having filed a grievance against the agency in late 1994 concerning his classification. Grievant testified very sincerely concerning both the physical and mental conditions which kept him from work during the periods in question, and also, as he contends, explained the reasons why he was not capable of maintaining constant communication with his supervisor.

Grievant testified that he received psychological counseling for anxiety and depression, and that it was recommended by hisphysician that he temporarily sever all ties with work. To do this, Grievant had his wife call his office several times to inform it of his situation. Grievant contends that he was willing to provide Rehab with as much supporting medical evidence as available to explain and/or justify his absence but that his employer never demanded that he obtain such evidence. In conclusion, Grievant stated that he still had both sick and annual leave at the time of his dismissal.

In cases dealing with disciplinary matters, the burden of proof rests with the employer to prove the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Schmidt v. W.Va. Dept. of Highways, Docket No. DOH-88-063 (March 31, 1989). And, as our Supreme Court recognized long ago,

> In order to support a dismissal of a covered employee, the evidence must show good cause thereof. Such cause must be substantial. 'The cause must be one which specifically relates to and effects the administration of the office, and must be restricted to something of a substantial nature directly effecting the rights and interests of the public. An officer should not be removed from office on trivial or inconsequential matters, or for mere technical violations of statute or official duty without wrongful intention.'

Guine v. Civil Service Commission, 149 W.Va. 461, 468, 141 S.E.2d 364, 369 (1965), citing, 67 C.J.S., Officers, Section 60b. The appropriateness of a penalty, while depending upon resolution of questions of fact, is by no means a mere factual determination. Douglass v. Veterans Administration, 5 M.S.P.B. 280 (1981). Such a decision "involves not only an ascertainment of the factual circumstances surrounding the violations but also the application of administrative judgment and discretion." Id. citing Kulkin v.Bergland, 626 F.2d 181, 185 (1st. Cir. 1980); Beall Const. Co. v. OSHRC, 507 F.2d 1041, 1046 (8th Cir. 1974). Because the imposition of a penalty results from an employer's administrative exercise of discretion, said action may be the result of arbitrary and capricious decision-making or an abuse of discretion. See, Thompson v. U.S. Postal Service, 596 F.Supp. 628 (D.C.Va. 1984). At question herein is whether Rehab can establish that Grievant neglected his duty by failing to comply with its leave use policies, and whether said failure constituted just cause for his termination.

The case at hand presents a close case wherein the rights and interests of the employer in maintaining an effective and efficient work place must be weighed against the rights of a tenured, civil service employee in his continued employment. Rehab has established that Grievant went on annual leave beginning January 23, 1995, but did not return to work until March 13, 1995. At this time, Grievant presented Rehab with an explanation of the reasons why he had not been to work, along with three physician's statements verifying that he had been under a doctor's care. Also, more than once during this time, Grievant's wife called and informed Rehab that he would not be able to work until further notice.

When Grievant came to the office on March 13, Rehab requested that he give it some form of assurance as to when and how often he would be able to work. Grievant did not respond with any certainty as to his plans to return to work other than to affirm that he didnot wish to terminate his employment. At the hearing, much was made of the fact that Grievant never presented Rehab with a complete medical abstract of the care he was receiving from his psychiatrist; however, Rehab has not established that it placed any greater restrictions on him with regard to providing it with more detailed medical information. In any event, Grievant was again upset after this March 13, 1995 meeting, and he was granted annual leave for the following Thursday and Friday, March 14, and 15, 1995. Grievant then did not return to work. Grievant was never placed on unauthorized leave even though he never complied with Rehab's policy of requesting leave in advance.

It is understandable that Rehab was concerned with Grievant's chronic absenteeism and the uncertainty of his return because it needed to assure that his workload was covered. However, there was no testimony refuting that Grievant was suffering from either physical or psychological conditions which kept him from appearing at work, and from keeping constant contact with his superiors. Further, even though Grievant was eventually dismissed for only failing to comply with the agency's leave usage policy, he was never denied the ability to use his sick or annual leave. In fact, he still maintained some leave at the time of his termination.

Nevertheless, Grievant was fully aware that his employer wished to be kept informed as to his intentions and ability to return to work on a full-time basis. It is properly inferred from the record that Rehab did not wish to allow Grievant to work part-time. Still, Grievant did not return to work after he requestedand was granted two days annual leave on March 14 and 15, 1995. It is obvious that Rehab did not believe Grievant was justified in not returning to work thereafter, as the series of memoranda and letters that followed indicating that he would be dismissed if he did not provide sufficient justification for his absence and failure to request appropriate leave.

With regard to Rehab's policy on annual leave, Policy 1703.D states that employees are to request annual leave from their immediate supervisor at least two weeks in advance of the leave. In regard to sick leave, Policy 1704.D requires that an employee notify his immediate supervisor one-half hour prior to the beginning of the work day, or if unable to so report, as soon as possible thereafter. This policy goes on to state that "In the event an employee fails to report a need for sick leave as required by the provisions of this section, the period of absence will be charged to unauthorized leave. . ." Subsection 1703.E also states that if an employee is off due to illness for more than 24 consecutive hours, he/she must attach a physician's statement to the leave slip upon return or the absence will be deemed unauthorized. (See footnote 1)

There is no question that Grievant failed to comply with Rehab's leave use policy; however, it is also clear that the agency did not hold this failure on behalf of Grievant against him until it fired him. Consistent with its own policy, Rehab should haveplaced Grievant on unauthorized leave for the periods of January 23, 1995 through March 13, 1995, and March 16, through 24, 1995, as the policy states that the employee **will** be placed on unauthorized leave status if the appropriate procedures are not followed. Instead, the agency condoned Grievant's behavior and actually encouraged it when it granted him two days of annual leave for March 14, and 15, 1995, inconsistent with the

requirements of Policy 1702.

Further, Grievant was never told that his continued failure to request sick leave and/or annual leave in advance would result in disciplinary action until after he received the March 24, 1995 letter indicating that it was the intent of his employer to dismiss him. Rehab treated Grievant's absence from March 16, through March 24, 1995, as unexcused, even though it did not tell him prior to that date that he would have to report to work or his absence would be unauthorized. As mentioned, there is no evidence that Grievant's pay was ever docked a single day for his absence, even for the days after March 16, 1995.

An agency has the right to expect that its employees will be in attendance, absent a valid excuse. Giesler v. Dept. of Transportation, 3 MSPB 367 (1980). However, an agency may not consider that an employee has been AWOL as a basis for an adverse action against him/her if said employee was on approved status. Cooke v. Federal Aviation Administration, NY075281F1252 (1983). An agency may deny leave to an employee who has improperly requested such, but once the leave is granted the absence should not be usedas a basis for discipline. Williams v. Department of Army, SF07528110366 (1984). Finally, with regard to an employee's failure to abide by leave use restrictions, in Fleming v. USPS, 30 MSPB 302 (1986), it was held that

> while an employee may not be disciplined on the basis of approved leave, per se, it is yet permissible to predicate discipline on failure to follow leave-reporting procedures, provided the employee is clearly on notice of such requirements and of the likelihood of discipline for continued failure to comply. We emphasize the responsibilities supervisors have in this regard. The efficiency of the service is not promoted when employees are left to believe, through leave approvals, that their attendance patterns are acceptable-only to discover later that the approved leave is used as a basis for subsequent discipline. Confronted with an unscheduled absence, a supervisor, concluding that discipline is appropriate, must mark the employee AWOL or, if leave is approved, must make clear to the employee that the failure to schedule the leave in advance is not being disregarded.

Here, the record is not entirely clear as to the instructions Grievant was given on March 13, 1995, concerning his duty to return to work on the following Monday. As noted, Grievant believed that it was within his best interests to return to work gradually but his employer wanted him to commit to full-time attendance. The record does not establish by a preponderance of the evidence that Grievant was told that he had to appear for work on the 16th or else he would be disciplined. Given the past events, and the tenor of the March 13, 1995 meeting, Rehab should have been aware of the possibility that Grievant would not be at work on March 16.

Being that Rehab did not establish Grievant had been disciplined in the past, his termination is too harsh a penalty given the facts of this case. Further, Rehab has not established just cause for his termination, but instead, has established a meretechnical violation of the policy which it has itself not followed. Therefore, Grievant's termination is hereby overturned. Grievant's affirmative defense of retaliation need not be addressed.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

Findings of Fact

1. Grievant was employed by the Division of Rehabilitation Services as a Rehabilitation Counselor until his termination for neglect of duty effective April 10, 1995.

2. Grievant did not appear to work on January 23, 1995 and, on that date, his wife called his office and requested that Grievant be placed on annual leave. Some time later, she again called and requested that Grievant be placed on sick leave as he was suffering from various illnesses which were later traced to his psychological condition.

3. Grievant did not return to work until March 13, 1995. On this date, he informed his employer that he had been seeing a psychiatrist, and that it was recommended that he return to work gradually as opposed to full-time. Grievant also presented the Division with copies of physician's statements indicating that he had been under the care and treatment of a psychiatrist.

4. As a result of Grievant's discussions with his supervisor on March 13, 1995, no "gradual" schedule for his return was agreed upon.

5. On March 13, 1995, Grievant was allowed to fill-out leave request forms to enable him to be paid for the time period he had been off work.

6. Grievant requested and was granted annual leave for March 14 and 15, 1995.

7. After Grievant met with his superiors on March 13, 1995, he again sought counseling from his treating psychiatrist for depression and anxiety.

8. Grievant did not return to work after he was granted annual leave on March 14 and 15, 1995. At some time, Grievant's wife informed his office that he was not able to come to work.

9. By letter dated March 24, 1995, Grievant was informed that his employer had considered that he had abandoned his job and had not complied with its policy on requesting leave. Grievant was

told to return to work immediately or else he would be terminated.

10. Grievant met with the Deputy Director of the Division on April 5, 1995, to explain the reasons for his absence. He also met with his immediate supervisor concerning his absence and expected return to work. Later, Grievant informed the Deputy Director that he had been advised to "take a few more days off of work."

11. By letter dated April 14, 1995, Grievant was notified by the Director of the Division that his employment had been terminated for neglecting his duty by not following the proper procedures for requesting and taking leave.

12. At no time was Grievant ever placed on unauthorized leave by his employer.

13. At no time did Grievant's employer ever specifically indicate that his presented justifications for his absence were insufficient.

14. At the time Grievant was terminated from employment, he still maintained some accumulated annual and sick leave.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. The Division of Rehabilitation Services bears the burden of proving the charges supporting Grievant's termination by a preponderance of the evidence. W. Va. Code §29-6A-6.

2. The Division of Rehabilitation Services has not proven that Grievant neglected his duty.

3. The Division of Rehabilitation Services has not established just cause to support Grievant's termination from employment. See generally, Guine v. Civil Service Commission, 141 S.E.2d 364, (W. Va. 1965).

Therefore, Grievant's termination is hereby **OVERTURNED** and this grievance is **GRANTED**. The Division of Rehabilitation Services is hereby **ORDERED** to reinstate Grievant to his previous position and to restore to Grievant the amount of sick leave and/or Annual leave which he had accrued but not used at the time of his dismissal, which has not been paid to him as of the date of this Decision. No back pay is awarded. Further, Rehab is requested to provide Grievant a detailed explanation, in writing, of whatever additional rights he may have as a classified employee of the Stateunder the Division of Personnel's Administrative Rules and Regulations, and also any rights he may have under

the Rehab's policies with regard to leave, either paid or unpaid, within five working days from receipt of this Decision. No further relief is provided.

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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ALBERT C. DUNN, JR.

Administrative Law Judge

July 31, 1995

Footnote: 1It is noted that some of these requirements are more strict than those adopted by the Division of Personnel in 143 C.S.R. 1.