RICHARD RUNYON

v Docket No. 95-CORR-414

WEST VIRGINIA DIVISION OF CORRECTIONS

DECISION

The grievant, a Correctional Officer II, employed by the West Virginia Division of Corrections (CORR) and assigned to the Mount Olive Correctional Complex (MOCC), filed this complaint June 5, 1995, protesting the following May 25, 1995 letter from MOCC Warden George Trent.

> An inspection of the attendance files from January 1995 have shown that you may be in danger of developing a record of unsubstantiated absences. Under Policy Directive 400.00 Section 7, unsatisfactory attendance may be classified as a Class A Offense and subject to applicable sanctions.
>
> Although a physician's statement is not required for three days or less of sick leave, the Administration has the authority to take disciplinary action if it has grounds to suspect an employee of abusing their leave privileges.
>
> Mr. Runyon, this letter merely constitutes an official warning. However, a copy will be placed in your personnel file. If you feel that you have not missed at least three (3) days of unsupported sick leave since January, you may contact the Human Resource Department for an appointment and every effort will be made to correct any errors.

The grievant concedes that on January 12, 1995, he was advised by his superior, Lt. Richard Littell, that his use of sick leavebetween August 1, 1994 and October 31, 1994, exceeded acceptable standards. (See footnote 1) There is no dispute that Lt. Littell's admonishment and Warden Trent's reference to "unsubstantiated absences" were based on the following portions of CORR's "Operational Procedure #4.39," adopted July 1, 1994.

> Sick Leave Usage - An approved paid period of absence granted to the employee in the event of illness or injury which incapacitates; or when illness or injury to an immediate family member requires employee's attendance; or an employee or a member of the immediate family has a medica/dental appointment; or the employee

> experiences a death in the immediate family; or the employee has been exposed to a contagious disease.
>
> Sick Leave Abuse - For the purpose of this directive, sick leave abuse shall be determined to occur when unsupported sick leave hours are equal to or greater than %5 of the time available for work in a given period of time, normally six (6) months or greater in duration, and 50% of those absences occur immediately before or after holidays, paydays, weekends, or periods of annual leave. Sick leave days in excess of three (3) days requiring a doctor's statement, and sick leave use for death in the immediate family will not be considered when computing unsupported sick leave of 5%. (See attached sick leave restriction work sheet.)
>
> Time Available for Work - Total regular working hours less holidays and all leave (paid or unpaid) except unsupported sick leave.
>
> Unsupported Sick Leave - A period of sick leave not supported by a doctor's statement defining the illness of the employee or the family member that caused the absence.
>
> Working Hours - Total number of hours, excluding any overtime hours of work, an employee is scheduled to work in any period, not to exceed forty hours per week.

The policy further provides,

> Absence Due to Illness or Injury:
>
> A. Absences of more than three days will require a physician's statement from a licensed medical practitioner certifying the period of the illness or disability and certifying that the employee was unable to work, and the employee must submit the physician's statement immediately upon his/her return to work.

The parties essentially stipulate that between January 1, 1995, and May 25, 1995, the grievant used four days' sick leave which was "unsupported" per the policy and that all of those absences fell immediately before or after one of the grievant's regularly scheduled days off (See footnote 2) or an approved annual leave day. Finally, the parties agree that while the grievant had 720 "regular" work hours available during the period in question, he also worked approximately three hundred overtime hours during that period.

The grievant's legal position is not entirely clear in that most of his assertions imply that he was

accused of violating the restrictions of CORR's Operational Procedure #4.39. He does not attack the validity of the policy and does not dispute that hisunsupported sick leave was "suspect" under its terms. The grievant, denies that he was ever provided a copy of the policy and appears to assert that he should not be bound by its terms. Finally, he seems to argue that the policy conveys a right upon the employee to use three days' sick leave without obtaining a physician's statement and that the warning letter encroached upon that right.

CORR argues strenuously that the grievant has not been accused of violating the policy and that the intent of the letter was to avert a violation. CORR asserts that its attendance records fully support that under the terms of the policy, the grievant was "in danger of developing a record of unsubstantiated absences."

Initially, the undersigned finds that Warden Trent's letter does not explicitly or implicitly charge the grievant with a violation of the pertinent policy. It is clear from the wording of the letter that the warden was seeking to avert a violation and provide some documentation of a potential problem.

It is also clear that the letter, when viewed in its entirety, was intended to be a low-level disciplinary measure. Its presence in the grievant's personnel file confirms that the warden intended his message to be more than remedial. Accordingly, CORR bears the burden of proof in the case. See, Dancy v. Raleigh County Bd. of Educ., Docket No. 95-41-168 (Sept. 7, 1995).

It is further concluded that the policy does not bind CORR to take disciplinary action only when an employee's unsupported sick leave falls within its proscriptions. There is nothing in thelanguage of the policy to indicate that CORR intended it to be controlling in all absence-related personnel matters, and it would be a distortion of its terms to conclude that the agency had prohibited itself from taking steps to rehabilitate or warn an employee whose sick leave use was approaching the levels defined in the policy. Accordingly, CORR's only burden in the matter is to demonstrate that Warden Trent's letter was accurate and that the grievant's unsupported sick leave was near the level addressed in the policy. Since, as noted, the grievant concedes its accuracy, and the record otherwise reflects that his unsupported leave was approximately 4.5 % of his available regular work hours, the agency has met that burden.

The record supports that the grievant's assertion that he was never furnished a copy of Operational Procedure #4.39. The record, however, also reflects that he had at least a general understanding of its terms. The grievant's own testimony indicates that he had been advised verbally

as early as July 1994 that CORR would be conducting periodic reviews of sick leave use and making the calculations provided for in the policy. While the record supports that the grievant may have been surprised upon reviewing the complete contents of the policy, there is no evidence whatsoever that he was harmed by his lack of knowledge. Again, the grievant was not charged with sick leave abuse as that term is defined in the policy.

Finally, the undersigned finds that it was not arbitrary or capricious for CORR to decline to consider the grievant's overtimehours during the pertinent period in its calculations. There is at least a rational basis for CORR's determination, communicated via the terms of the policy, that an employee's overtime is irrelevant to the question of whether he has abused sick leave privileges. (See footnote 3) 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.

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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: January 31, 1996

Footnote: 1

It does not appear that Warden Trent was aware of or considered the previous advisory. Lt. Littell did, however, memorialize his discussion with the grievant in a written memorandum which he retained but did not place in the grievant's personnel file. The memo was attached to and cited in Lt. Littell's Level II decision in the case. Despite that CORR did not rely on the document at Level IV, it was admitted into evidence on the insistence of the grievant's representative. The grievant then recalled his meeting with Lt. Littell but stated that he did not view his comments as a warning. The grievant generally represented that Lt. Littell agreed that errors were made in the review of his use of sick leave at that time.

Because the grievant moved for admission of the memo and presented testimony thereon, the evidence has been

afforded weight herein. Essentially, it has been considered only to the extent that it tends to dispute the grievant's claim that he was not aware of the terms of the policy in issue. This is only a marginal issue, and there is sufficient other evidence of record to resolve the substantive questions in the case.

Footnote: 2

It appears that the parties are in agreement that despite that the grievant's days off do not always fall on a Saturday or Sunday, those days should be considered his "weekend" as that term is used in the policy.

Footnote: 3

Nevertheless, in this case, it appears artificial to say that the grievant had only 720 hours available work time during the period. The record establishes that overtime is a regular part of the schedules of nearly all MOCC correctional officers. It seems that a more accurate picture of the grievant's attendance history would include some written record of the extra hours. The undersigned suggests that CORR permit the grievant to place a brief addendum to the warning letter in his personnel file which sets forth the dates and amounts of those hours during the relevant time.