DAVID GILBERT,

Grievant,

v.

DOCKET NO. 03-ADMN-100

WEST VIRGINIA DEPARTMENT OF
ADMINISTRATION/DIVISION OF PURCHASING/
SURPLUS PROPERTY UNIT,

Respondent.

D E C I S I O N

Grievant, David Gilbert, filed this grievance against his employer, the West Virginia Department of Administration/Division of Purchasing/Surplus Property Unit ("DOA or State"), on or about February 27, 2003, protesting a letter from his supervisor dated February 10, 2003, in which he was advised his "pay and leave time would be docked as discipline for alleged unauthorized leave taken February 10th, 2003." The grievance was denied by Dave Tincher on March 7, 2002. A level three hearing was held on March 20, 2003, and the grievance again denied by John T. Poffenbarger on March 26, 2003. Grievant appealed to level four on April 8, 2003, and a level four hearing was held in the Grievance Board's Charleston, West Virginia, office on May 13, 2003. The grievance became mature for decision at the close of the level four hearing. Grievant was represented by Clinton Smith, Esq., and DOA was represented by Amy J. Haynie, Esq.

SUMMARY OF EVIDENCE

Level Three State Exhibits

Ex. 1 -

Department of Administration Employee Handbook, effective February 2001, Absence Reporting; Basic Rules About Annual Leave Use; Requesting Sick Leave.

Ex. 2 -

Division of Personnel Administrative Rule § 14.3. Annual Leave; 14.4. Sick Leave; 14.6. Unauthorized Leave.

Ex. 3 -

March 7, 2002 memorandum from Dave Tincher to David Gilbert; Statement of Grievance; Dave White's February 2003 Calendar; February 11, 2003 email from Dave White to Ken Frye, and March 5, 2003 email in response; February 11, 200(3) letter from David White to David Gilbert. (See footnote 1)

Level Three Grievant's Exhibits

Ex. 1 -

Applications for Leave With Pay, dated January 9, 2003, January 7, 2003, January 15, 2003, January 13, 2003, February 14, 203, February 13, 2003, and February 27, 2003.

Level Four State Exhibits

Ex. 1 -

Purchasing Division Attendance Report for David Gilbert, February 1 through 14, 2003.

Level Four Grievant's Exhibits

Ex. 1 -

Applications for Leave With Pay, February 1999 through February 2003 (67).

Testimony

DOA presented the testimony of Kenneth Frye, David White. Grievant testified in his own behalf, and presented no additional witnesses.

Based upon a review of the testimony and evidence in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed in the Surplus Property Unit of the Purchasing Division as an Information Services Coordinator.
2. David White is Grievant's immediate supervisor.
3. On Monday, February 10, 2003, Grievant was absent from work.
4. Grievant did not give Mr. White advance notice, verbal or written, that he would be absent on February 10, 2003.
5. Grievant did not call in at any time on February 10, 2003.
6. On February 11, 2003, Grievant reported to work and submitted leave slips for the prior day. He requested 4 hours sick leave and 4 hours annual leave.
7. The practice in the Surplus Property Unit has been that, when taking sick leave for a known doctor's appointment, employees are required to verbally inform their supervisors in advance. Upon an employee's return from the appointment, the employee completes a leave slip. This policy is used because it is virtually impossible for an employee to know how long he will be at the doctor's office.
8. When an employee takes annual leave, he is required to fill out a leave slip in advance, unless the leave needed is an emergency. In the case of an emergency, the employee is required to call in to work within thirty minutes of the start of his workday.
9. When employees inform Mr. White they will be off work, either for sick or annual purposes, he records that information on his calendar. LIV State Ex. 1.
10. Every day at approximately 9:00 a.m., each supervisor in the Surplus Property Unit submits an “Administrative Services Employee Daily Leave Report” to their supervisor, Ken Frye's, secretary. 11. Mr. White and Mr. Frye discussed Grievant's February 10, 2003 absence with the Division of Personnel, and determined his request for leave for that day would not be approved, and

he would be docked pay for that day.

12. Mr. White signed off on a letter prepared by the Division of Personnel to Grievant on February 11, 2003, advising him of the decision to dock his pay for his February 10, 2003 absence. LIII State Ex. 3.

DISCUSSION

The burden of proof in disciplinary matters rests with the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met is burden of proof. Hammer, supra.

DOA docked Grievant's pay for 8 hours for taking unauthorized leave on February 10, 2003, in violation of DOA and Division of Personnel policies, and for insubordination. Grievant denies his use of leave on February 10, 2003, was unauthorized, claiming he notified his supervisor well in advance that he would be taking that day off for a doctor's appointment. Grievant alleges this incident is just part of a continuing pattern of harassment against him by DOA.

DOA's Absence Reporting Policy states:

> To request and report time off work, fill out an application for leave form and give it to your supervisor. The application for leave is a standard form that most agencies use for reporting and documenting absences. In any case, use the appropriate form established for reporting absences in your agency.
>
> Absences from your job during your regular work hours, including scheduled medical appointments, must be approved in advance, except in cases of emergency. If you must be absent without advance approval due to personal or family illness, or other emergency situation, you must personally notify your supervisor according to the procedure established at your work site.

LIII State Ex. 1 (emphasis in original).

West Virginia Division of Personnel Administrative Rule 14.6. Unauthorized Leave provides as follows:

> When an employee is absent from work without authorization for sick or annual leave, the appointing authority shall dock the employee's pay in the next pay period for an equal amount of time paid during which no work was performed. The appointing authority shall notify the employee in writing that his or her pay is being docked and that the unauthorized leave is misconduct for which discipline is being imposed. The appointing authority shall use unauthorized leave only in cases when the employee fails to obtain the appropriate approval, according to agency policy, for the absence. The appointing authority shall transmit notice of the action in writing to the Director of Personnel.

LIII State Ex. 1.

The evidence presented demonstrates that the Surplus Property Unit's practice with regard to sick and annual leave is that, for anticipated sick or annual leave, the employee gives advance notice to his supervisor, and submits a leave slip if he knows exactly how long he will be off work. If the leave is for a doctor's appointment, where it is difficult to know exactly how long the appointment will take, it is customary for an employee to notify his supervisor in advance he will be off, and then fill out the sick leave slip upon return to work with the exact time. For emergencies, the practice is for the employee to fill out thesick or annual leave slip upon return to work. This practice conforms with DOA's policy, supra.

Mr. White testified he remembered Grievant coming into his office some months before and giving him some dates in February on which he had doctors' appointments. He noted those dates on his monthly calendar. See LIII State Ex. 3. Grievant also remembers giving Mr. White dates he would be off work in February, and watching him write them down, although he did not see exactly what dates Mr. White had written. Grievant insists he told Mr. White he would be off on February 10, 2003, and Mr. White insists he did not.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR- 066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dept. of Health and Human

Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness'sinformation. See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

Mr. White testified he remembered Grievant telling him what dates he would be off in February, and that he made a list of those dates, which he transferred later to his calendar. Mr. White testified he always makes notations on his desk calendar when employees verbally notify him they will be taking off work. Grievant confirmed Mr. White has followed that practice with regard to him, stating in his grievance statement:

> Since my employment with Surplus Property began more than 4 years ago, I have been requesting leave time in advance through a verbal request to my immediate supervisor. These verbal requests were written down by my supervisor while in my presence on all occasions (including the one in question), . . .

Grievant testified he watched Mr. White make notations when he told him what days he would be off in February, but he did not see exactly what Mr. White was writing. All of the dates Grievant took off in February are recorded on Mr. White's calendar, except February 10.

Mr. White testified in all his years as supervisor, he cannot remember ever making a mistake about an employee's leave request, and is certain Grievant did not tell him he would be off work on February 10, 2003.

Finally, Grievant testified he reminded Mr. White verbally on several occasions that he would be taking off February 10. Mr. White denies Grievant reminding him he would be taking that day off specifically.

The undersigned is not convinced that either Grievant or Mr. White is being less than truthful in their testimony. However, it appears more likely than not, given Mr. White's detailed and accurate record-keeping, that Grievant believed he included February 10 inthe list of days he would be taking off, but in reality forgot to include that date. It also seems plausible that Grievant may have reminded

Mr. White from time to time that he would be taking some days off in February, but again, as he had not originally included February 10 in his list of days, Mr. White did not anticipate that would be one of the days Grievant would be absent.

Unfortunately, Grievant did not remind Mr. White he would be off on February 10 close to the actual date, and did not call in on February 10, which would have cleared up the mistake. It is ultimately an employee's responsibility to make sure his employer has been notified that he will be absent from work.

Once Grievant failed to show up for work on February 10, or call in, Mr. White and Mr. Frye took what seemed to them to be the appropriate course of action, after consultation with the Division of Personnel, and there is no dispute over the sufficiency of the notice to Grievant that his pay would be docked for February 10, 2003.

Grievant alleges, however, that this action is consistent with a pattern of harassment, and retaliation, on the part of DOA. Grievant's claims are in the form of an affirmative defense, and Grievant has the burden of proving those claims by a preponderance of the evidence. Parham v. Raleigh County Bd. of Educ., Docket No. 91- 41-131 (Nov. 7, 1995).

"Harassment" means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession. W. Va. Code § 29-6A-2(l). Harassment has been found in cases in which a supervisor has constantly criticized an employee and created unreasonable performance expectations, to a degree where the employee cannot perform his duties withoutconsiderable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997). See also Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999)(disallowing such a claim because it was based on an isolated incident); Thacker v. Bd. of Trustees/Marshall Univ., Docket No. 98-BOT-400 (June 24, 1999)(distinguishing a situation where the employer established legitimate reasons for all of its actions)." Earnest v. BOD/SWVCTC, Docket Nos. 98-BOD-273/00-HE-396 (Jan. 2003). Grievant has presented no evidence to demonstrate a pattern of harassment on the part of DOA. Apparently, Grievant has been counseled about his use of leave time over the course of his employment; counseling an employee about job expectations does not constitute harassment.

Grievant further claims he is being retaliated against for previously filing a grievance against his employer. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent

toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(1)

that he engaged in protected activity, e.g., filing a grievance;

(2)

that he was subsequently treated in an adverse manner by the employer or an agent;

(3)

that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4)

that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Dunford v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-546 (June 24, 1998). Once a prima facie case of retaliation is established, the employer mayrebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. If the employer successfully rebuts the presumption, the employee may offer evidence to demonstrate the reasons given by the employer were merely a pretext. Id.

Grievant testified he filed a grievance against DOA in September, 2002, and that things had been “tense” since then. No other specific information was presented regarding this prior grievance; nevertheless, Grievant has established a prima facie case of reprisal. He filed a grievance about which is employer had knowledge, and thereafter was subjected to adverse treatment.

However, DOA has successfully articulated a legitimate, non-retaliatory reason for taking the adverse action. Grievant did not show up for work on February 10, 2003, did not inform his supervisor in advance, and did not call in, all in violation of applicable DOA and Division of Personnel policies. He was subsequently docked his pay for that day, again in conformance with Division of

Personnel policy. Therefore, Grievant has not proven this action was in reprisal for previously filing a grievance.

The above discussion is supplemented by the following applicable conclusions of law.

CONCLUSIONS OF LAW

1. The burden of proof in disciplinary matters rests with the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. DOA's Absence Reporting Policy states:

> To request and report time off work, fill out an application for leave form and give it to your supervisor. The application for leave is a standard form that most agencies use for reporting and documenting absences. In any case, use the appropriate form established for reporting absences in your agency.
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> Absences from your job during your regular work hours, including scheduled medical appointments, must be approved in advance, except in cases of emergency. If you must be absent without advance approval due to personal or family illness, or other emergency situation, you must personally notify your supervisor according to the procedure established at your work site.

LIII State Ex. 1.

3. West Virginia Division of Personnel Administrative Rule 14.6. Unauthorized Leave provides as follows:

> When an employee is absent from work without authorization for sick or annual leave, the appointing authority shall dock the employee's pay in the next pay period for an equal amount of time paid during which no work was performed. The appointing authority shall notify the employee in writing that his or her pay is being docked and that the unauthorized leave is misconduct for which discipline is being imposed. The appointing authority shall use unauthorized leave only in cases when the employee fails to obtain the appropriate approval, according to agency policy, for the absence. The appointing authority shall transmit notice of the action in writing to the Director of Personnel.

LIII State Ex. 1.

4. DOA has proven by a preponderance of the evidence that Grievant did not show up for work on February 10, 2003, did not notify his supervisor in advance of taking leave, and did not call in, in violation of applicable DOA and Division of Personnel policies.

5. "Harassment" means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession. W. Va. Code § 29-6A-2(l).

6. Grievant has failed to establish a pattern of harassment by his employer. 7. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(1)

that he engaged in protected activity, e.g., filing a grievance;

(2)

that he was subsequently treated in an adverse manner by the employer or an agent;

(3)

that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

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that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Dunford v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-546 (June 24, 1998). Once a prima facie case of retaliation is established, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for its action. If the employer successfully rebuts the presumption, the employee may offer evidence to demonstrate the reasons given by the employer were merely a pretext. Id.

8. Grievant has established a prima facie case of reprisal, but DOA has articulated a legitimate, non-retaliatory reason for the adverse action.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: May 29, 2003

Footnote: 1

The letter is actually dated February 10, 2002, which the parties agree is a typographical error.