JAMES NALLE,

Grievant,

v v.

Docket No. 04-WCC-113

WORKERS' COMPENSATION COMMISSION,

Respondent.

D E C I S I O N

Grievant, James Nalle, is employed by the Workers' Compensation Commission ("WCC") as a Deputy Claims Manager. He filed a Level I grievance on January 22, 2004, over the denial of sick leave, docking of holiday leave, and placement on delayed payroll. Although, not specifically stated, Grievant also grieves a portion of his written reprimand dealing with sick leave abuse. Grievant requested extensive relief, including change in payroll status, all holiday and sick leave replaced, all sick leave used on January 6 & 7, 2004, be changed to other paid leave because his medical condition was aggravated by stress and anxiety caused by his supervisor's actions, and a transfer from his current supervisor's team.

This grievance was denied at all lower levels, and an appeal to Level IV was received on March 10, 2004. (See footnote 1) A Level IV hearing was to be held on May 7, 2004, but the parties agreed on that day to submit the case on the record developed below, with theaddition of a document from Grievant about work performance. (See footnote 2) The parties did not wish to submit proposed findings of fact and conclusions of law. (See footnote 3)

Issues and Arguments

___Grievant insists the only issue to be resolved in this grievance is whether he called in as required by procedure. He asserts that after he turned in his altered phone bill Respondent then asserted he

had abused his sick leave. He also maintains this sick leave abuse was the reason for his written reprimand. Respondent avers the written reprimand was given to Grievant for sick leave abuse, unauthorized Internet usage, and poor work performance and this information is clear from the written reprimand.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by Workers' Compensation as a Deputy Claims Manager. He has been in this position since 1999.

2. Grievant has a history of hooking pre-approved annual leave to unplanned sick leave.

3. Grievant has had trouble maintaining a leave balance of forty hours combining annual and sick leave. 4. On July 21, 2003, Grievant received a verbal reprimand for unauthorized Internet usage. Grievant had accessed sports and cheerleader web sites on his work computer. This verbal warning indicated that if this problem occurred again Grievant would receive a written reprimand.

5. On October 30, 2003, Grievant called in from vacation stating his plane was delayed, and since he did not have any annual leave left he would need to take sick leave. Upon his return to work, Grievant was called into a meeting with his supervisor, Leilani VanMeter. At that time, he received a memo indicating since he did not have enough annual leave to cover his absence, his absence was counted as unauthorized leave, and he would have to go off payroll. Grievant was also notified that if another incident occurred within six months he would be placed on delayed payroll pursuant to the Division of Personnel's Delayed Payroll Policy at III A 1. Resp. Exh. at Level III.

6. At the meeting referred to in Finding of Fact 5, Ms. VanMeter also explained to Grievant that sick leave could not be used in place of annual leave. Grievant's response was he did not know he could not take sick leave when he ran out of annual leave, and he said something like, "If I had known that, I would have called in sick."

7. Prior to this grievance, Grievant had received several Leave Exhaustion Forms indicating he was in danger of going off payroll. Ms. VanMeter wrote on one of these forms indicating continued absenteeism could result in being placed on delayed payroll. This note was considered a verbal warning.

8. In early December 2003, Grievant asked for a day and one half of annual leave for December 31, 2003, and January 2, 2004, to attend the Gator Bowl inJacksonville, Florida. Ms. VanMeter approved this leave request with the understanding that Grievant would need to have accumulated this leave before he took it. At the time Grievant was to take this annual leave he had enough hours of annual leave for this day and one half, with 5.8 hours left over.

9. On December 29, 2003, at 7:16 a.m., Grievant left a voice mail message on Ms. VanMeter's phone to say he was sick and would be unable to come to work on that day.

10. Ms. VanMeter received an inaudible message that day and erased it. Later that morning, Ms. VanMeter noticed Grievant was not at work and called him at home to check on him. Grievant was not there. She called again around noon. Grievant was not there. She called again around 4:30 p.m., a male answered the phone, and he stated Grievant was not there, and he did not know when he would be there.

11. Grievant called Ms. VanMeter again at 9:17 a.m. on December 30, 2003, and left a message on Ms. VanMeter's voice mail that he was "still sick." (See footnote 4) Ms. VanMeter again attempted to call Grievant at home and received no answer.

12. While Grievant was gone, Ms. VanMeter had Grievant's computer check out because she had seen computer printouts on Grievant's desk relating to sports. MIS foundGrievant had again spent work time visiting sports web sites and had printed off reports from a fantasy sports league.

13. On January 6, 2004, Grievant was called to a meeting with Ms. VanMeter and her supervisor, Jeannie Spatafore, and given two memos by Ms. VanMeter. The first memo, dated January 5, 2004, was a written reprimand for abuse of sick leave, unauthorized Internet usage, and high absenteeism resulting in poor work performance. This memo also informed Grievant that he was placed on leave restriction, and he was required to have a doctor's excuse for every medical absence. This memo noted numerous problems with Grievant's leave, and listed examples that demonstrated a pattern of Grievant requesting sick leave to attach to pre-approved annual leave. Problems with suspected sick leave abuse were noted as far back as December 2000. One example of sick leave abuse given in this memo was Grievant's request on September 17, 2003, for 3.5 hours of sick leave, from 1:00 p.m. to 4:30 p.m., on Thursday, October 23, 2003, for a doctor's appointment. This request was granted. A WVU home football game was scheduled on that date. The next day on his return to work, Grievant was heard saying he was very tired because he had not returned from

the WVU football game until 2:00 a.m. that morning.

14. The second memo dated January 6, 2004, informed Grievant he was placed on delayed payroll, his holiday pay was docked, and his sick leave request for December 29 and 30, 2003, was denied. This second memo also outlined Ms. VanMeter's attempts to call Grievant, and that he was not at home, even though he had called in sick.Additionally, this memo noted Grievant had violated Administrative Directive 6700.50 on December 30, 2003, when he did not call thirty minutes prior to the start of the work day.

15. During the meeting on these two memos, Grievant informed Ms. VanMeter he had called and could prove it with his cell phone records.

16. When Grievant found out Ms. VanMeter had called his house repeatedly without success, he stated he was having trouble at home and was at his father's house on December 29 and 30, 2003.

17. On January 22, 2004, Grievant filed this grievance.

18. On January 27, 2004, Grievant had his Level II conference, and he presented to Sally Edge, Director of Claims Resolution, an altered phone bill from his cell phone. Grievant had intentionally deleted two sections from this bill: 1) Call type, either home or roam; and 2) Call location. The call location section would indicate where Grievant was when he made the call. Grievant did not tell Ms. Edge he had altered the original bill, but she discovered these changes upon close inspection. Grievant was called and asked to submit an actual copy of the bill, and he refused saying it did not matter where he called from because he could be sick anywhere.

19. This altered phone bill did reveal that Grievant had called work on December 29 and 30, 2004, but not the type of call and the call location. These calls were listed under roam usage.

20. This altered bill also demonstrated that certain calls made earlier in December were listed under Home usage, and these same numbers called on December 29, 2003, were listed under Roam on the altered bill. 21. The portion of the altered bill submitted by Grievant shows Grievant made many calls on December 29, 2003. (See footnote 5) Grievant called his father's home on December 29, 2003, at 1:41 a.m., 2:41 p.m., 2:53 p.m., 7:40 p.m., 7:41 p.m., 7:42 p.m., 10:49 p.m., and 11:02 p.m. Grievant testified he was not "bedridden," he was not at this father's home the entire time, he did not go to the doctor, and he did not remember where he had gone.

22. Grievant was not at his father's home on December 29 and 30, 2003.

23. At hearing, Grievant presented a "Physician's Certification" for "State Parental and Federal Family Leave Without Pay." After receiving his written reprimand on January 6, 2004, Grievant went to a doctor to obtain this document. It states Grievant will require care from December 28, 2003, through December 28, 2004, for a chronic condition. This chronic condition will require periodic visits for treatment from a health care provider. Grievant did not go to a health care provider on either December 29 or 30, 2003, had not submitted this document to his employer before those dates because it had not yet been created, and this document does not have any bearing on this grievance.

Discussion

In a disciplinary action 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; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that acontested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

I. Credibility

An issue that must be addressed is credibility. 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. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., 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. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that this testimony is offered in written form does not alter this responsibility. Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).

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 footnote 6) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

The undersigned Administrative Law Judge finds Grievant's testimony to be less than truthful. While the undersigned Administrative Law Judge did not observe Grievant testimony, it is clear from the written record that Grievant's answers were evasive, frequently not on point, and implausible. Grievant's desire to frame the grievance as only about whether he called in or not is understandable, but incorrect. While it would appear Grievant's altered phone bill proves he called in early on December 29, 2003, and late on December 30, 2003, the fact is, the bill was altered. Upon request for a correct and complete copy of the bill, Grievant refused. The undersigned Administrative Law Judge concludes Grievant was untruthful and was not at home or his father's house for the two days in question. Grievant did not have sufficient annual leave to depart for the ball game on December 29, 2003, but he did have a few days of sick leave. See Finding of Fact 8. Grievant attempted to use that sick leave for his football trip, and when he was caught, he lied.

II. Merits

Grievant's assertion that the only reason for the written reprimand was the sick leave abuse is incorrect, and it is unclear why he would think this. The document stated on its face that he also received this written reprimand for his second offense of failing to followthe Acceptable Use Policy-Internet and for lack of work production because of his multiple absences. Grievant's prior verbal reprimand for unauthorized Internet usage informed him that another instance of this behavior would result in a written reprimand. This is what Grievant received.

As for the sick leave abuse, Grievant's overall behavior and assertions demonstrate his inability to recognize he is guilty of sick leave abuse. He appears to want to make a game out of his sick leave usage and fails to understand sick leave is for personal and family illness and doctor's appointments. As revealed by the above discussion and Findings of Fact, the undersigned Administrative Law Judge finds the written reprimand, denial of sick leave, and docking of pay was appropriate. Because the undersigned Administrative Law Judge finds Grievant to be guilty of sick leave abuse, Grievant's placement on delayed payroll and docked pay need not be discussed further.

The above-discussion will be supplemented by the following 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; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id. 2. Respondent has met its burden of proof by a preponderence of the evidence and has demonstrated Grievant is guilty of sick leave abuse and the written reprimand, docking of pay, delayed payroll, and leave restrictions are entirely appropriate.

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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 30, 2004

Footnote: 1

Because Grievant did not submit the lower level Decisions as directed on the grievance form, and only marked on the grievance form that he wanted a Level IV hearing, this grievance was remanded to proceed through the lower levels. Later, Grievant informed the Grievance Board he had been through the lower levels.

Grievant's Statement of Grievance at Level III was much longer than his original Statement of Grievance as it

contained his arguments and assertions. The relief sought remained the same.

Footnote: 2

Because no one explained what the numbers on this document meant and how they were to be interpreted, it could not be considered.

Footnote: 3

Grievant represented himself, and Respondent was represented by David Fryson, Esq.

Footnote: 4

Grievant asserted this second call was just a "courtesy" call as he had stated in the December 29, 2003 call that he would be sick for two days. There is no evidence to support this assertion as the call was inaudible. When asked how he knew he would be sick for two days, Grievant responded he could just tell. When asked about traveling to Florida the following day on December 31, 2003, Grievant responded this travel was much different and non-stressful. Grievant also responded to this line of questioning, on February 25, 2004, by stating, "I'm not sure I'm well yet." Level III Trans. at 121.

Footnote: 5

Only two calls made on December 30, 2004, were listed because the phone bill was incomplete as well as altered.

Footnote: 6

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).