JAMES M. MILLER,

Respondent,

v. **Docket No. 06-CORR-093**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL
CENTER,

Respondent.

DECISION

James M. Miller ("Grievant") initiated this proceeding on February 7, 2006, claiming that documentation of a counseling session for sick leave abuse was unwarranted and should be destroyed. (See footnote 1) After denials at the lower levels, Grievant appealed to level four on March 14, 2006, and a hearing was held in Elkins, West Virginia, on May 16, 2006. Grievant was represented by counsel, David H. Wilmoth, and Respondent was represented by Charles Houdyschell, Jr., Senior Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on June 21, 2006.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant has been employed by the Huttonsville Correctional Center ("HCC") for 17 years. He has been a unit manager since 2001. 2. As a unit manager, Grievant supervises a team of counselors and case managers who provide treatment and counseling services for inmates. He is responsible for scheduling the employees' work, evaluating their performance, and is involved in disciplining them, if needed.

3. Grievant is a disabled veteran, and he receives medical treatment through the Veterans' Administration ("VA"). (See footnote 2) Most of Grievant's treatment occurs at the VA Hospital in

Clarksburg, West Virginia, which is approximately 70 miles from his residence in Elkins, West Virginia. He also occasionally goes to Pittsburgh, Pennsylvania, for overnight stays at their sleep clinic, to be treated for sleep apnea.

4. Patients at the VA Hospital are not allowed to schedule appointments at their own convenience. Appointments are scheduled by the clinic in accordance with the physicians' schedules, and patients have no choice regarding dates or times. If veterans do not keep their appointments, their disability benefits are at risk.

5. Grievant's performance evaluations for 2004 and 2005 noted a “needs improvement” rating in the category of “Availability for Work--Employee's presence can be relied upon for planning purposes.” His supervisor, Diana Miller, noted that he was frequently absent from work for medical appointments and gave advance notice of his schedule, but that his absences affected the running of the unit. However, Grievant received “meets” or “exceeds” expectations in all other categories, and it was noted that he was a dependable and reliable employee. He received an overall “meets expectations” evaluation for both years. 6. Grievant gave Ms. Miller a list of his scheduled doctor appointments for the year at the beginning of 2005 and added to it as new appointments were scheduled.

7. In 2005, Grievant took sick leave on 27 occasions. All but four of these occasions were for pre-scheduled medical appointments, and all of this leave was requested in advance and approved by his supervisors. On two occasions, Grievant either called off sick or left work due to illness; one occasion of sick leave was to take his father to the doctor; and another day of leave was taken when Grievant's daughter suffered an injury.

8. Grievant normally works Monday through Friday. On 11 of the occasions that he took sick leave in 2005, it coincided with a weekend or holiday.

9. At the end of 2005, Grievant maintained a balance of 245 hours of sick leave, and has not been in danger of going off payroll.

10. Ms. Miller often asks Grievant to perform her duties in her absence, and she describes him as a very dependable employee, when he is present at work.

11. On January 31, 2006, Ms. Miller met with Grievant for a counseling session to discuss his leave usage. He was warned that his sick leave usage had made him undependable, was affecting the running of his unit, and that he needed to strive to be at work more consistently. He was warned

that future violations may cause the need for progressive discipline.

12. Ms. Miller documented the counseling session in a written memorandum, which was placed in her office in an administrative file, and it would be considered if another leave abuse violation occurred.

Discussion

As a preliminary issue, Respondent contends that this counseling session was not disciplinary. 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).

A virtually identical situation occurred, also at HCC, when an employee was given a “verbal counseling session,” which was documented and placed in an administrative file. As here, in *Channel v. Division of Corrections*, Docket No. 00-CORR-350 (Aug. 8, 2001), the employee's supervisor testified that the documentation could be “used against him” if further similar infractions occurred. It was determined in that case that the document was the equivalent of a verbal reprimand, which DOC's progressive discipline policy provides for, and which is to be maintained only in an administrative file and destroyed after twelve months, if no further infractions occur. The following language from that case is dispositive of the issue here:

> This Grievance Board has held that a letter which alleges misconduct by an employee and states that it constitutes a warning, is a letter of warning or reprimand and is therefore a disciplinary action. *Runyon v. Dep't of Corrections*, Docket No. 95-CORR-414 (Jan. 31, 1996). If Respondent had not intended to discipline Grievant for this incident and had merely meant to “coach” him, it should not have been documented as a verbal counseling session. In addition, Respondent should not have retained the documentation to be used against Grievant if further infractions occurred within twelve months. Accordingly, this was unquestionably a disciplinary measure taken against Grievant, and Respondent bears the burden of proof regarding these charges.

Channel, supra. The first step in DOC's policy calls for a reprimand/warning which is to be placed only in an administrative file, a copy given to the employee, and it is to be retainedfor twelve months if no further infractions occur. Obviously, despite its title, that is what was issued to Grievant.

Respondent argues in this case that Grievant's frequent absences had made him “undependable” and had affected the operation of his unit. His supervisor, Ms. Miller, testified that, because of Grievant's absences, his unit lagged behind in classifying inmates in order to move them through the

system. She also stated that one of Grievant's employees was frequently calling off sick and had been disciplined for leave abuse, and that another was young and needed a lot of guidance. Therefore, she concluded that Grievant's absences had caused problems for the unit. However, she gave only cursory explanations for her conclusions, and no other witnesses were presented to support her claims of problems in the unit.

HCC's policy regarding leave abuse, Institutional Operational Procedure Number 1.29-8, provides that “[w]hen an employee appears to have a pattern of leave abuse, including such frequent use of sick leave as to render the employee's services undependable,” substantiation of leave can be required of the employee. However, this option was not chosen by Ms. Miller, who testified that she did not question Grievant's need for the sick leave he used, and she believed that he was attending medical appointments. Rather, she maintained that he had become “undependable,” justifying a warning regarding his leave usage. She also pointed to Grievant's dramatic reduction in leave usage during the first half of 2006 (only 3 days), as evidence that the counseling session had its desired effect.

Grievant argues that, because most of his leave was requested in advance for approved medical appointments, he should not have been disciplined for using it. Althoughmost leave abuse cases involve employees who have been repeatedly absent by calling in on the day of the absence or not calling in at all (*See Duty v. Dep't of Transp.*, Docket No. 06-DOH-015 (April 28, 2006); *Hairston v. Dep't of Health and Human Res.*, Docket No. 05-HHR-247 (Feb. 17, 2006); *Nalle v. Workers' Comp. Comm.*, Docket No. 04-WCC-113 (July 30, 2004)), even absences supported by a physician's excuse can be considered leave abuse. “[T]his Grievance Board has also previously held that a physician's statement does not necessarily remove an absence from consideration for determining leave abuse, and that 'whether Grievant abused sick leave must be based on all the facts in evidence.' *Parker v. W. Va. Dep't of Health and Human Resources*, Docket No. 97-HHR-042B (Sept. 30, 1997).” *Lynge v. Dep't of Health and Human Res.,* Docket No. 00-HHR-258 (Dec. 15, 2000). However, it should be noted than in *Lynge*, *supra*, the grievant did not provide physician's excuses until after the absences had occurred, and she did repeatedly call off at the last minute. Similarly, *Parker*, *supra*, involved an employee who was required to work weekends and holidays, and persisted in calling off sick at the last minute on these occasions. It was found that her after-the-fact physician's statements did not excuse her obvious leave abuse.

Considering all of the facts presented in this case, the undersigned cannot find that Grievant's leave use constituted abuse or had made him “undependable.” It was undisputed that, of 27 occasions of sick leave, 23 were requested in advance, and some were requested many months in advance. Indeed, Grievant provided Ms. Miller a list of all of his scheduled appointments for 2005 at the beginning of the year, which is indicative of his desire to cause as little disruption as possible by his absences. Moreover, Grievanthas also proven that the scheduling of his appointments was not his own choice, so it would simply be irrational to penalize him for events beyond his control. As evidenced by the cases discussed above, most employees who are disciplined for leave abuse have shown a consistent pattern of calling off at the last minute, taking unscheduled leave, and showing a general lack of consideration for the effect of their actions. Conversely, Grievant has shown nothing but consideration with regard to his leave usage, and his superiors have described him as a totally dependable employee who does everything he is asked. Accordingly, the undersigned finds that, under the facts and circumstances presented here, Grievant should not have received a counseling session for leave abuse.

The following conclusions of law support this Decision.

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).

2. A letter which alleges misconduct by an employee and states that it constitutes a warning, is a letter of warning or reprimand and is therefore a disciplinary action. *Runyon v. Dep't of Corr.*, Docket No. 95-CORR-414 (Jan. 31, 1996). Similarly, documentation of a “verbal counseling session” is considered disciplinary. *Channel v. Div. of Corr.*, Docket No. 00-CORR-350 (Aug. 8, 2001).

3. “'[W]hether Grievant abused sick leave must be based on all the facts in evidence.' *Parker v. W. Va. Dep't of Health and Human Res.*, Docket No. 97-HHR-042B(Sept. 30, 1997).” *Lynge v. Dep't of Health and Human Res.,* Docket No. 00-HHR-258 (Dec. 15, 2000).

4. Respondent has failed to prove by a preponderance of the evidence that Grievant abused sick leave, and he did not deserve to be disciplined for the same.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to destroy the

documentation of counseling session dated January 31, 2006, and it shall not be used against Grievant in the future.

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.

Date: July 19, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant has also requested attorney's fees, which are not available at this level of the grievance process. An "Administrative Law Judge has no authority to award attorney's fees under the law. Stollings v. Div. of Envtl. Protection, Docket No. 97-DEP-411 (June 8, 1998); Chafin v. Boone County Health Dep't and Div. of Personnel, Docket No. 95-BCHD-362 (June 21, 1996). See e.g., Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986)." Wyant v. W. Va. Dep't of Trans./Div. of Highways, Docket No. 00-DOH-219 (Nov. 29, 2000).

Footnote: 2

The exact nature of Grievant's disabilities was not discussed during this proceeding, aside from a mention of sleep apnea treatment.