THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

SHARLEAN GARBER

Grievant,

v. Docket No. 07-DJS-061

DIVISION OF JUVENILE SERVICES/

GENE SPADARO JUVENILE CENTER,

Respondent.

D E C I S I O N

Grievant, Sharlean Garber, is employed as a Correctional Officer/Youth Specialist 2 by the Division of Juvenile Services ("DJS") at the Gene Spadaro Juvenile Center ("GSJC"). She filed this grievance on January 8, 2007, because she received a reprimand for leave abuse. Her requested relief is the reinstatement of all sick and annual leave she has used for doctor's visits directly related to her on-the-job injury, and the use of this leave to be expunged from her records.

The grievance was denied at all lower levels. Grievant appealed to Level IV on February 20, 2006, and on April 9, 2007, a Level IV hearing was held was held in the Grievance Board's Beckley office. Grievant represented herself, and DJS was represented by Steve Compton, Esq. This case became mature for decision on that date, as the parties elected not to submit proposed findings of fact and conclusions of law.

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 as a Youth Specialist 2 at GSJC. Her date of hire is October 16, 2002.

2. In October 2004, Grievant was injured in a fall at work. She elected to return to work on light duty in September 2005.

3. Grievant and Ralph Terry, the GSJC Director, worked out a verbal agreement that the Center would work around Grievant's medical appointments as much as possible. Grievant still needed several more surgeries to complete her recovery from her injury, as well as continuing physical therapy.

4. Pursuant to this agreement, Grievant was placed on day shift for a period of time to accommodate her evening physical therapy schedule.

5. Grievant frequently scheduled her doctor's appointments on her days off. (Because GSJC requires coverage for the residents 24/7, Grievant often has days off during the week.)

6. Grievant also used her sick and annual leave for these appointments, and received payment for this leave.

7. On January 4, 2007, Grievant's Shift Supervisor was directed to talk to all employees suspected of leave abuse. He called Grievant in because she had a low leave balance. Grievant became upset during this meeting believing this discussion violated the verbal agreement she had when she returned to work. The meeting did not go well.

8. She filed this grievance on January 8, 2007, and met with Director Terry on January 11, 2007. Director Terry assured Grievant at that conference that he did not see her as an abuser of her leave, noting she had doctor's slips to back up her absences, andher attendance was not a problem. No record of the conversation with the Shift Supervisor exists in Grievant's record.

9. Director Terry talked to Grievant's Shift Supervisor about his discussion with Grievant, and the supervisor apparently received some type of disciplinary action for his behavior.

10. Director Terry continues to this day to believe firmly that Grievant does not and has not abused her leave. He notes her attendance is better than many at the facility.

11. Grievant was paid for her sick and annual leave at the time she took it.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

The essence of this grievance is that Grievant feels like she has been "damaged" both personally and monetarily. She asserts she should still have her leave and not be required to use it for her doctor's appointments. She argued that anyone who sees her record would view her as a leave abuser, and the testimony of Brenda Holyman below andDirector Terry, both below and at Level IV, could not convince her otherwise. In fact, during the Level IV, Grievant called herself a leave abuser several times.

Grievant did not cite to any statute, policy, rule, or regulation that Respondent violated. Additionally, she did not explain why the leave she took and was paid for should be returned to her other than to say, at Level III, that Workers' Compensation should pay GSJC for her sick leave when she uses this time for doctor appointments related to her injury, and then she should be allowed to earn and retain her leave. This logic is somewhat understandable from Grievant's point of view, but no such requirement currently exists.

Grievant testified she could have remained on Workers' Compensation, but elected to come back to her position. While it is clear Grievant is upset by the circumstances she finds herself in, it was her choice to return to work on light duty while she continued with her medical recovery. She was told from the first that she would have to use her sick and annual leave to cover these appointments. As much as possible, GCJC has accommodated her schedule, such as placing her on days so she could receive her physical therapy in the evening. (See footnote 1) Given the facts of this case, Grievant has not met her burden of proof

and demonstrated GSJC violated any statute, policy, rule, or regulation. The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rulesof the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. Grievant has not met her burden of proof and demonstrated that requiring Grievant to use her leave when she is absent from work violates any statute, policy, rule, or regulation.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. See W. Va. Code § 18-29-7 (repealed) (but see Executive Order No. 2-07, May 8, 2007). 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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Janis I. Reynolds

Chief Administrative Law Judge

Date: July 31, 2007

Footnote: 1

It is noted Grievant did not grieve using her sick and annual leave for these appointments until approximately 1½ years after returning to work.