THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WILLIAM JACKSON RIGGS,

Grievant,

v. **DOCKET NO. 2009-0005-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

William Jackson Riggs ("Grievant") challenges the decision of Respondent Department of Transportation/Division of Highways ("DOH"), to discipline him and place him on leave restrictions for a one-year period. The July 3, 2008, "Statement of Grievance" provides, in part, "[w]ritten reprimand on 6/9/08 . . . without good cause."[1] As relief, the Grievant generally seeks to be made whole.

As this is a disciplinary matter, the grievance proceeded directly to Level Three. *See* W.VA. CODE § 6C-2-4(a)(4). A Level Three evidentiary hearing was held before the undersigned Administrative Law Judge ("ALJ") in Charleston, West Virginia, on April 20, 2009.[2] Grievant appeared in person and through his representative, Gordon Simmons,

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[1] The entire "Statement of Grievance" of July 3, 2008, provides as follows: "written reprimand on 6/9/08 and suspension of 7/4/08 without good cause." At the time of the Level Three hearing, Grievant had not been suspended and was not suspended on July 4, 2008. Likewise, there was no indication of a July 4, 2008, suspension in his personnel file. Both parties agreed that this issue was not yet ripe or mature for decision. As recognized by Grievant's representative at the hearing, should the Grievant desire to grieve a future suspension, he should file a separate grievance within fifteen (15) days of a grievable event.

[2] The Level Three hearing was originally assigned to ALJ Wendy A. Elswick (formerly Wendy A. Cambell). It was transferred to the undersigned for administrative

Steward, UE Local 170. Respondent appeared by and through its counsel, Robert Miller, Esquire. This matter became mature for decision on May 22, 2009, the deadline for submitting proposed findings of fact and conclusions of law. Both parties have submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant was taken by ambulance from his home to the hospital on May 19, 2008. He was admitted to the hospital for four days. While in the hospital, he called the DOH and informed it that he would not be able to make it into work. The day he returned to work, he provided the DOH a physician's excuse. Thereafter, Grievant was given a written warning, placed on leave restrictions and given unauthorized leave time for part of his absence during his hospital stay, and a one-day absence which directly followed the absences required by his physician. Grievant argues there was no "just cause" for this disciplinary action.

Respondent DOH has a motion to dismiss pending. It argues that this grievance was not timely filed because the grievance was not filed within fifteen days of the Grievant being reprimanded and placed upon leave. Further, DOH maintains that even if this matter was timely filed, in recognition of the particular facts in this matter, it was not erroneous for the Grievant to be reprimanded and placed on leave restrictions.

The statutory time limit for filing this grievance was extended due to the Grievant's sickness. Therefore, dismissal for untimeliness is inappropriate. The Respondent has failed to establish that the Grievant abused his sick leave. The unequivocal evidence

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reasons.

establishes that the Grievant was sick during the time period in question. This grievance is **GRANTED**.

The following findings of fact are based upon a thorough review of the record produced in this matter.

Findings of Fact

1. Grievant has been employed with the DOH for approximately ten years. At all relevant time periods, Grievant worked in District One as a Transportation Engineering Technician.

2. On April 1, 2008, Grievant called his workplace and stated he would not be able to work this day.

3. On April 3, 2008, Grievant's supervisor found that Grievant was not at the job site. Grievant's work vehicle was at his home. The next day, on April 4, 2008, the Grievant turned in a leave slip for 4 ½ hours sick leave.

4. Grievant called into work on April 7, 8, and 9, 2008.[3]

5. Prior to May 19, 2008, Grievant had been having medical problems for approximately five months. He had informed his supervisor of his medical issues on several occasions. Level Three, Testimony of William Jackson Riggs.

6. On the evening of May 19, 2009, the Grievant's relative stopped by his home and found that the Grievant was not well. The Grievant's relative called an ambulance. Grievant was transported from his home to the hospital by ambulance. He was suffering

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[3] It is unclear from the record whether Grievant took annual or sick leave for the days he was absent in April, 2008. There was no testimony regarding whether Grievant provided a physician's excuse for any or all of these days. Mr. Larry Porter, Grievant's supervisor, was unsure.

from abdominal pain and psychological stress. Also, Grievant was suffering from acetaminophen toxicity. Level Three, Testimony of William Jackson Riggs; Respondent's Exhibit 1, p. 3. Ultimately, it was found that the Grievant's prostate had shut down and his bladder had backed up into his kidneys. Level Three, Testimony of William Jackson Riggs.

7. While in the hospital, Grievant was heavily sedated. He does not remember having visitors at the hospital, though he was told that his pastor came to visit. On May 19, 2008, through May 21, 2008, Grievant was not capable of calling into work.

8. On May 22, 2008, while a patient in the hospital, Grievant called into work and told the DOH of his inability to attend work due to hospitalization.

9. Grievant was discharged from the hospital on May 23, 2008. His physician cleared him to return to work on June 2, 2008. Grievant was sick on June 2, 2008, and called the DOH at 7:05 a.m. to inform it he was unable to come in. *Id*. Level Three, Testimony of Larry Porter.

10. Grievant returned to work on June 3, 2008.

11. Upon returning to work, on June 3, 2008, Grievant provided the DOH with a physician's excuse dated May 23, 2008.[4] This physician's excuse, from Charleston Area Medical Center, Inc., provided as follows:

> Mr. William Riggs is admitted to CAMC on 5-19-08 and discharged on 5-23-08 . . . will need rest for 10d [sic] can return to work on 6/2/08.

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[4] Grievant's supervisor, Larry Porter, testified he was not sure whether he had the physician's excuse when he signed the written reprimand. However, the physician's excuse is specifically cited in the written reprimand. The record suggests that on June 9, 2008, the Grievant had *not* exhausted all his sick leave or annual leave, though he did not have much. *See* Respondent's *Motion to Dismiss and* [proposed] *Findings of Fact and Conclusions of Law*, Proposed Finding of Fact 1; Level Three, Testimony of William Jackson Riggs.

Level Three, Respondent's Exhibit 1, p. 3.

12. During the 2008 year, Grievant had four surgeries. Some of these surgeries were exploratory in nature. In the early months of 2009, Grievant had one surgery.

13. On or about June 9, 2008, Respondent DOH issued a written warning/reprimand[5] to the Grievant. Level Three, Respondent's Exhibit 1 (Form RL-544). This written warning/reprimand provided the following:

> You were absent from work starting May 19, 2008 thru [*sic*] June 2, 2008. You did not call in until May 22, 2008 at approximately 3:20 p.m. The West Virginia Department of Transportation, Administrative Procedures, Volume II, Chapter 10 states, "obtain approval of the immediate supervisor for unplanned leave…at least by the organization's established reporting time…" You attended a staff meeting on February 19, 2008 with Mr. Anthony Carovillano, District Engineer/Manager, concerning expectations of employees where he stated that employees are responsible for contacting their supervisor before their regularly scheduled work time. You are being placed on unauthorized leave[6] from May 19, 2008 thru [*sic*] May 22, 2008. You provided a physician's statement that says you could return to work on June 2, 2008 but you did not return to work until June 3, 2008. Therefore you are being placed on unauthorized leave on June 2, 2008. Due to your low amounts of leave time and due to your unexcused absences, you are also being placed on leave restrictions. All annual leave must be approved by your supervisor twenty-four hours in advance.[7] You must provide this

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[5] The document identifies itself as both a warning and a written reprimand.

[6] 143 C.S.R. 1 § 14.6. provides as follows: "Unauthorized Leave - 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."

[7] According to 143 C.S.R. 1 § 14.5, "[w]hen an employee appears to have a pattern of leave use that is inconsistent with the reasons provided in subdivision 14.4(f) of this rule,

> office with a physician's statement for all sick leave used upon your return to work. This restriction is for a period of one year. Further violations of this or of similar violations may result in further disciplinary action being taken including dismissal.

14. The June 9, 2008, written warning provided the Grievant an opportunity to respond. A meeting was initially scheduled for June 12, 2008.[8] Grievant's representative could not make it to this meeting. Thereafter, the meeting was rescheduled for June 25, 2008. Level Three, Respondent's Exhibit 1 (Form RL-546). The Grievant did not attend the rescheduled meeting. *Id*.

15. DOH policy requires that an employee obtain prior approval before taking unplanned leave, and an employee may be disciplined for failure to obtain prior approval. If employees are "capable" of calling in, it is his or her responsibility to inform the DOH before using sick leave. Level Three, Testimony of Larry Porter.

16. Between June 3, 2008, and July 3, 2008, Grievant missed several days of work due to illness.[9] Level Three, Testimony of William Jackson Riggs. He worked very little

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including such frequent use of sick leave as to render the employee's services undependable, the appointing authority may request appropriate substantiation of the employee's claim for leave, for example, verification of an illness of less than three days. The appointing authority shall give the employee prior written notice of the requirement for appropriate substantiation." 143 C.S.R. 1 § 14.4(f) specifically recognizes that sick leave *shall* be granted when an employee is ill and unable to perform his duties.

[8] From the language of the written reprimand, it does not appear Grievant or his representative was required to attend a meeting. The reprimand stated that "[p]rior to a final decision on a *suspension or dismissal*, you will be given the opportunity to respond in writing or in person to the District Engineer/Division Director. If you desire to meet in person, an appointment has been scheduled for you on 6/12/08 (date) at 8:30 a.m. (time) . . . ." Grievant was neither suspended nor dismissed.

[9] Grievant did not specify the precise number of days he was absent in the month of June, 2008. *See* Level Three, Testimony of William Jackson Riggs. Nor did the Respondent provide any evidence that he was, in fact, at work during the fifteen days after

during the month of June, 2008. *Id*.

17. On July 3, 2008, Grievant filed this grievance.

Discussion

Timeliness

The first issue is whether this grievance was timely filed, and whether the statutory time limits are extended due to sickness. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Oct. 24, 2008). If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH- 060 (July 16, 1997).

WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." WEST VIRGINIA CODE § 6C-2-4(a)(1) identifies the time limits for filing a grievance and states:

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the June 9, 2008, reprimand.

> Within fifteen days[10] following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989). The event giving rise to this grievance was the June 9, 2008, reprimand letter which gave the Grievant unauthorized leave and placed him on leave restrictions. Level Three, Respondent's Exhibit 1. Grievant did not initiate this grievance until July 3, 2008. Hence, this matter was not filed within fifteen days of the reprimand letter. The Respondent has met its burden of proving, by a preponderance of the evidence, that this grievance was untimely filed.

Where a respondent meets its burden of proof, the grievant may demonstrate that he should be excused from filing within the statutory time limit. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997). The Grievant bears the burden of proving a statutory excuse by a preponderance of the evidence. W. Va. Public Employees

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[10] Pursuant to WEST VIRGINIA CODE § 6C-2-2(c) "'[d]ays' means working days exclusive of Saturday, Sunday, official holidays and [a]ny day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice."

Grievance Board, 156 C.S.R. 1 §3 (2008). WEST VIRGINIA CODE § 6C-2-3(a)(2) provides that:

> [t]he specified time limits may be extended to a date certain by mutual written agreement and *shall be extended whenever a grievant is not working because of* accident, *sickness*, death in the immediate family *or* other cause for which the grievant has approved leave from employment.

(Emphasis added). In this matter, there was no mutual agreement to extend the time limits for filing this grievance. However, the Grievant worked "very little" during June of 2008. He was out several work days between June 3, 2008, and July 3, 2008, due to sickness. Indeed, the record indicates that the Grievant has serious medical conditions that hampered his ability to work.

In *Shoup v. Workforce West Virginia*, Docket No. 2009-0957-DOC (June 5, 2009), the grievant resigned from her position and then, after three months, filed a grievance. The *Shoup* grievant argued that she was excused from the statutory time requirement because she was suffering from a sleep disorder and bipolar disorder. However, there was no evidence that she was unable to work. The *Shoup* grievant applied for other positions and did various other tasks during the time period she alleged sickness. The *Shoup* ALJ found that the grievant was not excused from her untimely filing because the grievant was not "on the type of leave that could be approved by her employer." *See also Sumner v. Putnam Co. Bd. of Educ. & Sumner*, Docket No. 2008-1310-PutED (Mar. 31, 2009)(recognizing the time line is extended where the grievant is actually on approved sick leave). Further, the *Shoup* ALJ recognized that substantial compliance did not apply because the evidence suggested that the grievant "slept on her rights." (Citation omitted).

Unlike the Grievant in *Shoup*, the Grievant has established that it is more likely than not he was sick during the time period in question. The statutory time limit must be extended. Grievant worked very few days in June, 2008, because of illness. *See* Finding of Fact 16 *supra*. His sickness was the type of leave that could be approved by his employer.[11] There were seventeen (17) week days between the June 9, 2008, letter of reprimand and July 3, 2008, the date this grievance was filed. One of these days was a recognized holiday: June 20, 2008, was West Virginia Day. Hence, this date is not considered a "day" for the purpose of counting the fifteen day requirement. W. VA. CODE § 6C-2-2(c).

This grievance was timely filed. It is "more likely than not" that the Grievant was sick at least two days between June 9, 2008, and July 3, 2008. *Jackson, supra*. The Grievant has met his burden of proving a statutory excuse by a preponderance of the evidence. This matter was timely filed as the time limit was statutorily extended due to the Grievant's sickness. Accordingly, the Respondent's motion to dismiss is **DENIED**. The merits of this grievance are now addressed.

Merits

Upon consideration of the all the facts in evidence, the DOH has not established, by a preponderance of the evidence, that the Grievant abused his sick leave so as to warrant the June 9, 2008, written reprimand, unauthorized leave and the leave restrictions contained therein. The Grievant's absences directly flow from his hospitalization. "Good

[11] No evidence was presented to establish whether Grievant's absences were actually considered sick leave, annual leave or something else.

cause" for the written reprimand and leave restrictions does not exist.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). *See 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 & 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.*

Generally, employers have the right to expect employees to come to work on time and to follow orders that do not impinge on their health and safety. *Page v. W. Va. Dep't of Health & Human Res.*, Docket No. 02-HHR-049 (July 5, 2002); *English v. Div. of Corrs.*, Docket No. 98-CORR-087 (June 29, 1998). Several past Grievance Board decisions have recognized that the mere fact an employee produces a physician's excuse is not, in and of itself, dispositive of the issue of whether an employee abused his leave. *Parker v. W. Va. Dep't of Health & Human Res.*, Docket No. 97-HHR-042B (Sept. 30, 1997); *Lynge v. Dep't of Health & Human Res.,* Docket No. 00-HHR-258 (Dec. 15, 2000). Previous decisions suggest that the time at which the employee produces his or her physician's excuse, the days upon which the leave time was taken and the totality of the circumstances should be examined. *Id. See Miller v. Div. of Corr./Huttonsville Corr. Cntr.*, Docket No. 06-CORR-093 (July 16, 2003). "[W]hether Grievant abused sick leave must be based on all

the facts in evidence." *Parker, supra*. In this grievance, analysis of this issue hinges upon the absences cited in the reprimand.[12]

May 19, 2008, through May 22, 2008

On May 19, 2008, Grievant was transported to the hospital via ambulance. He was in great pain. While in the hospital, he was heavily sedated and incapacitated. He was unable to call the DOH until May 22, 2008. He called the DOH while he was in the hospital. Apparently, that was not good enough. The DOH placed the Grievant on unauthorized leave from May 19, 2008, through May 22, 2008, even though he provided a physician's excuse upon his return to work that specifically stated that he was admitted to Charleston Area Medical Center on May 19, 2008, and discharged on May 23, 2008. Respondent's Exhibit 1, p. 3.

According to 143 C.S.R. 1 § 14.4(f) "[s]ick leave *shall* be granted in the event of an employee's illness or injury which incapacitates him or her from performing his or her duties." Sick leave is "[a]n *earned employee benefit of paid time* off . . . for illnesses, injuries and other circumstances." 143 C.S.R. 1 § 3.86 (emphasis added). *See generally State ex rel. Crosier v. Callaghan*, 160 W. Va. 353, 236 S.E.2d 321 (1977)(recognizing a state employee's interest in sick days). This ALJ is hard pressed to see how the Grievant abused his sick leave from May 19, 2008, through May 22, 2008. This is not a case in which the Grievant was hunting in Colorado. *See Clutter v. Webster Co. Bd. of Educ.*, Docket No. 04-51-429 (Oct. 18, 2005)(finding the grievant abused his sick leave where he

[12] At Level Three, the DOH recognized that the Grievant's April, 2008, absences were presented to merely show the reasonableness of the disciplinary action taken on June 9, 2008.

claimed he was sick when he was actually hunting in Colorado). Grievant was incapacitated and *in the hospital*.

Grievant was incapacitated from May 19, 2008 through May 22, 2008. He called the DOH while he was a patient in the hospital. Respondent has *not* proven, by a preponderance of the evidence, that the Grievant abused his leave from May 19, 2008, through May 22, 2008.

June 2, 2008

In addition to the dates of May 19, 2008, through May 22, 2008, the June 9, 2008, letter of reprimand also cites June 2, 2008, as an additional date in which the Grievant abused his leave. Grievant was placed on unauthorized leave for this day. In light of the totality of the evidence, the DOH has failed to meet its burden of proving that the Grievant abused his sick leave on June 2, 2008. Nor has it established "good cause" for disciplining the Grievant for the June 2, 2008, absence. As the reprimand points out, the Grievant's physician's excuse states he could return to work on June 2, 2008. At approximately 7:05 a.m. on June 2, 2008, Grievant called in and told the DOH that he would not be able to come to work as he was sick. He returned the next day, June 3, 2008.[13]

When considering all the evidence, the facts do not evince a malingerer. The Grievant was sick. He had recently been discharged from the hospital. The Grievant's

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[13] 143 C.S.R. 1 § 14.4(g)(3) provides that "[i]f the physician' statement from the attending physician specifies a period of incapacity that is less than the entire absence, only the period of incapacity shall be charged to sick leave and the remaining absence shall be charged to annual leave, if annual leave is available to the employee and is not otherwise restricted."

hospitalization and his physician's order of rest evinces the reasonableness of his June 2, 2008, absence. The DOH has failed to meet its burden of proving, by a preponderance of the evidence, that the Grievant abused his leave on June 2, 2008.

In summation, when considering the specific instances cited in the June 9, 2008, letter of reprimand, the evidence simply does not establish that it is "more likely than not" that the Grievant abused his sick leave. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Grievant was transported by ambulance from his home to the hospital. He spent four days in the hospital. He called the DOH while he was a patient in the hospital to inform it of his situation. He was unable to come to work for a one-day period beyond his physician's excuse, and he called in on this day. It seems the DOH would benefit by recognizing that "[s]ometimes we need to mix a little mercy with justice" when applying sick leave abuse policies. *Lawyer Disciplinary Bd. v. Brown*, 2009 W. Va. LEXIS 45 (W. Va. May 6, 2009)(Ketchum J., dissenting). In light of the circumstances, the disciplinary action was without "good cause." This grievance must be granted.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If a respondent meets its burden of proof, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory

timeliness. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

2. Grievances *must* by statute be filed within fifteen days of the occurrence of the event giving rise to the substantive claim of the grievance. W. VA. CODE § 6C-2-3(a)(1); W. VA. CODE § 6C-2-4(a)(1). The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

3. Respondent DOH has established, by a preponderance of the evidence, that the Grievant failed to timely file this grievance.

4. WEST VIRGINIA CODE § 6C-2-3(a)(2) provides that:

> [t]he specified time limits may be extended to a date certain by mutual written agreement and *shall be extended whenever a grievant is not working because of* accident, *sickness*, death in the immediate family *or* other cause for which the grievant has approved leave from employment.

(Emphasis added).

5. Grievant has established, by a preponderance of the evidence, that he is excused from filing within the statutory fifteen days because he was absent from his employment because of sickness.

6. 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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). *See Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

7. "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

8. The DOH has *not* established, by a preponderance of the evidence, that the Grievant abused sick leave on May 19, 2008, through May 22, 2008. Nor has the DOH established, by a preponderance of the evidence, that the Grievant abused his sick leave on June 2, 2008. There exists no good cause for discipline.

Accordingly, the Respondent's motion to dismiss is **DENIED**. This grievance is **GRANTED**. The DOH is hereby **ORDERED** to remove the June 9, 2008, Form RL-544, letter of reprimand/warning from the Grievant's file. It is further **ORDERED** that the Grievant *not* be given disciplinary unauthorized leave for the absences cited in the June 9, 2008, letter. Such leave shall be subtracted from the Grievant's leave time, if such leave time exists. If the Grievant was docked any pay based upon his placement on unauthorized leave, he shall be compensated the appropriate back pay, plus interest at the statutory rate, plus any lost benefits.

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 § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: August 4, 2009

Mark Barney
Administrative Law Judge