THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS SPENCE,
Grievant,

v. **Docket No. 2008-1112-DOC**

DIVISION OF NATURAL RESOURCES,
Respondent.

DECISION

Thomas Spence ("Grievant") filed this grievance on January 30, 2008, challenging an unfavorable performance appraisal he received on January 26, 2008. He seeks to have it removed from any files and destroyed "because it is unjust and unfair." A level one conference was held on February 4, 2008, and the grievance was denied in a decision dated February 13, 2008. A mediation held on June 12, 2008, was unsuccessful. Upon appeal to level three, a hearing was conducted by the undersigned in Westover, West Virginia, on November 21, 2008. Grievant was represented by Fred Tucker of the United Mine Workers of America, and Respondent was represented by counsel, William R. Valentino, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on January 12, 2009.

Synopsis

Grievant received a counseling document which informed him that he was not following proper procedure regarding submission of leave requests. Although there had been emails and meetings where the issue of leave was discussed, Grievant did not

understand that leave was to be requested in advance. Even after being required by his supervisor to complete a leave form in a parking lot, because he had not submitted the required form with the proposed schedule for the upcoming week in which he intended to use the leave, Grievant continued to request leave without submitting the form in advance. Therefore, an evaluation form was completed by Grievant's supervisor, explaining the proper procedure, so that Grievant would understand how to comport with his employer's policy. Grievant failed to establish any abuse of discretion in this matter, and the grievance is denied.

Findings of Fact

1. Grievant is employed by the Division of Natural Resources ("DNR") as a Conservation Officer. He has served in this position for approximately 11 years.

2. On January 5, 2008, Sergeant C.D. Shriner met with the officers under his command, including Grievant, to review various work-related issues. Among the matters discussed was the submission of leave slips when earned holiday leave is used at a later date, such as when an officer is required to work on a holiday and desires to take a day off at another time, without being charged annual leave.

3. The Law Enforcement Section of DNR utilizes a "weekly report" form, which is essentially a time sheet, that is turned in at the end of each week and shows the hours worked by each employee during that week. It also contains a separate section, a small box, reflecting the upcoming schedule for the next week, indicating the anticipated hours the employee will work on which days, along with any days the employee intends to use leave. This box is commonly referred by DNR personnel as the "proposed schedule."

4. At the January 5, 2008, meeting, officers were instructed regarding how to complete the leave form when holiday leave is being used. However, it is not clear what Sergeant Shriner told them regarding *when* a leave slip is to be submitted. It was apparently the intention of DNR administrators that leave, including earned holiday time, should be requested in advance, in conjunction with the submission of the weekly report, showing leave to be requested for the upcoming week in the proposed schedule section.

5. Rhonda Banks, Administrative Secretary for the Law Enforcement Section, sent an email to all staff on December 11, 2007, explaining a change in procedure regarding submission of leave slips and completion of time sheets. She stated in the email that, "In order to be consistent and have accurate records, please note the following . . .

> If you take a holiday on the day it falls, then no holiday time is earned or used. An "H" should be entered on the leave slip, if it is necessary to fill one out due to taking leave near the holiday date. The date of the holiday should be left blank on the monthly report.[1]
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> If you work on a holiday, then enter holiday earned on the leave slip by entering the number of hours with the "HE".[sic] If a holiday falls on your normal day off, then you get holiday earned time. If you are scheduled to work on a holiday and take annual leave, you get holiday earned time. The holiday name and date should be noted on the leave slip.
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> When you use holiday leave, enter the number of hours on the leave slip with the "HU".[sic] The holiday name and date should be noted on the leave slip.

6. On January 12, 2008, Grievant submitted a weekly report for the week ending January 11, 2008, which contained a proposed schedule for the upcoming week, showing that he wanted to use earned holiday leave on January 23, 2008. Grievant did not submit

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[1]Apparently, Ms. Banks was referring to time sheets, and there was no explanation in the record as to why she referred to them as "monthly" reports, when all the other evidence indicated that they were submitted on a weekly basis.

a leave slip for the time he wished to use on January 23, because he did not understand that the leave was to be requested in advance.

7. When Grievant submitted the January 11 report without a leave slip for use of holiday leave on January 23, Sergeant Shriner asked Grievant to complete the leave form that day. They walked out to Sergeant Shriner's vehicle, where he had some forms, and Grievant filled out the leave slip.

8. On January 18, 2008, a meeting of all District One employees was held and conducted by Captain Della Mae.[2] He discussed the submission of leave forms, stating that they should be submitted with weekly reports. After making that statement, he clarified that leave requests must be submitted with the "proposed schedule," contained on the same report.

9. On January 19, 2008, Sergeant Shriner met with the officers he supervises, including Grievant, to perform annual performance evaluations. Weekly reports were turned in at that time, and Grievant was requesting leave on the proposed schedule for the upcoming week, but he had not submitted a leave slip. Sergeant Shriner called Grievant after the meeting, and asked Grievant to complete the leave slip and mail it to him. At that time, he explained to Grievant that the form had to be submitted with the weekly report, and Grievant finally understood that leave forms were to be submitted in advance of the day leave was being requested.

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[2]No specific information was provided regarding Captain Della Mea's first name or exact position in the hierarchy of the Law Enforcement Section, but it appears that he has supervisory authority over Conservation Officers. The undersigned takes administrative notice that the State Phone Directory lists a Louis DellaMae as an employee of DNR.

10. Sergeant Shriner felt that he should formalize Grievant's non-compliance with the instructions regarding leave requests. He completed an Employee Performance Appraisal "EPA-2" form, dated January 26, 2008, which stated that Grievant's "Progress Evaluation" rating was "does not meet expectations." Attached to the form was a document prepared by Sergeant Shriner, stating, in part, as follows:

> On 1-5-08 Officer Spence was given the orders on how holiday leave was to be requested on a leave form. [Also instructed on how to do so.][3] On 1-12-08 he turned in reports for week ending 1-11-08 with a request for a HU [11-23-07] without turning in the proper leave form. [We filled out a leave form at my vehicle.] On 1-18-08 Officer Spence was again advised on the proper way to request holiday used time. This was by Capt. Della Mea at a District meeting. On 1-19-08 Officer Spence once again turned in a request for holiday used time without turning in a leave form. I had to call him on the phone and advise him to mail it to the Captain's secretary.

Discussion

At the level three hearing in this grievance, the parties debated whether or not this was a disciplinary matter. 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); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). However, Respondent contends that the EPA-2 form completed by Sergeant Shriner should be considered according to the law applicable to employee performance evaluations.

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[3]The bracketed information is contained in the original document. It appears that, when providing parenthetical information, Sergeant Shriner used brackets in lieu of parenthesis.

Pursuant to established precedent, an employee grieving his evaluation must establish by a preponderance of the evidence that the evaluation is wrong because the evaluator abused his/her discretion in rating the grievant, or the performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. *Wiley v. W. Va. Div. of Natural Res.*, Docket No. 97-DNR-397 (Mar. 26, 1998); *Maxey v. W. Va. Dep't of Health & Human Serv.*, Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993); *Messenger v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-388 (Apr. 7, 1993); *Hurst v. W. Va. Dep't of Transp.*, Docket No. 91-DOH-326 (Feb. 27, 1992); *Wiley v. W. Va. Workers' Compensation Fund*, Docket No. WCF-89-015 (July 31, 1989). In order to prove a supervisor has acted in a manner that constitutes an abuse of discretion, the grievant must prove the evaluation was the result of arbitrary or capricious decision-making. *Kemper v. W. Va. Dep't of Transp.*, Docket No. 91-DOH-325 (Mar. 2, 1992).

As discussed above, Grievant did actually receive an actual performance evaluation in January of 2008, just before the January 26 form that is the subject of this grievance. That evaluation was completed on an EPA 1 form, which the Division of Personnel ("DOP") designates as having a purpose of "use for initial planning session, coaching, or when expectation must change." On this form, Grievant's responsibilities and expectations for the upcoming year were designated. Interestingly, the EPA 2 form used to "counsel" Grievant regarding proper procedure for requesting leave is designated by DOP as being used for "interim or mid-point review, probationary employee, or special situations." In

addition to the attachment completed by Sergeant Shriner, explaining the problem, the form purports to give Grievant a "progress evaluation" of "does not meet expectations."

Although DNR administrators testified that the EPA 2 form is commonly used to counsel employees, it is obvious from the form itself that it is not intended to be used for this purpose. Instead, the EPA 1 form is the appraisal form which is designated to be used for "coaching," so DNR would be well-advised to use it in the future when employees need to be counseled or coached. Clearly, the EPA 2 form completed on January 26, 2008, was intended to serve as a coaching or counseling tool, so that Grievant would understand that he was not complying with proper procedures regarding leave. "A counseling session is non-disciplinary and is used to discuss a potential problem before it requires utilizing the progressive discipline process." *Hairston v. Dep't of Health and Human Res.*, Docket No. 05-HHR-247 (Feb. 17, 2006). Accordingly, this is a non-disciplinary matter, as Respondent has argued, and Grievant would bear the burden of proving that the "evaluation" was wrong or improper in some respect or constituted an abuse of the employer's discretion.

Grievant contends that, until he was admonished by Sergeant Shriner on January 19, 2008, for not submitting a form for leave requested on the proposed schedule for the upcoming week, he did not understand that the leave form was to be completed in advance, at the time leave was requested. He has stated that, at the January meetings with administrators where leave usage was discussed, employees were told to submit leave forms with the "weekly report," leading Grievant to believe that they were to be submitted "after the fact," when time sheets for the previous week are completed. When Sergeant Shriner told Grievant on two occasions in January that he needed the leave form

to be completed and turned in when leave was requested on the proposed schedule, Grievant contends that he was not told he "did anything wrong."

As Respondent has noted, Grievant was the only employee who had difficulty understanding that leave was to be requested in advance with the proposed schedule for the upcoming week. Although the "proposed schedule" is contained on the same form as the "weekly report," it is difficult to comprehend why Grievant did not understand that the leave form had to be completed in advance, after Sergeant Shriner escorted him to his car to complete a form which had not been submitted with the report. Admittedly, the email from Ms. Banks did not explain or address *when* leave slips were to be submitted, and it is not difficult to understand that there initially was not a clear directive regarding when leave forms should be completed. However, after Grievant was instructed to complete a leave form in advance on January 12, it would seem that Grievant may have wondered why it was so important that the form be completed that day and in a parking lot. In spite of this event, the next time Grievant intended to use leave and reflected as much on the proposed schedule for the week of January 19, it did not occur to him to submit the leave form with the report.

It is understandable that, after having been advised at least two--if not three--times regarding the proper procedure for requesting leave, Respondent believed that Grievant needed "coaching" on this issue. If Grievant had actually been disciplined for his deficiencies in this area, a different outcome would likely result, due to some ambiguities regarding the clarity of explanations given on the issue. However, DNR officials utilized the counseling procedure to notify Grievant of the problem before resorting to discipline. Since it was obvious that Grievant was having difficulty understanding the procedure to be

followed, it was not an abuse of discretion for Respondent to utilize a coaching document to ensure that the problem would not continue. Accordingly, Grievant has failed to prove by a preponderance of the evidence that the document issued on January 26, 2008, was unreasonable or improper in any respect.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. An employee grieving his evaluation must establish by a preponderance of the evidence that the evaluation is wrong because the evaluator abused his/her discretion in rating the grievant, or the performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. *Wiley v. W. Va. Div. of Natural Res.*, Docket No. 97-DNR-397 (Mar. 26, 1998); *Maxey v. W. Va. Dep't of Health & Human Serv.*, Docket Nos. 92-HHR-088/224/362 (Aug. 16, 1993); *Messenger v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-388 (Apr. 7, 1993); *Hurst v. W. Va. Dep't of Transp.*, Docket No. 91-DOH-326 (Feb. 27, 1992); *Wiley v. W. Va. Workers' Compensation Fund*, Docket No. WCF-89-015 (July 31, 1989).

2. "A counseling session is non-disciplinary and is used to discuss a potential problem before it requires utilizing the progressive discipline process." *Hairston v. Dep't of Health and Human Res.*, Docket No. 05-HHR-247 (Feb. 17, 2006).

3. In a non-disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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).

4. Grievant has failed to establish by a preponderance of the evidence that the coaching document issued to him constituted an abuse of discretion or was otherwise improper.

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 § 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: January 30, 2009

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DENISE M. SPATAFORE
Administrative Law Judge