THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANDREW JENSEN,

Grievant,

V. **Docket No. 2008-0743-DOR**

**WEST VIRGINIA DEPARTMENT OF REVENUE/
INSURANCE COMMISSION,**

Respondent.

DECISION

Grievant Andrew Jensen is employed by the Office of the Insurance Commissioner ("OIC") and holds the classification of Workers Compensation Clerical Assistant 2. Grievant was originally employed on October 1, 2003, by the Workers Compensation Commission and, like many employees, was transferred to the OIC when the Workers Compensation Commission was dissolved as a state agency on January 1, 2006. On October 18, 2007, Grievant received a written reprimand related to his job performance. Grievant filed a level one grievance form contesting the reprimand on November 7, 2007. For his statement of grievance Grievant wrote:

> The written reprimand against me, and all matters relating to it, are not based on good cause and are otherwise inappropriate. The written reprimand and the matters set out in it and the corrective plan resulting from it are not supported by good cause, and the actions taken are believed to be based upon reprisal, retaliation and/or favoritism.

As a remedy Grievance seeks to "remove the written reprimand from [his] personnel file and restore all [his] rights."

A level one conference was held and a written decision was issued on December 7, 2007, denying the grievance. An unsuccessful mediation was held on March 25, 2008,

and Grievant appealed to level three. On December 16, 2008, a level three hearing was held at the Charleston office of the Public Employees Grievance Board. Grievant Jensen attended the hearing and was represented by another OIC employee, Tammy D. Frazie. Respondent was represented by Gregory A. Elam, OIC Associate Counsel. The parties agreed to submit fact/law proposals by January 27, 2009. Grievant requested four extensions for filing his proposals, the first dated January 26, 2009, and the last dated February 12, 2009. All extensions were granted; however, in the letter granting the last extension until February, 20, 2009, the undersigned Administrative Law Judge noted that no more extensions would be granted. Respondent submitted proposals on January 30, 2009, but Grievant did not submit fact/law proposals. This grievance became mature for decision on February 20, 2009, the last day for submitting post hearing proposals.

Synopsis

Respondent issued a written reprimand to Grievant for his failure to comply with leave policies and follow directions concerning his schedule. Respondent presented a plethora of evidence supporting the charges in the written reprimand, as well as corrective measures taken prior to that action. Grievant does not agree with all of the allegations but Respondent has met the burden of proof that the disciplinary action was proper. The grievance is denied.

The following findings of fact are based upon a thorough review of the record.

Findings of Fact

1. Grievant Jensen was initially employed by the Workers Compensation Commission on October 1, 2003, and is classified as a Workers Compensation Clerical Assistant 2. His main duties involved working in the mail room receiving, recording and distributing mail to various state offices.

2. On January 1, 2006, the Workers Compensation Commission was dissolved as a state agency. Grievant Jensen, and many of his co-workers in that agency, were transferred to the OIC. Grievant kept his classification and pay rate from the Workers Compensation Commission and continued to work in the mail room at the OIC.

3. From February 2006, through the present, Grievant has had significant problems with being late for work and failing to meet the designated schedule for mail deliveries.

4. On April 28, 2006, Grievant received a verbal reprimand from Timothy Whitener, Director of Administration at the OIC. The reprimand was related to Grievant's excessive absences and failure to give forty-eight hours notice prior to taking annual leave as required by OIC policy. *See* OIC Policy Number IC-202.

5. On May 8, 2006, Grievant received an Employee Performance Appraisal for the period of January 1, 2006 through March 31, 2006. This Appraisal was conducted prior to the completion of a full year so that Grievant could be given a Plan of Improvement.[1]

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[1] For general information regarding Employee Performance Appraisals, see Division of Personnel's *Supervisor's Guide to the Performance Management and Appraisal Process.*

Grievant received an overall rating of "Needs Improvement." James Harvey, Grievant's immediate supervisor at that time, made the following comment:

> Andy needs to improve his availability for work. He needs to be more flexible and cooperative with his supervisor in developing the most efficient mail operations. He also needs to follow the time constraints and outlines set forth by his supervisor for the completion of any and all duties assigned.

6. Grievant received an oral reprimand on August 23, 2006, for failing to take lunch at the scheduled time and for being uncooperative with his supervisor. Grievant was instructed to take his lunch at a designated time to accommodate a shortage of staff on that day. During a conversation that ensued after Grievant was reminded that he needed to take his lunch, Grievant told his supervisor to get out of the mail room and that the supervisor didn't know how to do his job.

7. On October 24, 2006, Grievant received an Employee Performance Appraisal from James Harvey. Mr. Harvey rated Grievant as "Fair, But Needs Improvement". Harvey specifically noted, "Andy is showing improvement on attendance issues, but he does need to recognize the additional burden it places on the unit when he is not here."

8. On May 30, 2007, Grievant received an Employee Performance Appraisal for the period of April 1, 2006 through March 31, 2007. Grievant received a "Needs Improvement" rating in twelve of the twenty-three areas rated. His overall rating was "Meets Expectations," however, in the "Improvement and/or Developmental " section of the Appraisal, James Harvey stated the following:

> Andy needs to improve his availability for work. Scheduling and planning have suffered in the unit, and as a result, his co-workers are forced to pick up the slack more routinely than should be expected. Andy needs to take direction better and become a more effective team player. Andy needs to realize there are functions outside sorting and delivering that are the responsibility of this unit and part of his assigned duties.

Grievant's only response was that he felt his customers and co-workers would disagree with the Appraisal.

9. Grievant received an oral reprimand at a meeting held on September 4, 2007. Present at the meeting were Grievant, Kathy Damron and Vickie Marcum. Ms. Marcum is Grievant's new supervisor. The issues raised at the meeting were:

- Grievant was not delivering the mail in a timely manner;
- Grievant could not be found on several occasions when special assignments came up requiring lifting and moving equipment and supplies;
- Grievant failed to keep his state-issued cell phone with him and turned on at all times so that he can be contacted when he is needed for special projects or deliveries;
- Grievant was reminded that Donna Thurston had been assigned as lead worker in the mail room and he was to follow her directives.

Grievant was given a schedule for mail pick-up and delivery in the Greenbrooke Building and was informed at the meeting that the very next incident would lead to disciplinary action.

10. A customer from Grievant's mail route arrived at the mail room shortly after 11:20 a.m. on September 11, 2007, complaining that she had not received the mail for her office. Grievant had been late starting his mail run in the Greenbrooke Building that morning due to "trouble writing up some signature sheets." Grievant was advised that mail had to be delivered on schedule. Other issues could be addressed after the mail was delivered.

11. Grievant signed an Employee Performance Appraisal 1 form setting performance standards and expectations on September 18, 2007. Among the listed

expectations was one stating, "[a]nnual leave is to be requested at least 48 hours in advance, all other leave is subject to disapproval."

12. On October 9, 2007, the mail room lead worker, Donna Thurston, discovered that incoming FedEx packages had not been delivered. This discovery was made at 3:30 p.m. The deliveries had arrived in the morning and Grievant had been previously instructed to deliver FedEx packages as soon as they are logged in.

13. Vickie Marcum, Grievant's supervisor, advised Grievant on October 5, 2007, that the mail room was going to be short staffed for the week of October 8, 2007 through October 12, 2007. Ms. Marcum asked Grievant if he had any annual leave scheduled for that week and Grievant said that he did not. Marcum informed Grievant that she would be out of town that week. Therefore, Grievant was not to take any annual leave during that time period. She also informed Grievant that if he missed any work that week he would have to submit a physician's statement. Grievant asked Ms. Thurston to leave at 3:30 p.m. instead of 4:00 p.m. on October 12, 2007, and Ms. Thurston signed his annual leave slip.

14. Upon her return on October 15, 2007, Vickie Marcum disapproved the annual leave request for October 12, 2007, and instructed Grievant to provide a physician's statement for the time he was absent on that day as she instructed him on October 5, 2007. Because the leave request was for annual leave, Grievant did not produce a physician's statement for his absence.

15. On October 18, 2007, Grievant was hand-delivered a written reprimand from Vickie Marcum for violating OIC policies and displaying insubordination in not following the directives of his supervisors. The specific violations sighted were the following:

- Failure to follow mail schedule for the Greenbrooke Building as provided during the September 4, 2007, meeting with Vickie Marcum, supervisor and Kathy Damron, Director.
- Failure to request annual leave 48-hours in advance as stipulated in your EPA-1 signed and dated by you on September 18, 2007.
- Failure to provide a doctor's excuse for leave taken on October 12, 2007 as instructed on October 5, 2007.

Discussion

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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent proved that Grievant had a history of missing or being late for work. Grievant also had a history of not following instructions of his supervisors, and not complying with the mail schedule. Grievant started working for the OIC in January 2006 and in April of that year received his first verbal reprimand for excessive absences and failure to give at least forty-eight hours notice prior to taking annual leave. In his May 2006 Employee Performance Appraisal, Grievant's availability for work was stressed, as well as the need for Grievant to follow the instructions and schedules of his supervisors. On

August 26, 2006, he received a second oral reprimand for failing to follow the schedule set out by his supervisor and becoming verbally combative with the supervisor when he instructed Grievant to comply with the schedule.

The Employee Performance Appraisal Grievant received on May 30, 2007, indicated that Grievant was still having issues related to absences and following the instructions of his supervisors. On September 4, 2007, Grievant received another oral reprimand regarding, among other things, his failure to deliver the mail on the schedule required by his employer. After nearly eighteen months of warnings, Grievant failed to follow his assigned mail schedule on two subsequent days and took annual leave after being specifically instructed not to. Respondent has proved that a written reprimand was justified.

Grievant argues that Donna Thurston, the lead worker, signed his annual leave form on October 12, 2007, so it is inappropriate for Respondent to reprimand him for taking that leave. Respondent's Exhibit 4. In some circumstances lead workers may approve annual and sick leave forms for employees in their assigned units. *See Bradley v. Dep't of Transp./ Div. Of Highways and Div. of Pers.*, Docket No. 2008-1772-DOT (Feb. 27, 2009); *Poole v. Dep't of Health and Human Resources*, Docket No. O7-HHR-347 (Nov. 7, 2008). However, in this situation Ms. Thurston did not have that authority. Grievant's supervisor, Vickie Marcum, made it abundantly clear to Grievant that the mail room was going to be short staffed the week of October 8 through October 12, 2007. She specifically told Grievant, on October 5, 2007, that he could not take any annual leave that week and no leave would be approved without a doctor's excuse. Notwithstanding this clear directive, Grievant went to Ms. Thurston with a form to leave work early on Friday, October 12.

Grievant cannot rely on Ms. Thurston's mistake to escape a reprimand for ignoring Ms. Marcum's directive.

Grievant also believes that he is being discriminated against because co-workers were not being subjected to the same scrutiny with regard to attendance and leave requirements. Discrimination is defined in the grievance procedure as "any differences in the treatment of similarly situated employees, unless such differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 221 W. Va. 306, 655 S.E.2d 52 (2007);[2] *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).[3]

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[2] *Frymier, supra,* was decided utilizing the definition of discrimination found in the old grievance statutes, W. VA. CODE §§ 18-29-2(m) and 29-6A-2(d). However, the definition of "discrimination" in the new grievance statute is virtually identical to the definitions found in the old grievance statutes. W. VA. CODE § 6C-2-2(d). Therefore, *Frymier* remains controlling on this issue.

[3] Grievant states in his grievance form that his reprimand was the result of favoritism. The analysis for determination of discrimination may be used in deciding allegations of favoritism in the grievance procedure. *Frymier v. Higher Education Policy Comm.*, 221 W. Va. 306, 655 S.E.2d 52 (2007).

Grievant failed to prove the first element of the discrimination test. The co-workers he claims were being treated differently were temporary employees supplied to Respondent through a private agency. Unlike Grievant, these employees do not accumulate paid sick or annual leave. Additionally, the temporary workers have no expectation of continued employment. Because the temporary employees do not accumulate paid leave, they and Grievant are not similarly-situated regarding enforcement of attendance and leave requirements. Consequently Grievant's claim of discrimination or favoritism must fail.

Grievant also alleged in his grievance that the written reprimand was based upon retaliation and reprisal. W. VA. CODE § 6C-2-2 (o) defines "reprisal" as follows:

> "Reprisal" means the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.

To demonstrate a prima facie case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (a) that he engaged in protected activity (i.e., filing a grievance);
>
> (b) that he was subsequently treated in an adverse manner by the OIC or an agent;
>
> (c) that the OIC official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (d) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ. Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995).[4]

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[4] These cases were decided under the definition of "reprisal" found in the old education grievance procedure at W. VA. CODE § 18-29-2 (p). Since the definition of "reprisal" in W. VA. CODE § 6C-2-2 (o) is virtually identical to the old statute these cases still apply.

Grievant did not produce any evidence that he had filed a grievance, or taken any other action, that would serve as the basis of a reprisal or retaliation claim. While it is clear that Grievant disagrees with his supervisors as to how the mail room should operate, there was not evidence presented that Respondent has retaliated against Grievant for his views. In fact, the record reflects that Grievant's supervisors have shown restraint in their disciplinary measures.

Ultimately, Respondent has met the burden of proving by a preponderance of the evidence that the written reprimand issued to Grievant was proper and the grievance is denied.

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. 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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. Respondent proved by a preponderance of the evidence that Grievant repeatedly violated OIC policy related to leave and failed to comply with directives from his supervisor. The issuance of a written reprimand was proper.

3. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> a) that he or she has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 221 W. Va. 306, 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

4. The analysis for determination of discrimination may be used in deciding allegations of favoritism in the grievance procedure. *Frymier v. Higher Education Policy Comm*., 221 W. Va. 306, 655 S.E.2d 52 (2007).

5. Grievant failed to prove that the written reprimand he received was the result of discrimination or favoritism.

6. To demonstrate a prima facie case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (a) that he engaged in protected activity (i.e., filing a grievance);
> (b) that he was subsequently treated in an adverse manner by the OIC or an agent;
> (c) that the OIC official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (d) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ. Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

7. Grievant had not engaged in any protected activity prior to receiving the written reprimand that could serve as the basis of a reprisal claim. Grievant failed to prove that the written reprimand was the result of reprisal or retaliation.

Accordingly, the 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: March 30, 2009

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE