THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL SWEENEY,
Grievant,

v. **Docket No. 2012-0466-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
BUREAU FOR PUBLIC HEALTH,
Respondent.

DECISION

Grievant, Michael Sweeney, is employed by Respondent, Department of Health and Human Reasources, Bureau for Public Health. On June 13, 2011, Grievant filed a grievance against Respondent stating he was "improperly denied annual leave," and requesting "to be made whole, including Respondent eliminating improper restriction on leave use and written formulation of policy conforming to the administrative rule governing granting of annual leave." On June 21, 2011, Grievant filed another grievance contesting "leave restriction on June 21, 2011, without good cause & for a[n] undefined period," and requesting "to be made whole, not limited to but including removal of restriction." Grievant filed a third and final grievance directly to level three on October 21, 2011, following a three-day suspension, seeking "to be made whole including back pay with interest & benefits restored." On October 24, 2011, due to the pending level three grievance, and upon the agreement of the parties, the June 13, 2011 and June 21, 2011 grievances were waived to level three. By order entered October 31, 2011, the three grievances were consolidated into the instant action.

A level three hearing was held on March 28, 2012, before Administrative Law

Judge William B. McGinley[1] at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Anne B. Ellison, Assistant Attorney General. This matter became mature for decision on May 7, 2012, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant filed three grievances that were consolidated for hearing purposes. First, Grievant grieved the denial of a particular request for annual leave. As relief, Grievant sought the elimination of "improper leave restriction" and for Respondent to formulate specific policy. That grievance must be dismissed as there is no order the undersigned could issue to the Respondent towards "eliminating improper restriction on leave use" that would not be speculative or advisory, and the undersigned has no authority to order the agency to draft policy. Second, Grievant asserts Respondent later improperly placed him on leave restriction without good cause and for an indefinite period. That grievance must also be dismissed as moot as Respondent has now removed the leave restriction. Last, Respondent was justified in placing Grievant on leave restriction due to his absence history, was justified in requiring Grievant to provide substantiation of his absence while on leave restriction, and was justified in suspending him when he failed to provide the required substantiation after already receiving a written reprimand for a previous violation of his leave restriction.

Accordingly, the grievance is denied.

[1] This case was assigned to the undersigned Administrative Law Judge on August 24, 2012 for administrative purposes.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed as an Office Assistant III for Respondent at the Office of Health Facilities Licensure and Certification ("OHFLAC"). During the grieved events, Grievant's direct supervisor was Health and Human Resources Specialist Senior, Julie Hall. Ms. Hall reported to Program Manager, Deanna Kramer, who, in turn reported to Office Director, Jolynn Marra.[2]

2. Jolynn Marra became the Director OHFLAC in February 2011. At the time she assumed her duties, OHFLAC had been the subject of many complaints from the public. To address these complaints, she immediately began looking at employee leave use and discovered that there was a serious problem with employee accountability and dependability. She personally reviewed all employee time records for the preceding months and found many employees had low leave balances, there was a lot of emergency leave being granted, and there was a lot of sick leave attached to holidays and weekends.

3. Grievant was one of the employees flagged for his leave usage. In reviewing his leave records, Ms. Marra found that Grievant frequently took emergency annual leave and frequently took sick leave close to weekends and holidays. The absences appeared to be impacting his ability to get his work done.[3]

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[2] Both Julie Hall and Deanna Kramer have since left employment with OHFLAC for the private sector.

[3] Jolynn Marra's Level 3 Testimony.

4. From October 2010 through May 2011, Grievant had 25 unscheduled and 7 scheduled absences, for a total on 77.5 hours of sick leave and 85.5 hours of annual leave.[4] The majority of Grievant's sick and emergency annual leave was in conjunction with weekends and holidays.[5] These absences were burdensome on the team, and Ms. Marra determined that Grievant, along with several other employees, should be placed on an Attendance Improvement Plan ("AIP") to provide coaching regarding attendance.[6]

5. Meanwhile, on June 7, 2011, Grievant requested four hours of annual leave for Friday, June 10, 2011[7]. Grievant had sufficient hours to cover the leave requested. Grievant's supervisor, Julie Hall, denied this request for leave, and Grievant grieved the denial.

6. In the preceding weeks, Grievant had taken large amounts of leave.[8] During the week of May 16th, Grievant took 3.5 hours of emergency annual leave on Friday. The next week, he took 2.5 hours of sick leave Wednesday, 8 hours of annual leave on Thursday, and 8 hours of sick leave on Friday, which was the Memorial Day holiday weekend. The next week, he was off on Monday for the holiday, took 8 hours of emergency annual leave on Wednesday, and 3 hours of annual leave on Friday.

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[4] Respondent's Exhibits # 1 and #2.

[5] Respondent's Exhibit # 1.

[6] Jolynn Marra's Level 3 Testimony.

[7] Throughout testimony and in the Proposed Findings of Fact and Conclusions of Law, there appeared to be some confusion as to the dates the leave was requested and for what date it was denied. The dates cited herein are the dates provided by Grievant at the level three hearing after reviewing his documentation upon questioning from the ALJ.

[8] Respondent's Exhibit # 1.

Therefore, he had worked a full, 8-hour work day on only eight of the preceding fourteen working days.

7. Following a pre-determination conference, by letter dated June 21, 2011, Grievant's supervisor placed him on restricted leave status, stating, "your pattern of leave use has become so frequent that your attendance and service to our agency is not sufficiently dependable to perform the essential elements of your job." The restriction, in pertinent part, required Grievant to submit a completed Physician/Practitioner's Statement form[9] to verify all future sick leave taken, and explained that any emergency annual leave would be granted on a case-by-case basis depending on the circumstances and documentation provided. The letter informs Grievant that failure to present the required form or unscheduled absences deemed not an emergency would result in docked pay for unauthorized leave, and that disciplinary action may result if Grievant failed to comply.[10]

8. On July 21, 2011, Grievant requested emergency annual leave to take a long lunch in order to take pictures of a rental property he co-owned with his father. The rental property was occupied by a family member, who was about to be evicted, and Grievant feared that the property might be damaged in retaliation.

9. Following a pre-determination conference, on July 25, 2011, Grievant's supervisor issued a written reprimand for this instance, stating that Grievant's verbal

[9] The required form was the DOP-L3, a copy of which was provided to Grievant along with the June 21, 2011 AIP.

[10] Testimony and later documents refer to this leave restriction as the "Attendance Improvement Plan".

request for emergency annual leave was verbally denied and Grievant's taking of the denied leave was unauthorized leave.[11]

10. On Thursday, October 6, 2011, and Friday, October 7, 2011, in conjunction with the Columbus Day holiday, Grievant called off sick.

11. Upon his return to work, Grievant did not provide a physician/practitioner's statement form as required by the June 21, 2011 leave restriction and July 25, 2011 written reprimand.

12. Following a pre-determination conference, by letter dated October 20, 2011, Grievant's supervisor suspended Grievant without pay for three days for his failure to provide a physician's statement form.

13. Sometime in January or February 2012, Grievant was removed from the AIP following a transfer to a different program within OHFLAC and improvement in his attendance.

Discussion

"Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2008). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. *Id.*; *Ramey v. W. Va. Dep't of Health*,

[11] While Grievant asserts he does not recall his supervisor clearly denying his request, Respondent provided testimony from Shannon Wallace that disputes this assertion. Wallace testified she spoke with Grievant after he spoke with his supervisor, and he was upset that his supervisor denied his leave request because the supervisor did not feel it was an emergency. It is not necessary for the undersigned to make particular findings on this issue because Grievant did not grieve the written reprimand, so the written reprimand is presumed valid.

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 burden has not been met. *Id.*

June 13, 2011 Grievance

In his first grievance, Grievant asserts Respondent improperly denied him leave on June 10, 2011, when he requested his leave several days in advance and had leave available. As relief, Grievant sought the elimination of the restriction on his leave use and written formulation of policy regarding the granting of annual leave. Repondent argues this portion of the grievance must be dismissed as Grievant seeks a wholly unavailable remedy and asks for an advisory opinion.

Pursuant to the procedural rules of the Grievance Board, "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." W.VA. CODE ST. R. § 156-1-6.11 (2008). In this case, it is very clear that the undersigned has no authority to order Respondent to formulate policy regarding the granting of annual leave. "[I]t is not the role of this Grievance Board to change agency policies…. The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed." *Jenkins v. West Virginia University*, Docket No. 2008-0158-WVU (June 2, 2009) (citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997)) (other citations omitted). Grievant has not cited, nor is the

undersigned aware of any law, rule, or regulation which would mandate Respondent draft the requested policy. As such, that portion of the remedy sought is clearly unavailable.

Grievant's other requested remedy, to "eliminat[e] improper restriction on leave use," is a murkier issue. It is unclear from the face of the grievance exactly what Grievant intended the Grievance Board to order the Respondent to do to accomplish this request. This issue was not clarified by Grievant either in testimony or in his Proposed Findings of Fact and Conclusions of Law. At the time of the grievance, Respondent had not placed Grievant on any sort of leave restriction. Grievant's supervisor had simply denied one specific request for annual leave after granting Grievant's many other requests in the preceding interval of time. One denial does not a "leave restriction" make. Even if Respondent did improperly deny the annual leave, there is no order the undersigned could issue to the Respondent towards "eliminating improper restriction on leave use" that would not be speculative or advisory. This Grievance Board has continuously refused to address issues when the relief sought is "speculative or premature, or otherwise legally insufficient." *Lawrence v. Bluefield State College*, Docket No. 2008-0666-BSC (June 19, 2008); *Stepp v. Dep't. of Trans./Div. of Highways*, Docket No. 06-DOH-215 (Oct 27, 2006); *Dooley v. Dep't. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ*., Docket No. 91-35-229/239 (Nov. 27, 1991). Therefore, the June 13, 2011 grievance must be dismissed.

June 21, 2011 Grievance

Grievant's next grievance asserts Respondent improperly placed him on leave restriction without good cause and for an indefinite period. Respondent argues that this portion of the grievance must be dismissed as moot. The allegation that a grievance is moot is an affirmative defense, as it is "an assertion of facts and arguments that, if true, will defeat the claim, even if all the allegations are true." *Black's Law Dictionary* (8th ed. 1999). In this case, the undisputed testimony shows that Grievant was released from the Attendance Improvement Plan months ago and is no longer under a specific leave restriction. As such, Respondent has proven that the June 21, 2011 grievance is moot and must be dismissed.

October 21, 2011 Grievance

Grievant last grieves his three-day suspension for violation of the AIP. The facts of this case show the Grievant had an attendance problem. In taking over OHFLAC, the new Office Director was faced with complaints from the public and lack of accountability and dependability in the office. She identified office-wide attendance issues that were significantly impacting the operation of the office. Regarding Grievant specifically, she reviewed his attendance records from October 2010 through May 2011, and discovered he had 25 unscheduled and 7 scheduled absences, for a total of 77.5 hours of sick leave and 85.5 hours of annual leave. The majority of Grievant's sick and emergency annual leave was in conjunction with weekends and holidays. In the three weeks preceding Grievant's placement on leave restriction, he had taken large amounts of leave, again mostly around weekends and holidays. Of the 14 working days in those three weeks, Grievant had only worked 8 full days.

Grievant argues that the AIP was improper because Respondent failed to notify him of his grievance rights, placed him on leave restriction for an indefinite period, and required he present a doctor's excuse for any use of sick leave. However, Respondent did not violate any law, rule, or policy in the institution of the AIP. As the AIP was not a disciplinary action, Respondent was not required to notify Grievant of his grievance rights. Although Grievant attempted to state that Respondent was required to specify the leave restriction for a particular period, citing the "Supervisor's Guide to Attendance Management", the portion cited was a sample written reprimand that is simply a recommendation that a timeframe for leave restriction be established. There was no rule cited, or of which the undersigned is aware, requiring a particular timeframe for the leave restriction. Finally, DOP rules specifically allow Respondent to require substantiation of sick leave requests. "When 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, 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." W. VA. CODE ST. R. § 143-1-14.5 (2008).

Given Grievant's attendance history, Respondent was justified in placing Grievant on leave restriction and violated no law, rule, or policy in so doing. Since Grievant was otherwise a good employee, it may have been kinder of Respondent to use a more informal coaching process prior to placing Grievant on an AIP. However, this was a management decision that was not improper and the Grievance Board

cannot substitute its management philosophy for that of Respondent. *See Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).

Following the proper implementation of the AIP, Respondent initiated progressive discipline that ultimately led to Grievant's suspension. Within a month of the implementation of the AIP, Grievant took unauthorized emergency leave and was issued a written reprimand. Although the facts of this instance were disputed at the level three hearing, Grievant had not grieved the written reprimand. Therefore, the written reprimand is presumed valid. *See Teel v. Bureau of Employment Programs/ Workers Comp. Div.*, Docket No. 01-BEP-466 (June 10, 2002).

Following the written reprimand, Respondent followed the principles of progressive discipline in issuing a suspension to Grievant for the next violation of the AIP. Respondent properly notified Grievant in his AIP that a physician's certification would be required for any use of sick leave. Grievant asserts that he had a stomach virus, for which no treatment was necessary, and that he could not afford to go to the doctor just to get substantiation. While the undersigned is sympathetic of the cost that would be incurred to visit a doctor to merely substantiate illness when treatment is not actually required, it is reasonable for Respondent to want substantiation of absence given Grievant's absence history. Indeed, the particular absence leading to the suspension was itself suspicious.

The undersigned does not make a particular finding that Grievant was faking an illness, because, whether or not he actually was ill, this was yet another unplanned absence abutting a holiday weekend. As such, Respondent is justified both to find the absence suspicious and to require substantiation. Even if the absence was not

suspicious, neither the rule nor the terms of the AIP require that a particular absence be suspicious. Once a pattern of suspected leave abuse has been established, substantiation may be required for any use of sick leave. Grievant knew he was required to provide a physician/practitioner's statement form, he knew the potential consequences of failing to provide the excuse, and he chose not to comply. Respondent has proven it was justified in imposing disciplinary action on Grievant for his violation of the AIP.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2008). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. *Id.*; *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 burden has not been met. *Id.*

2. Pursuant to the procedural rules of the Grievance Board, "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." W.VA. CODE ST. R. § 156-1-6.11 (2008).

3. “[I]t is not the role of this Grievance Board to change agency policies…. The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed.” *Jenkins v. West Virginia University*, Docket No. 2008-0158-WVU (June 2, 2009) (citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997)) (other citations omitted).

4. This Grievance Board has continuously refused to address issues when the relief sought is "speculative or premature, or otherwise legally insufficient." *Lawrence v. Bluefield State College*, Docket No. 2008-0666-BSC (June 19, 2008); *Stepp v. Dep't. of Trans./Div. of Highways*, Docket No. 06-DOH-215 (Oct 27, 2006); *Dooley v. Dep't. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ*., Docket No. 91-35-229/239 (Nov. 27, 1991).

5. The June 13, 2011 grievance must be dismissed as the undersigned has no authority to order Respondent to formulate policy nor is there any order the undersigned could issue to the Respondent towards “eliminating improper restriction on leave use” that would not be speculative or advisory.

6. The June 21, 2011 grievance is moot and must be dismissed as Grievant has already been released from the AIP.

7. “When 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, 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." W. VA. CODE ST. R. § 143-1-14.5 (2008).

8. Previous disciplinary action that is not grieved is presumed valid. *See Teel v. Bureau of Employment Programs/Workers Comp. Div.*, Docket No. 01-BEP-466 (June 10, 2002).

9. Respondent was justified in placing Grievant on an AIP due to his absence history, was justified in requiring Grievant to provide substantiation of his absence while on the AIP, and was justified in suspending him when he failed to provide the required substantiation after already receiving a written reprimand for other violation of the AIP.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: September 12, 2012

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Billie Thacker Catlett
Administrative Law Judge