# WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**RODNEY MARK CRAWFORD,**
**Grievant,**

**v.** **Docket No. 2011-1662-MAPS**

**DIVISION OF CORRECTIONS/ MOUNT OLIVE CORRECTIONAL COMPLEX,**
**Respondent.**

## DECISION

Rodney M. Crawford, Grievant, is employed by the Respondent Division of Corrections ("DOC"). He works at the Mount Olive Correctional Complex ("MOCC") as the Librarian. Mr. Crawford filed a grievance form dated May 14, 2011, contesting his suspension for ten working days without pay[1]. As his Statement of Grievance, Mr. Crawford wrote the following:

> Violation of Administrative Rule, Section 14.6 which states that employee's pay shall be docked in the next pay period on unauthorized leave. One pay period was skipped when docking pay for 19 February and 28 February 2011.

As relief Grievant seeks: To "[b]e reinstated with no suspension and with all pay and benefits due."

A level three hearing was held in Beckley, West Virginia on October 12, 2011. Grievant appeared at the hearing *pro se* and Respondent was represented by John H. Boothroyd, Esquire, Assistant Attorney General. At the end of the hearing, both parties agreed to submit written Proposed Findings of Fact and Conclusions of Law which were

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[1] Pursuant to W. VA. CODE § 6C-2-4(a)(4), Grievant proceeded directly to level three to contest his suspension without pay.

received by the West Virginia Public Employees Grievance Board on November 14, 2011. This matter became mature for decision on that date.

## Synopsis

Grievant was suspended for ten working days for taking unauthorized leave on two separate days in February 2011. The ten-day suspension was issued because Grievant had been previously disciplined on other occasions for similar offenses. Grievant does not contest that he took unauthorized leave but rather argues that Respondent failed to strictly follow the procedures for docking his pay set out in the West Virginia Division of Personnel's Administrative Rule Section 14.6 requiring that an employee's pay be docked during the next pay period.

Respondent proved the reasons for the suspension by a preponderance of the evidence. Grievant was unable to prove that Respondent committed any procedural error which effected the outcome of his disciplinary action in any way.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

## Findings of Fact

1. Grievant Crawford is employed at the Mount Olive Correctional Center as the Librarian.

2. The librarian is an important part of the programs offered to the inmates at MOCC and it is important that it be available to the inmates during scheduled times.

3. Grievant Crawford is under the direct supervision of Jason Collins, the Associate Warden for Programs at MOCC.

4. Grievant has received at least two Employee Performance Appraisals ("EPA") from Associate Warden Collins.

5. One of these EPAs was signed by Grievant and Mr. Collins on January 5, 2010, and was for the period of January 1, 2009 through December 31, 2009. Grievant received a rating of "Good: Meets Expectation." Associate Warden Collins noted that, "Mr. Crawford is an excellent employee with the skills and knowledge it takes to be an effective librarian." The only area cited as needing improvement was Grievant's availability for work. With regard to this area, Mr. Crawford noted that Grievant's attendance was poor and he could not be relied upon for planning and scheduling. Respondent's Exhibit 3.[2]

6. The second EPA3 was signed on January 4, 2011, and covered the period of January 1, 2010 through December 31, 2010. Respondent's Exhibit 4. The ratings on this EPA3 were virtually identical to the ones listed in the EPA3 for the 2009 calendar year. *See* footnote 2 *supra.* Associate Warden Collins noted that Grievant's attendance did not meet expectations and that Grievant had received disciplinary suspensions for unacceptable attendance. He also wrote the following comment:

> The law library is an extremely important piece of the division and Mr. Crawford is an asset to the team and continues to work on ways to make it better and smoother.[3]

7. Grievant was suspended on two separate occasions in 2010 for unauthorized

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[2] The first page of Respondent's Exhibit 3 is an EPA 2 form used to let an employee know how well he is performing half way through the one year evaluation period. That document covered the period of January 1, 2010 through June 6, 2010. The front page is attached to a longer EPA3 form which is used to evaluate the employees performance for the entire year. The EPA3 covered the entire 2009 calendar year.

[3] Respondent's Exhibit 4.

absences; on January 7 for three days and October 26 for five days.

8. During this time Grievant was caring for his mother who was suffering from incurable cancer. After the death of his mother, Grievant's daughter was also diagnosed with incurable cancer and Grievant is presently taking a leave of absence to care for her. Most of Grievant's attendance problems were related to difficulties in caring for these relatives.

9. On February 19, 2011, Grievant left work five and a half hours early to participate in a softball game. The game was a fund-raising event for cancer research. Grievant did not have sick or annual leave to cover this time and he did not seek prior approval to leave work from his supervisor.

10. On February 28, 2011, Grievant left work two hours early. He made up one and a half of those hours later in the week but still missed one half hour for which he had no accumulated leave.

11. On March 9, 2011, Grievant submitted an Application for Leave With Pay for February 19. Respondent's Exhibit 7. He submitted a similar form on March 16, 2011, requesting paid leave for one half hour on February 28. Respondent's Exhibit 8.

12. The MOCC Warden, David Ballard, issued a memorandum dated March 23, 2011, to Grievant Crawford denying Grievant's request for leave for February 19 and 28. Grievant was notified that $96.30 would be deducted from the pay he would receive on March 31, 2011. Respondent's Exhibit 10. Grievant's pay was docked as set out in that memorandum.

**Discussion**

As this grievance involves a disciplinary matter, the Respondent bears the burden

of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "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). "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 and 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*.

MOCC Operational Procedure #1.21 requires that an employee must submit a request for annual leave to his supervisor one week in advance except in the case of emergencies. Grievant took leave on these two days without seeking prior approval and without sufficient leave accumulated to cover the time he was gone. Respondent proved that Grievant violated the agency policy related to leave. The Respondent also proved that it had issued Grievant suspensions previously for similar violations.

Grievant does not contest that he had a history of problems with attendance, nor that he did not comply with the MOCC operational procedures on February 19 and 28, 2011. Rather, Grievant argues that Respondent violated Division of Personnel Administrative Rule Section 14.6 related to docking his pay for unauthorized leave. Grievant asserts that he should not be disciplined for violating policies and procedures if

the Respondent is not punished for violating the rules and regulations that control its conduct.

The Division of Personnel Administrative rule Grievant cites states the following:

> 14.6. 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.[4]

Grievant points out that the days he was absent from work were February 19 and 28, 2011 but his pay was not docked for that time until March 31, 2011. Grievant's pay was not docked from the next pay period after the unauthorized absences. Respondent counters that Grievant submitted Applications for Leave with pay for the February time on March 9 and March 16. Respondent points out that Grievant's pay was docked in the next pay period after these applications were denied. Respondent also noted that Grievant suffered no harm as a result of the pay being docked at the end of March.

Ultimately, when the pay was docked is not relevant to this grievance. The docking of Grievant's pay was not the disciplinary action for his violation of the operational procedures. The discipline was a ten-day suspension without pay. Whether the pay was docked in the next pay period has no effect upon the outcome of the disciplinary action from which Grievant seeks relief. Additionally, the Grievance Board consistently has held that while an administrative body must abide by the remedies and procedures it properly

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[4] 143 C.S.R. 1 § 14.6.

establishes to conduct its affairs,[5] failure to adhere to established procedures does not always mandate that the action taken must be considered null and void. Whether the grievant suffered significant harm as a result of the procedural error must also be considered. *McFadden v. W. Va. Dept of Health and Human Resources*, Docket No. 94-HHR-428 (Feb. 17, 1995). In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation constitutes "harmless error." *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS-023/040 (Mar. 25, 1999). *See generally Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd. of Educ.*, Docket No. 2008-0197-PLEED (Jan. 31, 2008); *Delauder v. Dept. of Health & Human Res./Bureau for Children and Families*, Docket No. 07-HHR-326 (Jan. 28, 2009); *Russell/Christian v. Wayne County Bd. of Educ.*, Docket No. 2010-1032-CONS (May 19, 2011). Grievant did not prove that the outcome of his suspension would have been any different if his pay for the unauthorized absences would have been docked from his earnings in the pay period immediately following February 28, 2011. Consequently, the grievance is DENIED.

**Conclusions of Law**

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995);

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[5] Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994).

*Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "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 and 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*.

2. Respondent proved that Grievant violated MOCC Operational Procedure #1.21 related to "Attendance and Authorized Leave" and that Grievant had been previously suspended for similar violations. The allegations against Grievant and the punishment was appropriate.

3. An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994). However, failure to adhere to established procedures does not always mandate that the action taken must be considered null and void. Whether the grievant suffered significant harm as a result of the procedural error must also be considered. *McFadden v. W. Va. Dept of Health and Human Resources*, Docket No. 94-HHR-428 (Feb. 17, 1995).

4. In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation constitutes "harmless error." *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS-023/040 (Mar. 25, 1999). *See generally Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County*

*Bd. of Educ.*, Docket No. 2008-0197-PLEED (Jan. 31, 2008); *Delauder v. Dept. of Health & Human Res./Bureau for Children and Families*, Docket No. 07-HHR-326 (Jan. 28, 2009); *Russell/Christian v. Wayne County Bd. of Educ.*, Docket No. 2010-1032-CONS (May 19, 2011).

5. Grievant did not prove that the outcome of his suspension would have been any different if his pay for the unauthorized absences would have been docked from his earnings in the pay period immediately following February 28, 2011.

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 6, 2012.**

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**WILLIAM B. MCGINLEY**
**ADMINISTRATIVE LAW JUDGE**