THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RICHARD A. PYATT,

Grievant,

v. **Docket No. 2011-0618-DOT**

DIVISION OF HIGHWAYS

Respondent.

DECISION

Grievant Richard A. Pyatt filed a Level One grievance on October 27, 2010, stating as follows: "[o]n October 18, 2010, met with DM Camden to request removal of reprimand accusing Grievant of leave abuse." As relief sought, the Grievant requests "[r]emoval of reprimand and to otherwise be made whole."

A Level One hearing on this grievance was conducted on October 27, 2010. By decision dated February 1, 2011, the grievance was granted, in part "by mitigating the punishment by reducing the written reprimand to an oral reprimand and denied in part relating to the claim of hostile work environment."[1] Respondent DOH was then ordered to complete the necessary paperwork to change the written reprimand to an oral warning, and to remove the written reprimand from Grievant's personnel file. The Level Two appeal was perfected on February 3, 2011. A Level Two Mediation was conducted on July 22, 2011. The Level Three appeal was perfected on July 28, 2011.

[1] The statement of grievance contains nothing about a hostile work environment claim. At Level One, the Grievance Evaluator allowed Grievant to present evidence regarding this claim, over the objection of Respondent, listed the same as an enumerated issue in her decision, and ruled on the issue. The undersigned has interpreted the Level One Grievance Evaluator's actions regarding the hostile work environment claim as amending the grievance.

Respondent filed a Motion in Limine on December 30, 2011, seeking an order prohibiting Grievant from introducing evidence at the Level Three hearing concerning an incident occurring on November 24, 2011, which resulted in a loss of pay to Grievant. A telephonic hearing on this motion was conducted on January 6, 2012. An Order Denying the Motion in Limine was entered January 9, 2012.

A Level Three hearing was held on January 10, 2012, before the undersigned administrative law judge at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant appeared only by his Representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union.[2] Respondent appeared by counsel, Jason C. Workman, Esquire. Pursuant to the January 9, 2012, Order, at the commencement of this hearing, Grievant's Representative clarified the matters at issue and the relief sought.[3]

Counsel for Respondent and Grievant's Representative then asked to submit this grievance for decision based upon the lower level record, with Respondent having the opportunity to present rebuttal evidence regarding the November 24, 2010, incident. There being no objection from Grievant's Representative, Respondent was permitted to present rebuttal evidence. This matter became mature for decision on February 14, 2012, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

---

[2] Grievant did not appear at the Level Three hearing in this matter. Grievant's Representative explained that Grievant could not appear due to a family emergency. However, when offered a continuance, Grievant's Representative declined such, stating that he had Grievant's authority to go forward in his absence.

[3] The on-going objections of Respondent to the January 9, 2012 Order Denying Motion in Limine were noted.

Synopsis

Grievant missed a day of work because of his child's illness. However, Grievant did not have enough accrued leave to cover his entire absence. After exhausting his leave to cover some of this absence, Grievant had to go off payroll for five hours. Respondent issued Grievant a written reprimand for unauthorized leave. At Level One, the written reprimand was mitigated to an oral warning. Grievant asserts that he did not take unauthorized leave and that Respondent has subjected him to a hostile work environment. Respondent argues that Grievant was on unauthorized leave for which he can be disciplined and denies Grievant's hostile work environment allegations. Respondent met its burden of proving that Grievant was on unauthorized leave. Grievant failed to meet his burden of proving that the oral warning he received was excessive, or an abuse of discretion. Further, Grievant failed to produce sufficient evidence to prove his hostile work environment claim. Therefore, this grievance is DENIED.

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, Richard Pyatt, is employed as a Transportation Worker 3 Mechanic in District 10, Mercer County. Grievant is the only mechanic employed in his organization.

2. On the evening of September 20, 2010, Grievant had to take his child to the emergency room. While there, Grievant called and sent a text message to his

supervisor, Joe Adkins, to advise Mr. Adkins of the situation and that, as a result, he would not be to work the next day.

3. Mr. Adkins did not work on September 21, 2010, but he did not tell Grievant such, and Mr. Adkins did not contact DOH and inform anyone that Grievant would not be in to work that day.

4. On September 22, 2010, Grievant returned to work and provided his supervisor documents showing he had been at the hospital with his child on September 20, 2010.

5. Grievant did not have enough accrued leave to cover his eight-hour absence on September 21, 2010. The result of this was that Grievant went "off payroll" for five hours.

6. On October 5, 2010, Grievant received a written reprimand dated September 22, 2010, for taking five hours of unauthorized on September 21, 2010. Those were the five hours for which Grievant had no accrued leave to use.[4]

7. Initially, Respondent intended to issue the written reprimand for Grievant's failure to call in on September 21, 2010. Grievant's lack of accrued hours to cover his absence was discovered later. Grievant contacted his supervisor as required by DOH policy, and the written reprimand does not allege the failure to call in as required.

8. Prior to September 21, 2010, Grievant had been counseled by his supervisors about having low leave balances and exhausting his accrued leave. However, Grievant had never been disciplined for anything related to leave usage, nor had he been placed on leave restriction.

---

[4] *See*, Form RL-544 dated September 22, 2010, Respondent's Exhibit 1, Lower Level ("LL").

9. On October 12, 2010, Grievant met with Tom Camden, a member of DOH management, and was given the opportunity to explain his absence on September 21, 2010.[5] However, it was determined that the written reprimand was to stand as issued.

10. Grievant's unplanned absences, regardless of the reasons for such, interfere with the operation of his organization. However, when absences are planned, DOH can arrange for someone to fill in for Grievant.

11. As a result of Grievant's debit card being stolen on November 1, 2010, Grievant was subpoenaed to testify in a criminal matter on November 24, 2010, in the Magistrate Court of Fayette County.

12. In advance of November 24, 2010, Grievant informed Mr. Adkins of the subpoena and his need to be off work that day. Grievant provided a copy of the subpoena to Mr. Adkins.

13. Grievant complied with his subpoena on November 24, 2010, and did not go in to work.

14. When Grievant returned to work the following Monday, Mr. Adkins, informed Grievant that it had been decided that Grievant would not be paid for November 24, 2010, because he had a "personal interest" in the proceeding at which he testified. Instead, Grievant would have to use his accrued leave to be paid for that day. However, Grievant did not have enough accrued time to cover his absence on November 24, 2010.

15. Grievant was not disciplined for his absence on November 24, 2010, or for going off payroll that day.

---

[5] *See*, Form RL-546 dated October 12, 2010, Respondent's Exhibit 1, LL.

16. Respondent based its decision to require Grievant to use accrued leave for November 24, 2010, in order to be paid for that day on Division of Personnel Policy DOP-P10 “Witness / Jury Service” (effective February 1, 1994). This policy provides that if an employee has a personal interest in a proceeding, the employee is to use annual leave or take leave without pay to cover absences resulting from appearing as a witness therein. *See,* Respondent’s Exhibit 1.

17. Even though the money stolen from Grievant had been returned to him by his bank when he reported his card stolen, and even though Grievant had no role in initiating the criminal action to which he was subpoenaed to testify, Respondent interpreted Grievant as having a personal interest in the November 24, 2010, magistrate court proceeding.

18. Grievant did not file a grievance regarding Respondent’s failure to pay him for November 24, 2010.

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 Employee Grievance Bd. 156 C.S.R. 1 § 3; *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.*

Respondent asserts that it properly disciplined Grievant for taking unauthorized leave on September 21, 2010, and for leave abuse. Initially, Respondent imposed a written reprimand upon Grievant; however, at Level One of the grievance process, this discipline was mitigated to an oral warning. Grievant argues that he has not abused leave and disputes that the five hours of leave at issue was unauthorized. Further, Grievant asserts that Respondent has subjected him to a hostile work environment.

The West Virginia Department of Transportation Administrative Procedures, Volume III, Chapter 10, Section V. "Unauthorized Leave Policies" states, in part, as follows:

> When an employee is absent from work without authorization, for sick or annual leave, the employee is on unauthorized leave. This is a disciplinary action that results in the loss of an employee's pay. . . .Immediate supervisors are to document the unauthorized leave with the completion and submission of Form RL-544 and Form RL-546 (disciplinary action forms). Also, Form GL-5, "Personnel Transaction Form," (to reduce the employee's tenure) must be submitted to Transportation Human Resources Division.
>
> Immediate supervisors may place an employee in unauthorized leave status whether the affected employee has accrued leave available or not, under the following circumstances:
>
>> Failure of an employee to notify the immediate supervisor of the reason for an absence prior to the call-in time established for the organization (see III. A.). (Supervisors should not apply this discipline when unusual or emergency situations make this rule difficult or impossible for the employee to follow.)
>>
>> If, when the employee does call in, the supervisor feels that the reason the employee gives for not calling in at the proper time is an acceptable reason, he or she may allow the employee to retroactively apply for paid leave or a leave of absence for the time missed from work. . . .

Grievant missed work on September 21, 2010, because he had taken his child to the emergency room late the night before. While at the hospital with his child, Grievant telephoned and sent a text message to his supervisor, Joe Adkins, informing Mr. Adkins of the situation and that he would not be would not be in to work the next day. At that time, Mr. Adkins informed Grievant that he was "low on hours." However, unbeknownst to Grievant, Mr. Adkins was not going to be at work on September 21, 2010. Apparently, Mr. Adkins did not inform DOH that Grievant would not be in as well. From this, the undersigned finds that Grievant called in as required by DOH policy. However, Grievant did not have enough hours of accrued leave on September 21, 2010, to cover his eight-hour absence. As such, Grievant's accrued leave was exhausted and he went "off payroll" for five hours that day. Respondent asserts that Grievant's taking of leave when he had no available accrued sick or annual leave to cover his absence is unauthorized leave, which is cause for discipline.

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-082 (June 29, 1998). 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). Even though the policy above does not explicitly state that leave is considered

unauthorized when an employee has no accrued leave time to cover an absence, logic dictates such. Further, the Grievance Board has recognized that,

> When the plain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own rules and regulations. *See Dyer v. Lincoln County Bd. of Educ.*, Docket No. 95-22-494 (June 28, 1996). Where the language in a rule or regulation is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own regulations or classification specifications. *See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth.*, Docket No. 97-PEDTA-420 (May 7, 1998). *See generally W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning & Dev. Agency,* 174 W. Va. 558, 328 S.E.2d 164 (1985); *Jones v. Bd. of Trustees*, Docket No. 94-MBOT-978 (Feb. 29, 1996); *Foss v. Concord College*, Docket No. 91-BOD-351 (Feb. 19, 1993).

Peacock/Stemple v. W. Va. Div. of Corrections, Docket No. 01-CORR-542 (Jan. 15, 2002). Therefore, deference must be afforded to Respondent's interpretation of its policy.

Regardless of the reason for Grievant's absence on September 21, 2010, Grievant did not have enough accrued leave to cover his entire absence. As such, the leave was unauthorized. The record is clear that Grievant has a history of exhausting his leave and going off payroll. Prior to this incident, Grievant's supervisors had counseled him about exhausting leave and having low leave balances. However, he had not been disciplined for such. Moreover, Grievant had to be aware of his accrued leave balances because such is listed on the time sheets he completes every two weeks. When an employee regularly exhausts accrued leave and goes off payroll, even if the absences are supported by doctor's excuses or other valid reasons, the

employee's services are rendered undependable, and such interferes with the operation of business.

While the undersigned is very sympathetic to the situation Grievant faced on September 20, 2010, and his need to be off work to care for his child, Grievant had no accrued leave time to cover his absence. This is, unfortunately, unauthorized leave for which disciplinary action can be imposed. Respondent has met its burden of proving that Grievant took unauthorized leave on September 21, 2010.

Grievant argues that no disciplinary action should be imposed on him. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W.Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.,* Docket No. 00-23-202 (Jan. 31, 2001). The West Virginia Division of Highways Administrative Operating Procedures, Section II, Chapter 6, subsection III allows for the issuance of an oral reprimand for unauthorized leave. Given Grievant's history of leave exhaustion, his going off payroll, and his having been counseled for such in the past, an oral reprimand for the September 21, 2010, instance of unauthorized leave is not excessive or an abuse of discretion. Therefore, Grievant has failed to meet his burden of proving that the discipline imposed was excessive.

Lastly, Grievant asserts that he has been subjected to a hostile work environment by Respondent. Specifically, Grievant asserts that Respondent's actions

in imposing a written reprimand on him for his September 21, 2010, absence,[6] talking to him about exhausting his accrued leave, and refusing to pay him for the time he was subpoenaed to a magistrate court trial on November 24, 2010, constitutes a hostile work environment.[7] As these claims are not disciplinary in nature, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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).

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See, Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June13, 1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 22 (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and

---

[6] Such was mitigated to an oral reprimand at Level One.

[7] Grievant did not file a grievance regarding his failure to be paid for the day of November 24, 2010. Said incident occurred after that giving rise the instant grievance. The Level One Grievance Evaluator allowed Grievant to present evidence regarding the November 24, 2010, incident at the lower level hearing as Grievant argued such was evidence of his hostile work environment claim. Given the evidence was allowed at Level One and was part of the record, the undersigned allowed Grievant to present evidence regarding the November 24, 2010 incident at Level Three. The undersigned further permitted Respondent to present rebuttal witnesses regarding the same.

whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris,* 510 U.S. at 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (Apr. 23, 2009). "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton,* 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See, Hanlon v. Chambers,* 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs.,* [*v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], *citing Kinzey v. Wal-Mart Stores, Inc.,*107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.,* Docket No. 02-ADMN-165 (Mar. 31, 2006).

The events that Grievant cites do not rise to the level of creating a hostile work environment. The Grievant's supervisors had counseled him about exhaustion of his leave, discussed the issue of his low leave balances, and eventually disciplined him for unauthorized leave. These issues were valid, and Respondent had the authority to do so. As for the November 24, 2010 incident, Grievant only offered this as evidence of a hostile work environment. It is noted that Grievant did not file a grievance over that incident, and as such, the undersigned cannot address the matter any further. Grievant has failed to produce sufficient evidence to prove his hostile work environment claims.

The following Conclusions of Law support the decision reached:

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 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. 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-082 (June 29, 1998).

3. 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).

4. "When the plain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own rules and regulations. *See Dyer v. Lincoln County Bd. of Educ.*, Docket No. 95-22-494 (June 28, 1996). Where the language in a rule or regulation is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own regulations or classification specifications. *See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth.*, Docket No. 97-PEDTA-426 (May 7, 1998). *See generally W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning & Dev.*

Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Jones v. Bd. of Trustees*, Docket No. 94-MBOT-978 (Feb. 29, 1996); *Foss v. Concord College*, Docket No. 91-BOD-351 (Feb. 19, 1993)." *Peacock/Stemple v. W. Va. Div. of Corrections*, Docket No. 01-CORR-542 (Jan. 15, 2002).

5. Respondent has met its burden in proving the charges against Grievant by a preponderance of the evidence.

6. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W.Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.,* Docket No. 00-23-202 (Jan. 31, 2001).

7. Grievant has failed to prove that the issuance of an oral warning was clearly excessive or an abuse of discretion. The oral warning ordered at Level One is affirmed.

8. In non-disciplinary actions, the Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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).

9. "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton,* 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See, Hanlon v.*

Chambers, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs.,* [*v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], *citing Kinzey v. Wal-Mart Stores, Inc.,*107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.,* Docket No. 02-ADMN-165 (Mar. 31, 2006).

10. This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 22 (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris, Harris,* 510 U.S. at 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (Apr. 23, 2009).

11. Grievant has failed to prove by a preponderance of the evidence that he has been subjected to a hostile work environment created by Respondent.

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 (eff. July 7, 2008).

DATE: June 13, 2012.

_____

Carrie H. LeFevre
Administrative Law Judge