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BLAINE BOLTON

v.

DOCKET NO. 90-DOH-022

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

DECISION

Grievant, Blaine Bolton, is employed by the Department of Highways (Department) as a highway laborer. Mr. Bolton filed a level one grievance on October 31, 1989 in which he stated "I am being suspended from my duties as a highway laborer in Upshur County for fifteen days starting November 6, 1989. I feel this suspension is without just cause. Relief; I seek my 15 days back with pay and to have all reference to this incident expunged from my personell (sic) file and in any other way be made whole." The matter was denied at levels one, two and three and a level four appeal was filed on January 22, 1990. An evidentiary hearing was conducted on February 22, 1990; neither party elected to submit proposed findings of fact and conclusions of law and the matter is now ready for decision.

By letter dated October 23, 1989 Joe L. Shelton, Director of Personnel, notified the grievant that, upon the recommendation of District Engineer Marvin Murphy, he would be suspended from his duties as a highway laborer for a period of fifteen working days, effective November 6 through November 27, 1989. The charge for the suspension was the grievant's failure to report to work or call in absent from September 18 through September 27, 1989. Testimony offered at level four establishes that the grievant was involved in Circuit Court proceedings on September 18, which resulted in his incarceration through September 27.

The grievant argues that he is being treated differently from other employees who, he claims, routinely complete leave slips upon their return to work. Further, the grievant asserts that he had advised Willis Kemper, who he perceived to be his immediate supervisor, that he would be in Court and that Kemper advised Hayes Cutright, County Supervisor, that he, the grievant, would not be at work one-half hour prior to the beginning of his shift as required by policy.

The Department asserts that the grievant did not comply with leave procedure even though he knew he would not report for work on September 18 and on September 18 he knew he would not be able to work through September 27. The Department argues that the suspension was warranted by the grievant's continued failure to report his absences and was in compliance with its progressive discipline policy.

Because the grievant had previously been issued a three-day suspension, a ten-day suspension was the next level of discipline.

Department of Highways "Administrative Operating Procedures," Vol. IX, Chapter 9, Revision #3, Section A(C)(I) provides

An "Application for Leave" (Form AL-505) will be completed for each period of time an employee requests annual leave. This form is to be initiated by the individual requesting annual leave and submitted to the approving authority in advance of the time requested for leave. Upon approval, the approving authority will sign and retain the AL-505. If not approved, the AL-505 will be so marked in the Remarks Section. Application for Leave forms will be utilized to aid in the preparation and certification of the DOH-12's. At the end of each pay period, each employee's Time Report will be verified to the Daily Attendance Record and the AL-505's. After verification, the AL-505 will be attached to the organization's copy of the Time Report of applicable employees and filed for future reference and/or audit. Each employee's absence must be documented by a Form AL-505.

In addition to this policy the Department submitted a copy of a posted notice which advised employees that "[y]ou must notify this office at least 1/2 hour before work time for sick leave. Notify office at least 24 hours before work time for vacation!" A handwritten notation indicates this notice has been posted several times.

During the level four hearing Mr. Murphy explained that he has delegated authority to county supervisors to grant leave requests and the grievant had made no such request of Mr. Cutright, although he had been previously counseled regarding the procedure. Mr. Cutright confirmed that the

grievant had not filed a request for annual leave prior to his absence. He indicated that Mr. Kemper had advised him on September 18 that the grievant would not be at work that day but that he did not confirm the grievant's whereabouts until Wednesday of that week.

Mr. Kemper, who was serving as crew leader on September 18, testified that he had been aware of the grievant's pending Court appearance two to three weeks in advance because the grievant had asked him about the possibility of securing a letter of recommendation from someone in authority to hopefully avert jail time. Mr. Kemper stated that the grievant did not ask him to complete a leave slip on his behalf and did not complete one himself. He stated that he had advised Mr. Cutright of the grievant's hearing and of the possibility that he would be sentenced to a jail term but that he, Kemper, had not given Mr. Cutright an exact date.¹ He specially recalled having told Mr. Cutright on the morning of September 18 that the grievant would not be at work that day due to the hearing.

The grievant has failed to show that the suspension resulted in his being treated differently than other employees. While leave forms completed after the fact support

¹The grievant notes that both Mr. Cutright and Mr. Kemper had given prior inconsistent testimony at level three relating to whether Mr. Kemper had notified Mr. Cutright of the grievant's absence; however, these facts have no bearing on the outcome of this decision.

the grievant's assertion that strict compliance with the written policy was not followed, their value is limited in that the involved employees did not offer testimony regarding these forms and because critical information, such as whether prior verbal approval was given, was not shown. Even if calling in annual leave was the accepted practice the grievant makes no assertion that he did call in, but rather he relies on the knowledge of his co-workers, in particular the crew leader, who provided information regarding grievant's absence to the county supervisor prior to the beginning of his shift as required by the notice. This reasoning is flawed on numerous points.

The grievant incorrectly designates Mr. Kemper as his immediate supervisor. The testimony of Mr. Kemper and Mr. Cutright was that Kemper's role of crew leader was similar to that of lead worker and did not involve administrative supervisory duties. Kemper specifically stated that he did not process leave requests. Mr. Cutright is the grievant's immediate supervisor and any requests were to be made to him. The fact that Mr. Kemper and other co-workers knew of grievant's absence is of no relevance in that they had no responsibility or authority regarding his leave. Finally, the fact that Mr. Kemper advised Mr. Cutright of the grievant's absence prior to the beginning of his shift was merely a coincidence and simply because Mr. Cutright was advised that the grievant would be absent prior to his shift

does not in any way change the fact that he failed to properly request leave time.

In summary, the grievant has failed to show that other employees failed to provide acceptable notice or to request annual leave prior to their absences or that they were not appropriately disciplined. The grievant has further failed in his attempt to show compliance with a system of informal notice and reporting which may have been in effect at the time.²

Having determined that the grievant was absent without receiving approval for leave time, the next issue is whether the fifteen-day suspension was properly imposed in compliance with the Department's progressive disciplinary policy. This policy, set forth in Vol. IX, Chapter 12, Revision #1 of the Department's "Administrative Operating Procedures," provides that repeated inexcusable offenses are subject to increasingly severe discipline beginning with an oral reprimand, proceeding to suspension and finally dismissal. Mr. Murphy testified that the grievant had been given an oral reprimand regarding his failure to report off work when

²The conclusion that a more informal practice of simply calling in a request for annual leave is somewhat supported by the grievant's disciplinary record. The written warning of October 21, 1988 states four times "...You did not report to work or call requesting any type of leave." The suspension notices of June 26 and October 2, 1989 both refer to the grievant's failure to report to work or to call in; however, the call-in procedure may have been applicable to sick leave only.

absent and documentation was submitted confirming that the grievant had been issued a written reprimand dated October 21, 1988, for failure to request leave on October 17 through 21, 1988. A three-day suspension was imposed in July 1989, for repeated offenses in May and June of that year. Therefore, when the grievant was again absent without approved leave in September Mr. Cutright recommended, and Mr. Murphy approved, the fifteen-day suspension giving rise to the instant grievance. This extended suspension was in compliance with Department policy which provides that a repetition of the same, or an occurrence of a similar, offense could call for more severe disciplinary action, with consideration given to such factors as the time between offenses, attempts to improve unacceptable behavior, overall work performance, improvement in attitude and penalties given to other employees for similar offenses. "Administrative Operating Procedures," Vol. IX, Chapter 12, Revision #1, Section III(B).

The suspension was also permissible under the more general provisions of the West Virginia Division of Personnel "Administrative Rules and Regulations," Section 13.03, which provides that

The appointing authority may, upon oral notice confirmed in writing or by written notice, suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a job related adverse impact. The suspension must be for a specific period of time, except where an employee is the subject of an indictment or other criminal proceeding. The person being suspended shall be allowed a reasonable time to reply thereto in writing, or upon

request to appear personally and reply to the appointing authority or deputy. The appointing authority shall file the statement of reasons for suspension and the reply with the Director of Personnel.

In addition to the foregoing it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. The grievant is employed by the Department of Highways as a highway laborer in Upshur County.

2. The grievant failed to report to work on September 18 through 27, 1989. The reason for his absence was a scheduled appearance in Circuit Court and a resultant ten-day jail sentence.

3. Although the grievant's co-workers knew of the grievant's Court appearance, he did not submit a request for annual leave, either in writing or verbally, with the county supervisor who is his immediate supervisor.

4. The grievant had previously received oral and written reprimands and a three-day suspension for similar absences without leave.

Conclusions of Law

1. Pursuant to the provisions of W.Va. Code §29-6A-6, the burden of proof in disciplinary matters rests with the

employer and the employer must meet the burden by proving the charges against an employee by a preponderance of the evidence. Martin v. W.Va. State Fire Commission, Docket No. 89-SFC-145 (Aug. 8, 1989); Gill v. W.Va. Department of Commerce, Docket No. COMM-88-031 (Dec. 23, 1988); Schmidt v. W.Va. Department of Highways, Docket No. DOH-88-063 (March 31, 1988).

2. The Department established that the grievant was absent without having requested leave time as is required formally, by policy, in writing, and informally, verbally, by practice.

3. The Department has also established that a fifteen-day suspension was in accordance with the progressive discipline policy set forth in its "Administrative Operating Procedures," inasmuch as it followed oral and written reprimands and a three-day suspension imposed for identical previous incidents.

4. The suspension was properly imposed under the W.Va. Division of Personnel Rules and Regulations, Section 13.03, which provides for such discipline "for cause" or conduct which has a job-related adverse impact.

Accordingly, the grievance is DENIED.

Either party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Barbour County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code §29-6A-7) Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED April 25, 1990

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER