THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ARRON FREEMAN,
Grievant,

v. **Docket No. 2015-1771-CONS**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Arron Freeman, is employed by Respondent, Division of Highways. Grievant filed three grievances alleging he had been suspended without good cause and requesting to be made whole including back pay, interest, and all benefits restored: June 30, 2015, assigned Docket No. 2015-1656-DOT; July 20, 2015, assigned Docket No. 2016-0063-DOT; and August 13, 2015, assigned Docket No. 2016-0135-DOT. The grievances were properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4).

A level three hearing was held on November 16, 2015, before the undersigned at the Grievance Board's Beckley, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Ashley Wright, Esq. and Krista D. Black, Esq.[1] During the hearing, the parties agreed that the grievances should be consolidated for purposes of hearing and decision. On November 19, 2015, the grievances were consolidated into the above-styled grievance. This matter became mature for decision on January 20, 2016,

[1] Ms. Black was the attorney of record in the grievances and submitted the Proposed Findings of Fact and Conclusions of Law. Ms. Black was unable to appear for the level three hearing and Ms. Wright substituted for Ms. Black at the hearing.

upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed as a Transportation Worker 2. Grievant protests his suspension for one and then two days for occurrences violating a previously-imposed leave restriction. Grievant cannot relitigate the imposition of the leave restriction as he previously filed a grievance, which was denied at level one that he did not appeal. Grievant was not denied due process as he was given clear written notice of the charges against him and written notice and an opportunity to respond and he failed to do so. Respondent proved Grievant violated his leave restriction on two occasions and was justified in suspending Grievant for one and then two days for this violation when Grievant had previously been disciplined for attendance issues. Accordingly, the 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 is employed by Respondent as a Transportation Worker 2 in District Nine.

2. Grievant is assigned to the District's gas house as an attendant. The gas house supplies fuel to Respondent's vehicles that are used in the field. The gas house is locked, and it is Grievant's responsibility to open the gas house in the mornings. If Grievant is tardy or absent without prior notice, it significantly impacts other employees who cannot get gas to perform their work.

3. Grievant's immediate supervisor at the time of the suspensions was Steve McCoy, who has since retired. Grievant had also been previously supervised by Scottie Miller, when Mr. Miller had been temporarily upgraded. Steven B. Cole, P.E., is the District Engineer and is responsible for the supervision of the entire district.

4. On July 23, 2012, Grievant received an Employee Performance Appraisal that rated him as "Fair, But Needs Improvement" to "minimize unscheduled leave to times of absolute need."

5. On April 9, 2013, Grievant received an Employee Performance Appraisal that rated him as "Meets Expectations," but noted that he "uses a great deal of leave time" and that he needed improvement in "Availability for Work."

6. On March 18, 2014, Grievant was placed on leave restriction. Grievant received the notice of leave restriction on Respondent's Form RL-444, which stated:

> For any disciplinary action, you are hereby given an opportunity to respond in writing or in person to the Agency Representative. If you desire to meet in person, an appointment has been scheduled for you on 3/27/2014 (date) at 8:30 a.m. (time) in District Nine HQ – Lewisburg WV (place). Written comments shall be made no later than five days after your receipt of this notice.

7. On March 27, 2014, Mr. Cole completed Respondent's Form RL-546, stating that Grievant had been given an opportunity to meet personally or give a written explanation and that "EMPLOYEE DID NOT SHOW."

8. A memorandum explaining the specifics of the leave restriction was attached to the March 18, 2014 Form RL-444, which Grievant acknowledged he received by his signature on March 20, 2014. The leave restriction required that annual leave for one day or less would require forty-eight hour advance notice and that leave requests for

more than one consecutive day would require one week advanced notice. It stated, "Annual Leave requested outside the usual and customary guidelines established by the organization will be unilaterally denied and considered Unauthorized Leave unless it is a documented emergency." Sick Leave would require the provision of a State of West Virginia Physician's/Practitioner's statement Form (DOP-L3). Family Sick Leave would require that the family member's physician verify Grievant's presence, also on the DOP-L3. No other document but the DOP-L3 would be accepted and failure to submit the DOP-L3 would be considered Unauthorized Leave.

9. The leave restriction was to remain in effect for a period of six months after receipt of the memorandum. Grievant signed the memorandum on March 20, 2014, so the leave restriction was to expire in September 2014.

10. On July 8, 2014, Grievant filed a grievance, assigned Docket No. 2015-0010-DOT, protesting a written reprimand and charge of two instances of unauthorized leave.

11. By letter dated August 13, 2014, the level one grievance evaluator in Docket No. 2015-0010-DOT stated that the parties had waived the grievance timeframes as Grievant's file had been referred to Respondent's Reasonable Accommodation Committee regarding his "tardiness issue." The grievance evaluator states further:

> The RL-544 dated June 30, 2014 has been "frozen" until the review has been completed. The RL-544 dated March 20, 2014 has been modified and the RL-544 dated June 16, 2014 will be removed from the Grievant's personnel file. Additionally, he will be reimbursed for the 15 minutes docked from his pay on June 16, 2014.

12. Drema Smith, Respondent's EEO Division Director sent Grievant a letter dated November 12, 2014, advising him that the EEO Division had "received information

from your organization that you may require modification of your work assignment due to medical reasons." The letter stated that if Grievant wanted to be considered for a reasonable accommodation under the Americans with Disabilities Act he must do three things:

> (1) complete the enclosed Request for Reasonable Accommodation form;
> (2) provide the agency with contact information identifying the healthcare provider(s) you have seen for the conditions(s) that prevent you from performing the essential functions of your job or that qualify you as disabled; and
> (3) sign the medical authorization release form, which allows the agency to contact the identified healthcare provider(s) for information about your conditions, and how it affects your ability to do your job, and how it qualifies you as disabled (see enclosed forms).

13. The letter specifically states that the completed forms must be submitted within two weeks to the attention of Raymond C. Patrick with the EEO Division.

14. The letter was sent by certified mail, the return receipt of which was signed by Carmen Spencer, Grievant's girlfriend with whom he resided.[2]

15. On December 3, 2014, Ms. Smith sent another letter, identical to the November letter with the addition of the words "FINAL NOTICE" in bold under the date.

16. The letter was sent by certified mail, the return receipt of which was signed by Carmen Spencer.[3]

17. Ms. Smith sent a final letter to Grievant on April 6, 2015. In the letter, she explains that Grievant had "submitted a DOP-L5 FMLA form dated September 9, 2014

[2] Respondent's exhibit of the letter and certified mail return receipt inexplicably redacted Grievant's address, so it is not clear where the letter was sent, but Grievant did not dispute that he received the letter.

[3] *Id.*

which indicated that you suffered from a medical condition and that you, therefore, may need to be considered for a reasonable accommodation to enable you to perform the essential function of your job." She states that Grievant's request was being denied because he had failed to respond to the November 12, 2014 and December 3, 2014 letters. Grievant was instructed that if he chose to reinstate his request he was to contact Mr. Patrick at the indicated number "or your district personnel office."

18. By letter dated June 23, 2015, Human Resources Division Director Kathleen C. Dempsey notified Grievant of the reinstatement of the March 2014 leave restriction stating:

> Due to the conclusion of the ADA review and referencing the correspondence from Sandra Castillo, Level One Grievance Evaluator, in the Abeyance letter dated August 13, 2014, the following actions are being effectuated as of the date of this letter.
>
> - The leave restriction presented to you on March 20, 2014 is now in full effect as outlined in your leave restriction and will be enforced for a period of three (3) months at which time your attendance will be reviewed to determine the extent of improvement.
> - The RL-544, Written Reprimand, dated June 16, 2014 has been removed from your personnel file and the 15 minutes leave time from that same date was credited back to you on August 8, 2014.
> - The RL-544, recommending a one (1) day suspension, dated June 30, 2014 has been reduced to a Written Reprimand.

19. On June 24, 2015, Grievant filed a grievance assigned Docket No. 2015-1628-DOT, grieving the "[i]mposition of stale leave restriction (from 3/20/14) and imposition of reprimand without good cause (from 6/30/14)."

20. On June 26, 2015, Grievant called in at 7:30 a.m. and said he overslept and would be late. On the same date, Grievant requested 1.25 hours of annual leave from

7:30 a.m. to 8:45 a.m. On June 29, 2015, Grievant's immediate supervisor disapproved the leave request stating that the leave restriction had been "put back in place." Grievant then applied for 1.25 hours of unpaid personal leave, which was also disapproved by his immediate supervisor.

21. On June 30, 2015, Mr. McCoy personally delivered a Form RL-544 notice to Grievant of Unauthorized Leave and a recommended one-day suspension for his tardiness on June 26, 2015, in violation of the March 18, 2014 leave restriction. Grievant refused to sign the notice. The notice also stated,

> For any disciplinary action, you are hereby given an opportunity to respond in writing or in person to the Agency Representative. If you desire to meet in person, an appointment has been scheduled for you on 7/7/2015 (date) at 9:00am (time) in DE / DM Office (place). Written comments shall be made no later than five days after your receipt of this notice.

22. On July 7, 2015, Mr. Cole completed Respondent's Form RL-546, stating that Grievant had been given an opportunity to meet personally or give a written explanation and that "EMPLOYEE FAILED TO APPEAR."

23. Only July 2, 2015, Grievant left work due to a broken tooth. On the same date he made application for leave with pay from 11:00 a.m. to 4:00 p.m. On July 9, 2015, Grievant's immediate supervisor disapproved the leave request stating that, per his conversation with Grievant on that date, Grievant had not gone to the doctor, that "he had [a] [t]ooth [i]ssue + was trying to ge[t] [d]entist [a]ppointment."

24. On July 9, 2015, Mr. McCoy personally delivered a Form RL-544 notice to Grievant of unauthorized leave, written reprimand, and a recommended two-day

suspension for his failure to submit a physician's statement in violation of the March 18, 2014 leave restriction. The notice also stated,

> For any disciplinary action, you are hereby given an opportunity to respond in writing or in person to the Agency Representative. If you desire to meet in person, an appointment has been scheduled for you on 7/20/2015 (date) at 9:00am (time) in District Nine HQ – Lewisburg WV (place). Written comments shall be made no later than five days after your receipt of this notice.

25. On July 17, 2015, the level one grievance evaluator consolidated Docket No. 2015-0010-DOT (written reprimand and two unauthorized leave charged under the leave restriction) and 2015-1628-DOT (reinstatement of the leave restriction and reprimand) into Docket No. 2015-1726-CONS.

26. On July 20, 2015, Mr. Cole completed Respondent's Form RL-546, stating that Grievant had been given an opportunity to meet personally or give a written explanation and that "EMPLOYEE FAILED TO APPEAR."

27. By letter dated July 13, 2015, Ms. Dempsey suspended Grievant for one day for unauthorized leave on June 26, 2015.

28. On August 6, 2015, the level one grievance evaluator dismissed Docket Number 2015-1726-CONS for Grievant's failure to appear for the scheduled level one conference and failure to provide any reason for his failure to appear. Grievant did not appeal.

29. By letter dated August 12, 2015, Ms. Dempsey suspended Grievant for two days for unauthorized leave on July 2, 2015 and the previous one-day suspension for unauthorized leave.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "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 argues that it proved the conduct at issue and that the suspensions were proper because Grievant was on notice regarding his attendance deficiencies. Grievant asserts that Grievant's supervisor was not credible, that he did not receive due process, and that Respondent did not have good cause to suspend Grievant.

This case involves significant relevant history regarding Grievant's attendance, but the only actions that are actually the subject of this grievance are the two suspensions for Grievant's alleged unauthorized leave on June 26, 2015, and July 2, 2015. Grievant does not dispute that he was late on June 26, 2015, or that he left early on July 2, 2015. Grievant argues that neither occurrence should have been considered unauthorized leave, because his June 26th absence was due to his medical condition and his July 2nd absence was excused. Grievant's contention regarding the June 26th absence is a legal argument, but his absence on July 2nd involves questions of fact.

Respondent's evidence regarding Grievant's absence on July 2nd consists of offered statements from Mr. McCoy in the remarks on the Application for Leave with Pay and in the Form RL-544. Mr. McCoy retired in July 2015, and was not subpoenaed or

called by either party to testify at level three. His statements on these documents are hearsay,[4] but reliable relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

Mr. McCoy stated on the Application for Leave with Pay and on the Form RL-544 that Grievant did not submit a Physician's Statement for the requested sick leave and that when Mr. McCoy questioned him, Grievant stated that the time off was spent trying to get a dental appointment for a broken tooth. Mr. McCoy made these statements in the ordinary course of his supervision. The statements were made on customary agency forms, which he signed and dated. Most importantly, although Grievant argued that Mr.

[4] "Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted." BLACK'S LAW DICTIONARY 722 (6th ed. 1990).

McCoy was not credible in general, Grievant does not appear to actually dispute these particular statements made by Mr. McCoy.

Grievant's testimony on this issue, in its entirety, is as follows:

> I had broke my tooth off and told him that I needed to try to get an apt set up to get what was left taken out. I was told that if I presented the documentation from the dentist that I had made an appointment that it would be dismissed and, which I did do that.
>
> . . .
>
> I take all my information that I bring from the dentist the doctor wherever and I make a copy and just hand it to the secretary.
>
> . . .
>
> Mr. McCoy wasn't there, Mr. Campbell was. I was told that I needed to get that paper so when I went to the dentist for the first trip for them to do x-rays and everything they [unintelligible] the paper. And I did have the appointment. I had two papers when they came back. I turned them both in. I was paid for the 4.5 hours but I was still suspended.

Grievant does not actually say that he went to the dentist on the day he took his sick leave. He does not actually say that he had his dentist complete the DOP-L3, Physician's Statement, as was required by his leave restriction. Grievant's testimony is quite confusing, but it appears that a Mr. Campbell, not Mr. McCoy, is actually the person who supposedly told Grievant that he could get proof that he had made an appointment, presumably in place of the DOP-L3. Grievant makes no explanation of who Mr. Campbell is, or why he would have had the authority to allow Grievant to ignore the requirements of his leave restriction. Further, although Grievant testified that he made a copy of the information that he provided to the secretary from his dentist, he did not submit any

documents at the level three hearing. Therefore, Mr. McCoy's hearsay statements are reliable and entitled to weight.

Grievant did not grieve the original imposition of the leave restriction in March 2014. He first filed a grievance regarding his attendance on July 8, 2014, when he received two charges of unauthorized leave and a written reprimand. When the level one grievance evaluator heard of Grievant's assertion that his attendance issues were due to a medical cause, she placed the grievance and leave restriction in abeyance to allow for a review of whether Grievant was entitled to reasonable accommodation under the Americans with Disabilities Act. Grievant failed to cooperate with the review process and a reasonable accommodation was not granted, so the leave restriction was reinstated. Grievant filed a second grievance protesting the reinstatement of the March 2014 leave restriction and the imposition of the reprimand from June 2014. The level one evaluator consolidated the two grievances and held a level one conference, which Grievant failed to attend. The consolidated grievance was denied, and Grievant did not appeal. Relitigation of the leave restriction is now barred by *res judicata*. "[T]he preclusion doctrine of *res judicata* may be applied by an administrative law judge to prevent the 'relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated.' *Liller v. W. Va. Human Rights Comm'n*, 180 W. Va. 433, 376 S.E.2d 639 (W. Va. 1988). *See also Boyer v. Wood County Bd. of Educ.*, Docket No. 95-54-309 (Sept. 29, 1995); *Peters v. Raleigh County Bd. of Educ.,* Docket No. 95-41-035 (Mar. 15, 1995)." *Ashley v. W. Va. Bureau of Senior Serv./Div. of Personnel*, Docket No. 00-BSS-506 (Aug. 1, 2000).

At the time of the absences, the leave restriction had been reinstated after Grievant had been given an opportunity to provide evidence of his medical condition that would excuse his tardiness, which Grievant failed to provide. However, Grievant asserts he was denied due process because he had not been notified that the leave restriction had been reinstated prior to his tardiness on June 26, 2015. Ms. Dempsey reinstated the leave restriction by letter dated June 23, 2015. Although the letter was not sent by certified mail, and Grievant's address was redacted, Grievant more likely than not had received the letter because he filed a grievance protesting the reinstatement of the leave restriction on June 24, 2015. Since he filed his grievance on June 24, 2015, protesting the leave restriction, he clearly knew when he was tardy on June 26, 2015, that the leave restriction had been reinstated.

Grievant also argues that he was denied due process in that Respondent's predetermination procedure is "inadequate and flawed." Respondent uses Form RL-544 for all disciplinary actions and it contains a note, which states as follows:

> For any disciplinary action, you are hereby given an opportunity to respond in writing or in person to the Agency Representative. If you desire to meet in person, an appointment has been scheduled for you on _____ (date) at _____ (time) in _____ (place). Written comments shall be made no later than five days after your receipt of this notice.

The two meetings regarding Grievant's suspensions were scheduled at headquarters, which Grievant testified was only about a half mile away from his work location. Grievant failed to attend either meeting and offered no reason for why he did not attend.

> The essential requirements of due process are notice and an opportunity to respond. The opportunity to present reasons either in person or in writing, why proposed action should not be taken is a fundamental requirement. (citation omitted) The tenured public employee is entitled to oral or written notice of

> the charges against him, an explanation of the employer's evidence and an opportunity to present his side of the story . . . . To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985). Respondent's Form RL-544 gave Grievant clear written notice of the charges against him and written notice of the time and place of the meeting where he could respond to the charges, or to respond in writing. Grievant choose not to attend the meeting and offered no reason for why he chose not to attend the meeting. Grievant's failure to avail himself of his rights is not Respondent's responsibility. Grievant was not denied due process.

Respondent proved it had good cause to suspend Grievant for the two instances of unauthorized leave. Grievant had received notice that the leave restriction had been reinstated. The leave restriction clearly requires advance notice of all annual leave requests, that sick leave requests would require the provision of a State of West Virginia Physician's/Practitioner's statement Form (DOP-L3), that no other document but the DOP-L3 would be accepted and failure to submit the DOP-L3, and that violation of the leave restriction would result in a charge of unauthorized leave and further disciplinary action. Grievant did not comply with the requirements of the leave restriction, and had been previously disciplined for attendance issues. Respondent's imposition of a one-day suspension for the June 26, 2015 occurrence and a two-day suspension for the July 2, 2015 occurrence was justified.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "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*.

2. "[T]he preclusion doctrine of *res judicata* may be applied by an administrative law judge to prevent the 'relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated.' *Liller v. W. Va. Human Rights Comm'n*, 180 W. Va. 433, 376 S.E.2d 639 (W. Va. 1988). *See also Boyer v. Wood County Bd. of Educ.*, Docket No. 95-54-309 (Sept. 29, 1995); *Peters v. Raleigh County Bd. of Educ.,* Docket No. 95-41-035 (Mar. 15, 1995)." *Ashley v. W. Va. Bureau of Senior Serv./Div. of Personnel*, Docket No. 00-BSS-506 (Aug. 1, 2000).

3. Grievant previously grieved the leave restriction, which was denied at level one and not appealed, so Grievant cannot relitigate the imposition of the leave restriction.

4. In order to receive due process, the grievant must be provided with notice and an opportunity to respond.

> The essential requirements of due process are notice and an opportunity to respond. The opportunity to present reasons either in person or in writing, why proposed action should not be taken is a fundamental requirement. (citation omitted) The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence and an opportunity to present his side of the story . . . . To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985).

5. Grievant was not denied due process as he was given clear written notice of the charges against him and written notice and an opportunity to respond and he failed to do so.

6. Respondent proved Grievant violated his leave restriction on two occasions and was justified in suspending Grievant for one and then two days for this violation when Grievant had previously been disciplined for attendance issues.

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: May 23, 2016

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Billie Thacker Catlett
Chief Administrative Law Judge