THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MATTHEW JOHNSON,
Grievant,

v. **Docket No. 2017-1555-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Matthew Johnson, is employed by Respondent, Division of Highways. On January 25, 2017, Grievant filed this grievance against Respondent stating, "Discipline & restriction without good cause (Jan 10, 11, 12, 19 & 20)." For relief, Grievant seeks "[t]o be made whole in every way including removal of all discipline/restriction."

Following the March 27, 2017 level one conference, a level one decision was rendered on April 18, 2017, denying the grievance. Grievant appealed to level two on April 20, 2017. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on May 29, 2017. On June 14, 2018, Respondent, by counsel, filed *Respondent's Motion to Dismiss*. A level three hearing was held on June 18, 2018, before the undersigned at the Grievance Board's Charleston, West Virginia office. At the beginning of the level three hearing, the parties announced their agreement that the motion to dismiss would be withdrawn and that all issues other than the charge of unauthorized leave usage on January 10, 2017, were moot. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Keith A. Cox. This matter became mature for decision on

August 20, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").[1]

Synopsis

Grievant is employed by Respondent as a Transportation Worker II Equipment Operator. Grievant was denied his application for four hours of emergency annual leave and disciplined for unauthorized leave for failing to provide twenty-four hours of notice for his emergency leave. Respondent had no written policy or procedure requiring twenty-four hours of notice for requesting emergency leave and it is unreasonable to require twenty-four hours of notice for emergency leave. Respondent failed to prove that disciplining Grievant for failing to provide twenty-four hours of notice for his emergency leave was justified. Accordingly, the grievance is granted.

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 II Equipment Operator, stationed in the Cabell County garage within District Two.

2. Grievant's supervisor during the relevant time-period was Robert Mantzel.

3. On January 9, 2017, Grievant was informed that his elderly father, who is oxygen-dependent and unable to drive, had been evicted from his home. As a result,

[1] PFFCL were due to be submitted by July 18, 2018, but was extended to July 30, 2018, by the request and agreement of the parties. The parties thereafter jointly requested a second extension of time in which to file PFFCL, which was granted and extended to August 20, 2018.

Grievant would need to help his father move into a federally-funded placement in low-income housing the next day, as Grievant's father was homeless due to the eviction.

4. On the same day, Grievant contacted his crew leader to request time off for the next day, January 10, 2017, to move his father. Grievant believed he could accomplish the move in half of a day, so requested only four hours time off for the morning of January 10, 2017.

5. Grievant's crew leader contacted Mr. Mantzel, who approved the leave.

6. On January 10, 2017, Grievant determined that, because of an unexpected amount of paperwork involved with the move, the move would take the entire day. At approximately 10:00 a.m. Grievant reported to his workplace and submitted an *Application for Leave with Pay* for the entire day of January 10, 2017. Grievant dated the application for January 9, 2017, but the application for the entire day was not made until January 10, 2017, so it appears Grievant either backdated the application or made a mistake in writing the date.

7. Mr. Mantzel believed Grievant was required to provide twenty-four hours advanced notice to request annual leave based on the explanation of the previous supervisor, but, as a new supervisor, was unsure what to do about Grievant's application. Mr. Mantzel reviewed the issue with district human resources personnel and determined that Grievant's request for the additional four hours of leave for the remainder of the day on January 10, 2017, was unauthorized.

8. On January 12, 2017, Mr. Mantzel changed the application for leave to reflect only the four hours of annual leave that was approved on January 9, 2017.

9. On January 19, 2017, Mr. Mantzel issued a West Virginia Department of Transportation Form RL-544, Notice to Employee to Grievant that he was taking disciplinary action for Grievant's unauthorized leave.

10. In a Record of Significant Occurrence of the incident, Mr. Mantzel stated, "Mr. Johnson did not give adequate notification (24 hours) prior to taking leave time."

11. Leave for Respondent's employees is governed by the *West Virginia Department of Transportation Administrative Procedures* Volume II Chapter 10 Section V, the relevant portion of which requires employees to "obtain approval of the immediate supervisor for unplanned leave (such as personal emergencies and sick leave) at least by the organization's established reporting time (the time by which employees must call in for unexpected absences, set at the organization manager's discretion). . ."

12. The Cabell County garage did not have a written policy or procedure for how employees were to report unexpected absences.

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), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Respondent asserts the charge of unauthorized leave is justified because Grievant did not seek approval or obtain approval for the additional four hours of annual leave prior to taking the leave. Grievant asserts he did request leave on the morning of January 10, 2017, and was not informed that leave would be denied.

Respondent's policy requires employees to "obtain approval of the immediate supervisor for unplanned leave (such as personal emergencies and sick leave) at least by the organization's established reporting time (the time by which employees must call in for unexpected absences, set at the organization manager's discretion). . ." In its PFFCL, Respondent asserts Grievant did not speak to Mr. Mantzel when he came to the garage on the morning of January 10, 2017, and that Grievant "wasn't asking" to take leave. While it is true Grievant testified "I wasn't asking. I turned in my information trying to do the right thing and I had a situation I had to handle, you know. There was no time for me to sit around," Mr. Mantzel, when asked if Grievant had turned in his leave slip on January 10, 2017, stated, "Yes…sometime that morning, and I looked at it and said 'I don't know if I can approve this because your request was for four hours, not eight.'" This testimony indicates Grievant did speak with Mr. Mantzel. Regardless, it is clear from the *Record of Significant Occurrence* that Grievant was disciplined, not for failing to ask for leave, but for failing to give twenty-four hours notice prior to taking leave.

Respondent asserts the Cabell County garage has an unwritten policy requiring employees to provide at least twenty-four hours of notice before taking leave. Grievant disputes this assertion, stating that the usual practice for an emergency request was to call to request leave as soon as the emergency was known. Grievant denied that twenty-four hours' notice had been required, pointing out that there had never been any

communication of this in writing, and that he had had six different supervisors since he began employment at the Cabell County garage. Respondent offered as proof of the existence of the alleged unwritten policy the hearsay testimony of Mr. Mantzel that the previous supervisor informed him of the policy, and the conclusory testimony of District Two Human Resources Manager, Kathleen Dempsey, that the policy existed and was "common" throughout DOH. In the absence of a written policy, this testimony is insufficient to prove that Grievant was required to provide twenty-four hours of notice before taking leave.

Further, as a practical matter, a twenty-four-hour-notice requirement for emergency leave is unreasonable and illogical. "Emergency" is defined as "an unexpected situation or sudden occurrence of a serious and urgent nature that demands immediate action." THE AMERICAN HERITAGE DICTIONARY 448 (2nd College Edition 1991). Emergencies are unexpected and sudden, by definition, which means that giving twenty-four hours' notice is going to be impossible in many situations.

Respondent does not dispute Grievant's stated explanation for needing emergency leave, and Grievant's explanation of the situation certainly seems to qualify as an emergency to the undersigned. Grievant did not know he needed additional leave until the morning of January 10, 2017, and Grievant came to the garage and requested leave as soon as he realized he would need to take additional leave because of the unanticipated amount of paperwork required to move his homeless, disabled father into federally-funded low-income housing. Therefore, Respondent has failed to prove that disciplining Grievant for failing to provide twenty-four hours of notice for his emergency leave 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), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. Respondent failed to prove that disciplining Grievant for failing to provide twenty-four hours of notice for his emergency leave was justified.

Accordingly, the grievance is **GRANTED**. Respondent is ORDERED to remove all references to discipline for unauthorized leave for January 10, 2017, including the related *Record of Significant Occurrence*, and to pay Grievant four hours of annual leave.

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 (2018).

DATE: September 18, 2018

_____

Billie Thacker Catlett
Chief Administrative Law Judge