

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JAMES WILLIAMS,  
Grievant,**

**v.**

**Docket No. 2018-0766-DHHR**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/  
JACKIE WITHROW HOSPITAL,  
Respondent.**

**DECISION**

Grievant, James Williams, is employed by Respondent, Department of Health and Human Resources/Jackie Withrow Hospital. On November 29, 2017, Grievant filed this grievance against Respondent stating, "Charged with unauthorized leave." For relief, Grievant seeks "[t]o be whole in every way including payment with interest and benefits restored."

Following the March 5, 2018 level one hearing, a level one decision was rendered on March 23, 2018, denying the grievance. Grievant appealed to level two on March 28, 2019. Following mediation, Grievant appealed to level three of the grievance process on August 18, 2018. On January 2, 2019, the parties jointly requested that the grievance be submitted on the lower level record, which was permitted by order entered January 4, 2019. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Mindy M. Parsley, Assistant Attorney General. This matter became mature for decision on February 22, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").

## **Synopsis**

Grievant is employed by Respondent as a Plumber. Grievant grieves a charge of unauthorized leave that resulted in the docking of his pay and ineligibility for two paid holidays. Respondent asserts Grievant's leave request was denied, which Grievant disputes. Although corroborating evidence was allegedly available, it was not presented, leaving the proof of the charge to the credibility of Grievant and his supervisor. Respondent failed to meet its burden to prove that the disciplinary action taken was justified when proof relied on witness credibility and it cannot be found that Respondent's witness was more credible than Grievant. 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 Plumber in the Maintenance Division and has been so employed since 2014.
2. Angela Booker is the Chief Executive Officer of Jackie Withrow Hospital and represented Respondent during the level one hearing.
3. Joseph Wickline is Grievant's supervisor. Joseph Wickline is the Assistant Supervisor of the Maintenance Division but at all relevant times was the acting Supervisor of the Maintenance Division.
4. Grievant and Mr. Wickline had both applied for the Supervisor position, which was awarded to another individual. Grievant grieved his non-selection for the position. The grievance was granted in part and denied in part with the Grievance Board ordering Respondent to repost the position.

5. The successful candidate served in the position only a few months before resigning. At that time, CEO Booker appointed Mr. Wickline as acting Supervisor. Mr. Wickline has served as the acting Supervisor on a temporary upgrade since April 2017 despite the Grievance Board's decision ordering Respondent to repost the position within 30 days of receipt of the June 28, 2017 decision, which was not appealed or stayed.

6. On November 20, 2017, Grievant gave Mr. Wickline a completed *Application for Leave with Pay* form requesting annual leave for November 21, 2017 and November 22, 2017. Mr. Wickline did not inform Grievant that his leave was not approved.

7. November 23, 2017 and November 24, 2017 were holidays.

8. On November 20, 2017 Assistant Administrator Aimee Bragg instructed Mr. Wickline to review the annual evaluations with his employees that day. Mr. Wickline attempted to meet with Grievant in the afternoon but did not see Grievant until after Grievant had clocked out for the day. Grievant stated he didn't have time to meet with Mr. Wickline and left.

9. On November 27, 2017, at 4:20 p.m., Mr. Wickline sent Assistant Administrator Bragg an email explaining why Grievant's evaluation had not been turned in to her on November 20, 2017. In the email, Mr. Wickline asserts that he denied Grievant's request for leave when Grievant requested it earlier in the day, that Grievant had refused to meet with Mr. Wickline earlier in the day and had cursed at him, that Mr. Wickline had informed Grievant again that his leave was not approved, and that other employees overheard this conversation.

10. By letter dated November 28, 2017, Assistant Administrator Aimee Bragg notified Grievant that he was being charged with unauthorized leave for November 21, 2017 and November 22, 2017, for which his pay would be docked, and that Grievant would not be paid for the November 23, 2017 and November 24, 2017 holidays. The letter further stated that Grievant's "failure to contact your supervisor to request approval for leave or report to work as expected is misconduct for which disciplinary action is taken." Although the letter does not specifically state what level of discipline was being imposed, it is clear Respondent considered the letter to be a disciplinary action.

### **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 (2018). "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 Mr. Wickline's testimony is more credible than that of Grievant and asserts that its actions complied with its employee handbook and the Division of Personnel's administrative rules. Grievant asserts Respondent failed to meet its burden of proof, that the charge of unauthorized leave and discipline were retaliatory, and that Grievant's due process rights were violated.

Leave is governed by the Division of Personnel's administrative rules, which state:

Accrued annual leave shall be granted at those times that will not materially affect the agency's efficient operation or when

requested under the provisions of the Parental Leave Act or FMLA. The employee shall request annual leave in advance of taking the leave except as noted elsewhere in this subdivision or, for unplanned annual leave, submit the leave request immediately upon return to work or, in cases of extended periods of leave, as directed by the appointing authority. Annual leave may not be granted in advance of the employee's accrual of the leave.

W. VA. CODE ST. R. § 143-1-14.3.c (2016). Although the disciplinary letter stated there was a policy governing requesting leave, the letter does not specifically name the policy and no policy was introduced as evidence at level one. Respondent, in its PFFCL, also argued the application of certain provisions of the employee handbook, which also may not be considered as the handbook was not introduced as evidence at level one.

The facts surrounding Grievant's request for leave are in dispute. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness;

and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

As the parties chose to submit the grievance for decision on the lower level record, the credibility assessment must be made based on the evidence presented at level one. As to the testimony presented at level one, only the written transcript of the testimony is available for review. The level one hearing examiner's observations regarding the demeanor of the witnesses is not evidence and cannot be considered.

The only witnesses called to testify at level one with direct knowledge of the disputed issue were Grievant and Mr. Wickline. Grievant and Mr. Wickline's testimony differs almost entirely. Grievant testified that, at 9:30, right before morning break, he handed Mr. Wickline the leave form, told him he needed off for a family issue "and there was nothing said." Grievant testified that there was nothing out of the ordinary, that employees don't get signed leave forms back, and that employees were not required to wait for the signed form before going on leave. Grievant testified he then received a text message from Mr. Wickline at 2:00 p.m. to come to his office before the end of the day, but that he did not see the text until 4:00 p.m., when he had already clocked out for the day. Grievant went to Mr. Wickline's office and Mr. Wickline stated he needed to go over Grievant's evaluation, to which Grievant replied, "Joe, I ain't got time for this." Grievant specifically denied that Mr. Wickline told him the leave request was denied. Mr. Wickline testified that, between 12:30 p.m. and 12:35 p.m., Grievant came in to Mr. Wickline's office and laid the leave form on Mr. Wickline's desk, that Mr. Wickline picked it up, looked at it, and told Grievant that he could not grant it. Mr. Wickline also testified that when he saw Grievant at the end of the day Grievant would not let Mr. Wickline hand him the

denied leave form, that Grievant cursed at him, walked out of Mr. Wickline's office, and that Mr. Wickline followed Grievant out into the hallway and told him the time was not approved and that Grievant was to report to Mr. Wickline's office first thing the next morning. Mr. Wickline testified that he always tells employees to wait for approval.

Both Grievant and Mr. Wickline have interest and bias in this matter. Grievant is attempting to have his leave and holiday pay restored. Grievant has opposed Mr. Wickline's appointment as the acting Supervisor and is serving in that position despite Grievant's successful grievance, which ordered that position be reposted. Mr. Wickline's testimony is consistent with his November 27, 2017 email to Ms. Bragg, but there was no explanation offered why Mr. Wickline didn't send the email soon after the alleged incident but waited three business days.

As to plausibility, without other evidence to the contrary that should have been readily available but was not presented, Grievant's assertion that verbal or written approval for leave was not generally given is plausible. Mr. Wickline's account is also mostly plausible, although Mr. Wickline testified that he had unequivocally denied Grievant's leave request, yet he further testified that he wanted to meet with Grievant at the end of the day to go over his evaluation and "discuss the L1 at hand and – and he – he would not." If Mr. Wickline had unequivocally denied Grievant's leave request earlier in the day, why would he need to discuss it again at the end of the day?

As to corroborating evidence, CEO Booker insinuated that Grievant had previously taken leave without approval for which he had been disciplined and had been informed that leave must be approved, which Grievant denies. Respondent failed to present evidence of this discipline, which would have established that Grievant knew he had to

have leave specifically approved. Further, Mr. Wickline's email and the statements made by CEO Booker during the level one hearing indicate that other employees overheard the afternoon conversation, but none were called to testify.

As Respondent failed to present corroborating evidence, the determination of this case rests solely on the credibility of the parties. Given the limited information in the level one record, it cannot be said that Mr. Wickline is more credible than Grievant. Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Therefore, Respondent has failed to prove it was more likely than not that Mr. Wickline told Grievant his leave was not approved and cannot meet its burden to prove that the disciplinary action taken was justified. As Respondent has failed to meet its burden of proof, it is not necessary to address the other defenses raised by Grievant.

As to Respondent's failure to post the position as ordered by the Grievance Board, such cannot be addressed in this decision. "The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court of Kanawha County." W. VA. CODE § 6C-2-5(a). "Any employer failing to comply with the provisions of this article may be compelled to do so by a mandamus proceeding and may be liable to a prevailing party for court costs and reasonable attorney's fees to be set by the court." W. VA. CODE § 6C-2-7.

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 (2018). "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. Leave is governed by the Division of Personnel's administrative rules, which state:

Accrued annual leave shall be granted at those times that will not materially affect the agency's efficient operation or when requested under the provisions of the Parental Leave Act or FMLA. The employee shall request annual leave in advance of taking the leave except as noted elsewhere in this subdivision or, for unplanned annual leave, submit the leave request immediately upon return to work or, in cases of extended periods of leave, as directed by the appointing authority. Annual leave may not be granted in advance of the employee's accrual of the leave.

W. VA. CODE ST. R. § 143-1-14.3.c (2016).

3. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher & William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider:

1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

4. Respondent failed to meet its burden to prove that the disciplinary action taken was justified when proof relied on witness credibility and it cannot be found that Respondent's witness was more credible than Grievant.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to pay Grievant annual leave for November 21, 2017 and November 22, 2017 and to pay Grievant holiday pay for November 23, 2017, and November 24, 2017, plus interest.

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: April 3, 2019**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**