JERRY SMITH, .

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Grievant, .

.

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v. . Docket No. 93-CORR-538

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WEST VIRGINIA DEPARTMENT OF .

PUBLIC SAFETY / DIVISION OF .

CORRECTIONS at Huntington .

Work/Study Release Center .

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Employer. .

D E C I S I O N

Jerry Smith (hereinafter Grievant) was dismissed from his employment at the Huntington Work/Study Release Center, on December 28, 1993, for his unauthorized absence from work on the evenings of December 8, 9, 10 and 11, 1993. Grievant filed the instant complaint challenging his dismissal at level four of the Grievance Procedure for State Employees, W.Va. Code §29-6A-1 et seq., on December 27, 1993. A hearing was held on February 1, 1994, and the case became mature for decision thereafter. The following facts are deduced from the record.

Findings of Fact

1. Grievant was employed as a Correctional Officer I until his dismissal.
2. On Wednesday, December 8, 1993, Grievant called work, spoke to another correctional

officer and told him that he would not be coming to work until further notice.

3. Grievant did not report to work on December 9, 10 or 11, 1993.

4. Grievant spoke with Administrator Ray Swecker over the phone on December 13, 1993, concerning his absence but did not provide any substantial reason for his failure to report to work the previous days.

5. Mr. Swecker recommended that Grievant be terminated from employment due to his unauthorized absence for four days.

6. Grievant had been verbally counseled regarding his use of sick leave on July 12, 1993. He was also given a written warning on September 13, 1993 for abuse of sick leave; at that time, he was informed that he would be required from then on, pursuant to the West Virginia Division of Personnel's (hereinafter Personnel) regulations, to provide a physician's statement for each time he used sick leave. Grievant was suspended for three days on October 6, 1993, for not complying with this directive. Grievant was suspended without pay for eighteen days for having abandoned his post on October 2, 1993, and also for not providing a physician's statement corresponding to his absence on October 4 and 6, 1993.

7. At the level four hearing, Grievant produced a physician's statement, dated December 21, 1993, which states "Pt. under physician's care, December 8th --> 12th, 1993." This statement was from the office of Dr. Leonard A. Fichter, general surgeon.

8. Grievant was involved in a car accident on or about the first week of November, 1993, in which he received a laceration on his scalp. Grievant had outpatient surgery for this injury during the first week of December. Grievant last saw Dr. Fichter on December 7, 1993.

Discussion

In cases dealing with disciplinary matters, the burden of proof rests with the employer to prove the charges by a preponderance of the evidence. Schmidt v. W.Va. Dept. of Highways, Docket No. DOH-88-063 (March 31, 1989). In the instant case, Grievant does not dispute that he was absent from work on December 8 through 11, 1993. He simply contends that his dismissal was improper because he was under a physician's care during that time. (See footnote 1) Respondent contends that Grievant's dismissal was warranted under its progressive disciplinary policy, Policy Directive 400, due toGrievant's failure to produce a physician's statement corresponding to his use of sick leave for the

dates in question. (See footnote 2)

Personnel's Administrative Regulation, Section 16.04(g), states that "[i]mmediately upon return to work, an employee shall furnish a written statement from the attending physician for all consecutive days of sick leave granted beyond three working days." Further, Section 16.05 states "When an employee appears to have a pattern of leave abuse, the appointing authority may request appropriate substantiation of the employee's claim for leave, for example, verification of illness less than three days." Here, Respondent had notified Grievant that he was to provide physician statements substantiating all leave due to illness for the period of six months from September 13, 1993. Respondent was justified in imposing this requirement upon Grievant based upon his past work record.

Grievant did not comply with this requirement corresponding to his absence December 8 through 11. The evidence establishes that Grievant never attempted to explain the reason for his absence on the dates in question even though he had an opportunity to do so on the telephone to Mr. Swecker on December 13, 1993. Further, only at the hearing in this matter was a physician's statement ever produced by Grievant, and then, the statement produced was prepared December 21, 1993. Perhaps above all, proper inferences drawn from Grievant's testimony lead to the conclusion that he was able towork after he had a follow-up visit with the Dr. on December 7, 1993, and that he simply obtained the physician's statement after-the-fact in order to keep his job. Grievant's presentation of the physician's statement into evidence at the hearing cannot support an overturning of his dismissal since he did not present the statement to his employer prior to his dismissal.

The foregoing discussion of the facts of the case and of the law applicable to those facts is hereby supplemented by the following appropriate conclusions of law.

Conclusions of Law

1. Pursuant to Respondent's progressive disciplinary policy, Policy Directive 400, it was justified in dismissing Grievant from his employment for an unauthorized absence of four days. Grievant committed what is classified as a "Class B" offense under said Policy and the recommended punishment for a third violation of a "Class B" offense is dismissal.

2. Grievant's admission of a physician's statement into evidence at the hearing in this matter, in order to substantiate that he was actually under a physician's care during the dates of his absence

from work, is not deemed to be compliance with the duty imposed upon him by his employer to verify his use of sick leave. Therefore, Respondent had good cause to terminate his employment.

3. Respondent has proven the charges upon which Grievant's dismissal was based by a preponderance of the evidence. Schmidt.

Therefore, this grievance is hereby **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

May 17, 1994

Footnote: 1 The dismissal letter was dated December 16, 1993. Grievant was given a fifteen day notice period for which he could work, making his dismissal effective December 31, 1993. Grievant was ultimately dismissed on December 28, for having reported to work under the influence of alcohol and sleeping while on duty that day. Grievant has not challenged this administrative action.

Footnote: 2 Throughout the hearing, reference was made to Grievant's alleged alcohol abuse problem. Grievant has made no claim that his dismissal should be vacated based upon this alleged illness.