STUART MCALLISTER,

Grievant,

v. DOCKET NO. 94-RS-270

DIVISION OF REHABILITATION SERVICES,

Respondent.

D E C I S I O N

Grievant, Stuart McAllister, filed this grievance at Level IV on July 11, 1994, protesting his dismissal from Respondent, Division of Rehabilitation Services, and requesting reinstatement, backpay plus interest, all references removed from his file, and to be made whole in every way. A hearing was held at Level IV on October 24 and 25, 1994, and the parties submitted proposed findings of fact and conclusions of law on or about November 14, 1994. The following findings of fact are derived from the evidence, testimony and briefs submitted by the parties.

Findings of Fact

1. Respondent's Disability Determination Section is regulated by the Federal Social Security Administration ("SSA") and is 100% federally funded. SSA dictates the workload, provides the funding to accomplish the goals of the agency, and specifies the expected performance levels of the division. Respondent isresponsible for the day-to-day management of the division. R Ex. 1.

2. Grievant was employed by Respondent as a Disability Evaluation Specialist from February 18, 1992 until July 15, 1994.

3. Grievant was a Disability Evaluation Trainee for the first year of his employment with Respondent. Trainees are expected to produce an average of 8 cases per week with a minimum 91% quality rating for three months before they can be promoted to Disability Evaluation Specialist ("DES"). Trainees receive priority treatment in processing their cases so that the supervisors can more completely evaluate their progress.

4. Grievant's trainee supervisor, Beverly Howard, evaluated Grievant at the end of his one-year training period on January 20, 1993. Grievant received an overall rating of 3.2 with 3 representing "Adequate Performance". (Gr. Ex. 7). Grievant did not score below a 3 in any of the 10 job performance categories, including production.

5. Following his one-year training period, and after producing 8 cases per week with acceptable quality ratings for three months, Grievant was promoted to a DES.

6. It is expected that an employee's production will "slump" for a short period after being promoted from trainee to DES because they no longer receive priority treatment in processing their cases and the production standard is increased to 10 cases per week with a minimum 91% quality rating.

7. This production number is arrived at by looking at what local DES' have produced for the past 2-3 years, and at Federal productivity data comparing DES' performance in other parts of the country. Based on these factors, Respondent determines what is a reasonable production expectation for its DES'. R Exs. 2, 4.

8. Based on the determination of reasonable production expectations, Jane Johnstone, DDS Director, issued performance evaluation standards for DES', including job knowledge, planning and organizing, work quantity, work quality, communication ability, attitude toward work, working with others, judgment, initiative, and dependability. R Ex. 3.

9. Following Grievant's promotion to DES in February, 1993, Grievant and Ms. Howard had discussions "almost weekly" regarding his production. Grievant was only producing 5 to 6 cases per week instead of the acceptable standard of 10 cases per week, even after the expected "slump" in production following promotion.

10. Ms. Howard counseled Grievant informally and offered assistance to increase his production. Grievant was also at risk of being put on "high risk review" for the number of quality errors in his case processing. Grievant was not keeping up his diary and not making timely follow-ups on his cases.

11. Ms. Howard and her supervisor, Area Administrator Tom Davis, met with Grievant in May, 1993, to discuss Grievant's untimely case actions and failure to use a diary to document needed case action. R Ex. 19.

12. Ms. Howard performed random case reviews of Grievant's files and recommended actions

that needed to be taken to ready them for decision. However, upon further review, Ms. Howard found that the cases sat on Grievant's bookcase with no action taken for months.

13. Ms. Howard issued Grievant a formal performance memorandum on October 13, 1993 setting forth the above observations and informing him that she would review his performance again in December, 1993 and that if his work had not improved to a satisfactory level, further corrective action would be taken. R Ex. 9.

14. Beginning in the summer of 1993, Grievant began taking excessive annual and sick leave, amounting to 274 hours or 34.25 work days by September, 1993. Grievant attributed much of this leave to having to take his girlfriend to the doctor. Grievant was counseled about taking too much leave.

15. Following the October 13, 1993 performance memorandum, Grievant, Ms. Howard, Mr. Davis and Area Administrator Victor Clark met to discuss Grievant's performance and his excessive leave usage. R Ex. 17.

16. On November 17, 1993, Mr. Davis met with Grievant, Ms. Howard, and James Kirk, EEO Counselor, to discuss problems Grievant was having working with Ms. Howard. Mr. Davis informed Grievant that the supervisors were going to be rotated so he would probably get a new supervisor, but in the meantime, he needed to work withMs. Howard and accept her offers of assistance to improve his production. Grievant claimed he was being harassed. R Ex. 20.

17. Grievant continued to refuse to work with Ms. Howard. Nevertheless, Ms. Howard continued to provide Grievant with support, and, with significant assistance from other DES', Grievant processed 10 cases the week ending November 18, 1993. Ms. Howard informed Mr. Davis of these developments on November 19, 1993. Gr. Ex. 1; R Ex. 11.

18. On November 22, 1993, the Unit Supervisors were reassigned and Grievant was assigned to Ann Bess' unit, effective November 26, 1993. R Ex. 18.

19. On December 2, 1993, Tom Davis informed Ann Bess that two of the DES' in her unit, including Grievant, were experiencing production problems, advised her to speak with these employees about their problems, and offered her suggestions for how to help them improve their performance. R Ex. 22.

20. Ms. Bess kept notes on each of her DES' with regard to their performance. With regard to Grievant, she noted that she spoke with him regarding his unsatisfactory production, and told him that

he needed to show significant improvement by December or he might be suspended. Grievant was counseled about his continued excessive leave usage. Grievant again alleged he was being harassed. Gr. Ex. 6.

21. Ms. Bess also performed random case reviews on Grievant's cases and provided assistance and suggestions on action needed. She testified that Grievant would not take action in a timelymanner, and sometimes not at all. Ms. Bess asked one of the senior DES' to assist Grievant and offered clerical help to help him organize his desk. Grievant told the clerical worker not to touch his desk and he did not utilize the senior DES.

22. On December 13, 1993, Grievant, James Kirk, Ann Bess, Tom Davis, Victor Clark, and James Quarles, Assistant Director, Human Resources, met to discuss various concerns voiced by Grievant with regard to his production, personnel actions against him, harassment, and his "disabilities". Mr. Clark asked Grievant to provide evidence or documentation with respect to these disabilities but no information was forthcoming from Grievant. R Ex. 16.

23. On December 17, 1993, Grievant was quoted in a Charleston Gazette article regarding the unmanageable caseload and overworked staff in the DDS office.

24. Ms. Bess discussed the article with Grievant on December 23, 1993, and was especially concerned with comments he made regarding a claimant with brain cancer having to wait for a disability determination, and calling utility companies on behalf of claimants who were waiting for their benefits, which was not allowed by DDS. Ms. Bess counseled Grievant on these matters and explained the appropriate actions to be taken in those instances. Gr. Ex. 6; R Ex. 14.

25. On February 2, 1994, Grievant was suspended for 10 working days by Director John Panza for "unacceptable and unsatisfactory work performance and your inability or unwillingnessto meet performance expectations. . . ." Mr. Panza's letter outlined the efforts taken by Ms. Howard to assist Grievant, Ms. Howard's performance memorandum to Grievant, and his continued failure to meet the 10 case per week standard. Mr. Panza noted that Grievant's weekly average production from October-December, 1993 was five (5) cases per week. Mr. Panza noted that subsequent case reviews since January, 1994 revealed serious caseload management problems. Mr. Panza also noted Grievant's excessive usage of leave and inappropriate use of work time as contributing factors to Grievant's unacceptable performance. Mr. Panza informed Grievant that he would be given an opportunity to bring his performance level up to an acceptable standard over the next two months.

Grievant's job expectations were listed and he was given until March 25, 1994 to do the following:

1. Clear a minimum of 10 cases per week with QA accuracy of 91% or greater.

2. Initiate timely and appropriate case actions.

3. Plan for and make appropriate use of leave.

4. Make appropriate authorized use of office work time, materials and equipment.

Grievant was unequivocally informed that he would be dismissed if he did not make marked improvement toward resolving his performance problems during the sixty (60) day evaluation period. R Ex. 10.

26. While Grievant was off on suspension, his caseload was worked by other DES', and 70 of his cases were cleared. Grievant was given credit for actions taken on those cases, and was provideda list of actions taken on his cases upon his return. R Exs. 15, 21. Grievant's caseload was in good shape upon his return from suspension.

27. Grievant's caseload was reduced to 100 cases upon his return from suspension. (See footnote 1)

28. Grievant's production report for the 1st quarter of 1994 showed that Grievant cleared 101 cases, 70 of which were cleared in February, 1994. As noted above, part of the production in February was done by others while Grievant was suspended. Ms. Bess indicated that many of these cases had just been sitting in Grievant's area with no action taken on them, but were in a position to have a decision made and cleared. Grievant only cleared 17 cases without significant assistance.

29. From February through June, 1994, Grievant continued to take excessive and unauthorized leave. R Ex. 15.

30. Grievant's production declined after the 1st quarter of 1994 and Grievant thereafter only averaged 4.9 cases per week.

31. Grievant's evaluation period was extended for an additional 30 days and he was given until the end of April, 1994, to improve his performance.

32. Grievant's performance was evaluated at the end of the post-suspension period and was found to be unsatisfactory in the four areas listed in his suspension letter.

33. Ann Bess, Tom Davis, Victor Clark and Jane Johnstone met to discuss Grievant's performance and unanimously agreed to recommend Grievant's termination.

34. On June 29, 1994, Grievant was notified by letter from Director John Panza that he was being terminated effective July 15, 1994 for unsatisfactory performance and failing to meet the four work expectations outlined in the letter of suspension and plan of remediation.

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). Based upon the foregoing findings of fact and testimony presented at the Level IV hearing, the undersigned finds that the employer has met its burden of proving that Grievant failed to satisfactorily meet the performance standards set forth in his suspension letter of February 2, 1994 within the time frame set for remediation. Indeed, Grievant does not deny that he did not meet the performance standards expected of him or that he took excessive and sometimes unauthorized leave time. Rather, Grievant raises several affirmative defenses to explain why he did not meet the expected performance standards.

When a Grievant raises an affirmative defense, it is his burden to establish the validity of that defense by a preponderance of the evidence. Young v. W. Va. Dept. of HHR, Docket No. 90-HHR-541 (Mar. 29, 1991).

Grievant alleges that the 10-case per week standard is unreasonable, arbitrary and capricious, can only be met by working overtime, and does not take into consideration legitimate uses of leave which would affect his ability to meet such a standard. The only evidence Grievant presented on this issue was testimony that it was difficult to produce 10 cases per week.

Lee Dadisman, a DES for 10 years, testified that he has received warning letters in the past regarding production and has been on improvement plans. He has attempted to do what the improvement plans call for and takes suggested actions on cases immediately, if at all possible. Mr.

Dadisman also testified that many of the DES' who consistently make production standards work overtime.

James D. Kirk, a DES for 10 years, also testified that he has failed to make the 10-case standard in the past and received a performance memorandum. Mr. Kirk requested his caseload be lowered to 100, which was granted, and he testified that he has continually shown improvement since that time. Mr. Kirk does not work overtime and got more cases out this last January and February than in the previous two months.

David Deyerle, a DES for 3 years, received a performance memorandum from Ann Bess in January or February, 1994. Mr. Deyerle was suspended because of his performance in June 1994. Mr. Deyerle had his caseload reduced following his suspension and has shown significant improvement since then. He averaged clearance of 11.5 cases a week for the last quarter and worked some overtime to gethis production up. Additionally, he testified that his attendance improved during the last quarter.

While Grievant's witnesses' testimony indicates that they have not consistently met the production standards and required assistance to improve, this does not prove Grievant's assertion that the standard is unreasonable or arbitrary and capricious. All of the witnesses' testified that, after disciplinary action, they improved production significantly and reached the acceptable performance standards. In fact, Grievant testified that when he realized that his superiors were serious about his performance and could fire him, he managed to clear 12 and 13 cases a week during the last weeks of December, 1993. Grievant's witnesses and his own testimony indicate that the agency was committed to its employees in whom it had invested considerable time and effort, and was reluctant to take disciplinary action until it was satisfied it had provided all the support and assistance it could.

Jane Johnstone, the DDS Director, explained how the 10-case per week standard was developed in relation to the budget and expectations set by SSA as reflected by national and regional standards. For Fiscal Year 1992, the average weekly productivity per full-time examiner for West Virginia was 9.8, compared with Virginia's average production of 13.6 cases per week, Pennsylvania's average of 12.7, the District of Columbia and Maryland average of 10 cases per week, and Delaware's average of 8.5. The averages overall increased from a regional average of 11.9 in FY 1992 to a regional average of 12.7 in FY 1993. R Ex. 2.

Therefore, while Grievant clearly established that he could or would not meet the 10 case per

week standard, he has not established that that average is unreasonable or arbitrary and capricious in relation to the regional averages, nor has he established that it is an impossible standard to meet, as he and others managed to satisfy production when sufficiently motivated.

Grievant also claims that he has been treated differently than others in the division by his dismissal. Grievant's disparate treatment claim apparently rests on the fact that he was dismissed when no one else was. However, Grievant failed to produce any evidence of any other employee who's performance was as unsatisfactory as his that did not receive some sort of disciplinary action. Testimony shows that only one other employee at DDS has ever been terminated, and only two, including Grievant, have been suspended because of unsatisfactory performance. The other suspended employee, Mr. Deyerle, showed significant improvement following his suspension and has been retained. Grievant did not and was dismissed.

Grievant also offers illness and injury, both individual and of family, as excuses for the excessive amount of leave taken and the consequent effect on his production. There is no evidence that Grievant requested a medical leave of absence or informed his employer that he or his family suffered from illnesses or injury. There is evidence that Grievant took excessive leave, both annual and sick, left work without telling anyone, and sometimes just did not report for work without any excuse. Grievant was well aware ofthe production standards expected of all DES' and it was his responsibility to make sure that he met those standards, or made his employer fully aware of circumstances which would prevent him from doing so.

Finally, Grievant offers as evidence an article discovered in his personnel file sometime in March, 1994, to substantiate claims of depression and frustration which contributed to his declining productivity during the last quarter. The article from the Charleston Gazette profiled the typical "office killer". Ann Bess testified that several employees had come to her with concerns and fears about Grievant's behavior. Ms. Bess saw the article in the paper and forwarded it to Jane Johnstone with a note concerning the fears expressed by Grievant's co-workers. R Ex. 13. Although Ms. Bess denies that the article was ever meant to be placed in Grievant's personnel file, or that she herself had any fear of Grievant, it nonetheless ended up there and Grievant discovered it while pursuing a grievance over his suspension.

Grievant testified that finding this article in his official personnel file, and realizing what his supervisor and co-workers thought of him, caused him to become stressed, depressed and anxious,

for which he sought medical help on March 23, 1994. G. Ex. 8. (See footnote 2) While the undersigned certainly sympathizes with Grievant over this unfortunate discovery, the evidence does not support his contention that he was so depressed that he could notsatisfactorily perform his job. The production reports offered into evidence by Grievant (G. Ex. 1) show that for the weeks ending March 18 and 24, about the time he discovered the article, Grievant cleared 9 cases each week. Then, following a slump in production, Grievant again cleared 10 and 9 cases for the weeks ending April 21 and April 28, respectively. Then, once again, Grievant's production declined to an average below 5 cases per week.

Thus, it is clear that, while Grievant may have indeed been despondent about the article and his co-worker's views, he was perfectly capable of meeting, and did meet, his production from time to time. Grievant testified that once he discovered the article, he could not work in that environment anymore. Thus, Grievant's decision not to work had less to do with his ability to meet the production standards than with his overall attitude about his job and his employer.

Therefore, based upon the foregoing findings of fact and discussion, the undersigned finds that Grievant has failed to meet his burden of proof, and it is appropriate to make the following conclusions of law.

Conclusions of Law

1. In a discipline-based grievance, the employer has the burden of proof and must prove its charges against the grievant by a preponderance of the evidence. Schmidt v. W. Va. Dept. of Highways, Docket No. 88-DOH-063 (Mar. 31, 1989).

2. Grievant was progressively disciplined for his work performance with many verbal and written warnings as well as asuspension and was notified that continued unsatisfactory performance could result in dismissal.

3. Respondent has proven by a preponderance of the evidence that Grievant was dismissed for good cause when he failed to satisfactorily meet the four work expectations outlined in his letter of suspension within the time frame set for improvement.

4. When a defense is raised by a grievant, it is his burden to establish the validity of that defense by a preponderance of the evidence. Young v. W. Va. Dept. of HHR, Docket No. 90-HHR-541 (Mar. 29, 1991).

5. Grievant has failed to establish any affirmative defense to the charges of unsatisfactory performance.

Accordingly, this grievance is **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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: January 25, 1995

Footnote: 1 The average caseload per DES ranged from 100-130.

Footnote: 2 The article was removed from Grievant's personnel file by Respondent and all copies destroyed upon its discovery.