

EDWARD B. COSTER, III,

Grievant,

v. Docket No. 96-CORR-157

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

DECISION

Grievant was employed as a Corrections Officer at the Northern Regional Jail and Correctional Facility ("NRJ") when he was disciplined for excessive absenteeism for the period of January 1, 1995, through September 30, 1995. The specific question presented involves Respondent's absenteeism policy as it relates to use of other types of authorized leave. After being denied at the lower grievance levels, Grievant filed this Level IV grievance, alleging:

This grievance is to object to the method of calculating sick leave as it punishes me for military leave time and vacation days for child visitation. . . . [The relief I seek is] to remove and recind (sic) the attached letter of reprimand dated December 7, 1995, from the file of Edward B. Coster, III.

A Level IV hearing was conducted on September 26, 1996, at the conclusion of which this matter became mature for decision.

Grievant received a letter of reprimand from Paul Kirby, Warden of NRJ, dated December 7, 1995, stating in pertinent part as follows:

[Y]ou are in violation of Operational Procedure #4.39 entitled "Notification of Unscheduled Leave, Misuse of Leave, Absenteeism and Tardiness."

Specifically, your unsupported sick leave as audited to date for the 1995 calendar year indicates the following -

(1) 8.16% usage for the period of 1 January to 31 March 1995

(2) 7.5% usage for 1 April to 30 June 1995

(3) 10.71% usage for 1 July to 30 September 1995[.]

The reprimand letter further advises Grievant to "make every effort" to correct his attendance problem, and "[f]urther infractions of attendance rules will result in more stringent disciplinary action."

Respondent presented testimony at Level IV from Dennis Eisenhower, Director of Operations for the facility, who stated that Grievant had a history of attendance problems and had previously received warnings in this regard. However, Mr. Eisenhower had no knowledge of specific warnings or the circumstances surrounding them, and Respondent presented no documentation of such warnings. During the Level IV hearing, Mr. Eisenhower searched Grievant's personnel file for such warnings and found none. Moreover, Grievant testified that he had no recollection of any prior warnings regarding his alleged excessive absenteeism. Respondent has failed to prove that it gave Grievant any warnings prior to taking disciplinary action.

Mr. Eisenhower was also questioned by Grievant regarding a warning letter for excessive absenteeism which was sent to another officer, Paul Howard, by Paul Kirby on January 19, 1996 (Level IV Grievance File). The letter states that Mr. Howard was in violation of the same policy, but it indicates that he had been given at least one prior warning letter; thus, Mr. Howard was given at least two warnings without receiving a reprimand. Mr. Eisenhower's response to why this employee was treated differently from Grievant was that "each employee is evaluated on an individual basis." This would appear to be in direct conflict with the Division of Personnel Administrative Rules, § 12.05 (1995), which requires employers to impose "like penalties for like offenses." Similarly, such a practice violates Code § 29-6A-2, prohibiting discrimination, defined as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Respondent presented no evidence indicating a relationship to Mr. Howard's and Grievant's job duties, nor was there any evidence of an agreement by them to this disparate treatment.

Included in the documents forwarded to this Board from Level III was Grievant's 1995 "absentee calendar" (L III, Ex. B). At the Level IV hearing, Respondent did not mention the calendar nor discuss the specific unapproved absences which were used as the basis for the reprimand. With no

explanation of the symbols [\(See footnote 1\)](#) used in Grievant's absentee calendar and no discussion of the particular absences used to find Grievant excessively absent, the undersigned has no method of ascertaining how it was determined that Grievant violated the leave policy in the per centages Respondent alleged. The burden of proof in disciplinary cases before this Board is upon the employer to show by a preponderance of the evidence that the action taken was appropriate. W.Va. Code § 29-6A-6. Respondent has simply failed to prove by a preponderance of the evidencethat Grievant was excessively absent in violation of their attendance policy for any reason, whether due to sick leave, annual leave, or military leave.

The focus of this grievance is primarily on the provisions of NRJ's Operational Procedure #4.39, which defines absenteeism as "unscheduled absences that are unexcused and/or excessive." The policy further states that "[s]ick leave restrictions and/or disciplinary action shall be taken when unsupported sick leave exceeds 5% of the available work time" (emphasis in original). The leave usage during a particular period of time is determined by a formula attached to the policy, which basically calculates unsupported sick leave by dividing sick leave hours without a doctor's statement by the total hours available for work multiplied by 100. The formula used to calculate Sick Leave Restriction is attached hereto as Appendix A.

"Total hours available for work" is calculated by totalling all of the work hours in the period and subtracting various items, including holidays, annual leave, approved sick leave, unauthorized leave, and military leave. Although Mr. Eisenhower maintained throughout his Level IV testimony that Grievant's military leave time was "not used against him" in this reprimand, he admitted that military leave time is counted as time when Grievant is unavailable for work for purposes of the calculation.

Respondent's policy directly violates Code § 15-1F-1, which allows all state employees who are members of the national guard or armed services a leave of absence from their employment "without loss of pay, status or efficiency rating." The Division of Personnel's Rule § 15.10 (1995) is virtually identical to the Code section, and states further that such a "leave of absence is considered as time worked for the agency in computing seniority, eligibility for salary increase and experience with the agency." "Status" and "efficiency rating" as used in the statute are not defined. However, since employees are subject to discipline, including discharge, for excessive leave usage, it follows that an individual's employment "status" is directly affected by application of the excessive usage formula. Accordingly, Respondent's leave policy violates state law and regulations and is invalid insofar as it

includes military leave in the formula.

Grievant's allegations, although unclear, appear to also involve objections to the use of annual leave (vacation time) in the calculation of excessive leave usage. Although the use of annual leave in Respondent's formula does not appear to violate any statute or regulation, Respondent has failed to meet its burden of proof for taking disciplinary action, and its actions toward Grievant related to the subject reprimand were discriminatory, as discussed above.

In addition to the foregoing discussion, the following Findings of Fact and Conclusions of Law are appropriately made from the proceedings at Level IV:

Findings of Fact

1. Grievant has been employed as a correctional officer at the Northern Regional Jail and Correctional Facility since at least 1989.
2. Respondent reprimanded Grievant by letter dated December 7, 1995, for allegedly violating its policy regarding excessive use of sick leave, specifically Operational Procedure #4.3, between January and September of 1995.
3. Grievant was absent because of sick leave, annual leave and military duty during 1995, but it is unknown how many absences occurred.
4. Operational Procedure #4.39 mandates that disciplinary action be taken against an employee whose unsupported sick leave exceeds 5% of his available work time. Time off on military leave, along with other leave time, is deducted from the number of hours an employee is considered to be available for work.
5. Upon applying Procedure #4.39 to Grievant's attendance record, Respondent found that his unsupported sick leave exceeded 5% of his available work time for the period stated in the reprimand letter.
6. Grievant's military leave time was used to reduce the amount of time he was considered to be available for work, which caused his unsupported sick leave to exceed his available work time by a larger percentage.
7. Officials at the facility where Grievant was employed gave another employee who violated the same policy at least two warning letters prior to any disciplinary action.
8. No evidence was presented which establishes that Grievant ever received a prior warning

regarding his violation of Respondent's absenteeism policy.

Conclusions of Law

1. The burden of proof in disciplinary matters is upon the employer. W.Va. Code § 29- 6A-6.
2. Respondent failed to prove by a preponderance of the evidence that Grievant was excessively absent from work in violation of Northern Regional Jail and Correctional Facility Operational Procedure #4.39.
3. Respondent treated Grievant in a discriminatory manner by reprimanding him on December 7, 1995, after having provided more than one prior warning to another employee for similar conduct. Employers must be consistent in the disciplinary measures they impose. Code §29-6A-2; McBride v. Wayne Co. Bd. of Educ., Docket No. 50-86-184-01 (August 28, 1986); Division of Personnel Administrative Rule § 12.05 (1995).
4. A state employee's military leave time may not be used against him in a manner which causes a loss of pay, status, or efficiency rating. Code § 15-1F-1; Division of Personnel Administrative Rule § 15.10 (1995).
5. NRJ's Operational Procedure #4.39 is invalid insofar as it uses military leave time to calculate excessive leave usage.

Based upon the above findings and conclusions, this Grievance is **GRANTED**, and Respondent is Ordered to remove the December 7, 1995, reprimand letter from Grievant's personnel file.

Any party 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.

DATE: November 4, 1996

DENISE MANNING

Administrative Law Judge

[Footnote: 1](#)

The absentee calendar includes a key showing absence codes and numbered specific reasons for absences. However, the letters and numbers used in Grievant's actual calendar do not appear to correspond with any of the items included in the key.