ALISA D. SISLEY,

Grievant,

v. **Docket No. 96-HHR-237**

WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES, WILLIAM R. SHARPE
HOSPITAL, WESTON, WEST VIRGINIA,

Respondent.

D E C I S I O N

Alisa D. Sisley (Grievant) initiated this grievance on October 2, 1995, challenging the written reprimand she received for an alleged "continuing pattern of not adhering to your work schedule." R Ex 6 at L III. The letter was amended by Janice Woofter, Grievant's immediate supervisor, following the Level I grievance conference on October 5, 1996. Grievant remained dissatisfied with the reprimand and appealed to Level II where her grievance was denied on January 19, 1996. Grievant then appealed to Level III where a hearing was held on March 29, 1996. The grievance was denied at Level III by Garrett E. Moran on May 24, 1996. Grievant timely appealed to Level IV, and a Level IV hearing was conducted in this Board's office in Charleston, West Virginia, on August 30, 1996. Following oral arguments by the parties, this matter became mature for decision at the conclusion of that hearing.

BACKGROUND

On September 4, 1991, Weston Hospital (See footnote 1) adopted a new "Absence Control Policy." R ex 2 at L II. Portions pertinent to this grievance are quoted below:

POLICY

As a condition of continued employment at Weston Hospital, employees are expected to adhere to their assigned work schedules. Absenteeism impairs the hospital's ability to provide quality and continuity of care to the patient. Therefore, Weston Hospital will review an employee's attendance and absences and will administer appropriate corrective measures when necessary.

PROCEDURE

I. GENERAL STATEMENT

This policy provides guidelines to assist with the identification and correction of an employee's patterns of absenteeism and specify violations which may result in corrective counseling or discipline consistent with the infractions. At certain times, a more severe or less severe penalty may be imposed because of extenuating circumstances (i.e., the number of instances). Each violation must be weighed and judged by the supervisor according to the unique circumstances which prevailed during the alleged offense.

II. GUIDELINES FOR RECOGNIZING AND DEALING WITH PATTERNS OF ABSENTEEISM:

A. Tardiness (REF. WH HUMAN RESOURCE MANAGEMENT TARDINESS POLICY)

B. Adjoining Time Days, Holidays, Vacation Days with Sick Days (See footnote 2)

3 occasions in a 3-month period establishes a pattern -

verbal counseling

First occasion after pattern is established -

written warning Next occasion - 3-day suspension

Next occasion - 10-day suspension

Next occasion - Dismissal

C. Calling in Sick the Same Day of a Week, Partial Days of Unscheduled Sick Leave, Other Established Patterns of Sick Leave Usage, or Any Combinations of Sick Leave Usage Patterns

3 occasions in a 3-month period establishes a pattern -

verbal counseling

First occasion after pattern is established -

written warning

Next occasion - 3-day suspension

Next occasion - 10-day suspension

Next occasion - Dismissal

* * *

III. RESPONSIBILITY

A. Employees

Employees are expected to adhere to their assigned work schedules. If an employee must be absent, it is his/her responsibility to request prior authorization when possible, or to request approval upon return to duty from an unscheduled absence. The employee must complete and submit a Leave Request Form to their supervisor at least 72 hours in advance of the date the absence is to begin when applicable or within 48 hours after return to duty from an unscheduled absence.

* * * *

R Ex II at L II (emphasis in original).

The amended letter of reprimand, dated October 5, 1996, stated:

This written reprimand is being given to you due to your continued pattern of not adhering to your work schedule.

The pattern of your non-adherence to your work schedule is as follows:

On Friday, February 24, 1995, you used eight hours of sick time.

On Friday, March 10, 1995, you left work early due to illness and used three hours of sick time.

On Monday, March 20, 1995, you left work sick and used two hours and thirty minutes of sick time.

On Thursday, March 23, 1995, you requested and received payment for one hour of emergency vacation covering your tardiness due to illness.

On Wednesday, April 12, 1995, you used eight hours of sick time.

On Thursday, April 20, 1995, you requested and received pay [for] thirty minutes of emergency vacation time covering your tardiness due to illness.

On Friday, April 21, 1995, you went home sick and used six hours and thirty minutes of sick time.

On Tuesday, May 2, 1995, you left work sick and requested to be paid for six hour[s of] emergency vacation, which was granted.

On Tuesday, May 16, 1995, you and I talked and discussed what excessive absenteeism meant. We discussed your use of emergency vacation at that time, and the fact that it could be viewed as part of excessive absenteeism. You were shown your time record on the computer, and were offered the Employee's Assistance Program. However, your pattern of not adhering to your work schedule continued.

On Wednesday, May 17, 1995, you used eight hours of sick time.

On Friday, May 26, 1995, you requested and received pay for thirty minutes of emergency vacation because you left work ill.

On Saturday, May 27, 1995, you called in using eight hours of sick time.

On Friday, June 9, 1995, you called and used four hours of sick time.

On Wednesday, June 14, 1995, you used four hours of sick time.

On Thursday, June 22, 1995, you left work 2-3/4 hours early because you were ill. You provided a doctor's billing receipt for that date.

On Monday, July 3, 1995, you left worked (sic) 1-3/4 hours early due to illness, and you provided a doctor's statement excusing you from work from 7-3-95 to 7-5-95.

On Monday, July 24, 1995, you again became ill at work, and left 2-3/4 hours early using sick leave.

On Monday, July 31, 1995, you again were ill at work and left 5-1/4 hours early using sick leave.

On Wednesday, August 16, 1995, you called in using eight hours of sick time.

On Monday, August 28, 1995, you were off eight hours sick time to keep a medical appointment.

On Friday, September 1, 1995, you requested and received pay for 1/4 hour emergency vacation to cover for being late, stating you did not feel well.

> On Thursday, September 7, 1995, you called in using eight hours of sick time.
>
> On Monday, September 11, 1995, you requested and received pay for 5-3/4 hours of emergency vacation. You left work early due to not feeling well. You spoke to Jody Valliant and told her you needed a week off. Jody told you she could not approve a week off, that you would have to speak to me your supervisor.
>
> Previously you had asked for a vacation day for 9-12-95, and it was granted by me.
>
> On Wednesday, September 13, and Thursday, September 14, 1995, you left early to attend school. You asked me if this was okay and said that you would make up the time later that week by working over. You did not fulfill your part of the agreement, and again you requested and received payment for emergency vacation for the time necessary to cover your absence.
>
> On Friday, September 15, 1995, you left work early for a medical appointment, and used 3-1/4 hours of sick time.

R Ex 6 at L II.

Prior to issuing the foregoing reprimand, Ms. Woofter met with Grievant on May 16, 1995. At that meeting, she discussed Grievant's excessive use of sick time, explaining what was expected of Grievant. She further warned Grievant in writing about her absenteeism on June 15, 1995. Grievant related "I am having some physical medical problems and am under a doctor's care." R Ex 3 at L II. In addition, Grievant's evaluationform, dated July 27, 1995, indicated Grievant "has been sick a lot" and "has been late a lot" under the category of Attendance. R Ex 4 at L II. Grievant was rated a "1" in this category, indicating "[s]upervision or further development needed." R Ex 4 at L II.

There is minimal dispute between the parties regarding the facts in this matter. Accordingly, the following findings of fact are set forth.

FINDINGS OF FACT

1. At the time of the events which gave rise to this grievance, Grievant was employed by the West

Virginia Department of Health and Human Resources at William R. Sharpe, Jr., Hospital (Sharpe) in Weston, West Virginia.

2. Janice Woofter, employed at Sharpe as a Nurse Manager, was Grievant's immediate supervisor.

3. Sharpe's Absence Control Policy prohibits various "patterns of absenteeism." The policy defines a pattern to include three occasions within a three-month period of: (1) calling in sick the same day of the week; or (2) taking partial days of unscheduled leave; as well as (3) any other established pattern of sick leave use; or (4) any combination of sick leave use patterns. See R Ex 2 at L II.

4. Sharpe's Absence Control Policy includes provisions for progressive discipline, suggesting verbal counseling after the first instance of excessive absenteeism is observed. Once a pattern is established, the next occasion calls for a written warning, and a three- day suspension is normally appropriate for the next occasion. See R ex 2 at L II.

5. Ms. Woofter verbally counseled Grievant for excessive absenteeism prohibited under Sharpe's Absence Control Policy on May 16, 1995. See R Ex 3 at L II. 6. Ms. Woofter issued a written warning to Grievant for excessive absenteeism prohibited by Sharpe's Absence Control Policy on June 15, 1995. R ex 3 at L II.

7. On September 11, 1995, Grievant left work early, receiving five and three-quarter hours of emergency vacation. The following day, September 12, 1995, had been previously scheduled and approved as a vacation day. See R Ex 1A at L II. Grievant did not provide any verification of her illness on that occasion.

8. At the time Grievant was issued the written warning described in Finding of Fact Number 6, she indicated to Ms. Woofter that she was experiencing a medical problem which she considered to be of a personal nature, and did not want the nature of that illness disclosed.

DISCUSSION

Under W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters falls on the employer. Brown v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH- 325 (Dec. 31, 1992). Consequently, the testimony and other evidence from the Level III (See footnote 3) and IV hearings must be examined to determine if Sharpe established sufficient facts to prove the charges alleged.

Grievant argues that Sharpe's Absence Control Policy is inconsistent with the Administrative Rule issued by the West Virginia Division of Personnel (DOP) to governleave and attendance matters. (See footnote 4) Grievant's contention that the policy under which she was reprimanded is invalid constitutes an affirmative defense. While the employer has the burden of proving the essential elements of a disciplinary matter by a preponderance of the evidence (W. Va. Code § 29-6A-6; Brown, supra; Broughton, supra), an employee asserting an affirmative defense must establish such a defense by a preponderance of the evidence. Shoemaker v. W. Va. Dept. of Transp., Docket No. 95-RMA-218 (Sept. 26, 1995); Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991), aff'd, 192 W. Va. 540, 453 S.E.2d 374 (1994); Morris v. W. Va. Dept. of Health, Docket No. 91- DHS-112 (June 25, 1991).

DOP's Administrative Rule governing leave and attendance authorizes supplementation in the following terms:

> Each agency shall prepare supplemental regulations as may be required. The regulations shall not enhance nor diminish the benefits afforded by this section. Copies of all regulations shall be filed with the Director who may approve, amend or disapprove the supplemental regulations.

143 C.S.R. 1 § 15.13 (1995).

There was no evidence presented to indicate if Sharpe's policy was submitted to the Director of Personnel for approval. However, Grievant did not argue that Sharpe's policy was technically deficient on that basis, arguing rather that it was substantively inconsistentwith the DOP policy. (See footnote 5) With regard to "suspected leave abuse," DOP's Administrative Rule states:

> When an employee appears to have a pattern of leave abuse, including such frequent use of sick leave as to render the employee's services undependable, the appointing authority may request appropriate substantiation of the employee's claim for leave, for example, verification of an illness of less than three days. The appointing authority must give the employee prior written notice of the requirement for appropriate substantiation.

143 C.S.R. 1 § 15.05 (1995).

As indicated in § 15.13, DOP anticipated that this Administrative Rule would be supplemented by state agencies. Sharpe's policy supplements § 15.05 of DOP's policy, clarifying what will constitute a

"pattern of leave abuse" in the context of employment at that particular hospital. Contrary to Grievant's contention, no provision in DOP's policy prohibits Sharpe from considering partial days off in establishing a pattern of leave abuse. Sharpe's supplemental policy, albeit strict, is not in direct contravention of DOP's rule governing leave and attendance, because it neither enhances nor diminishes any specific benefit provided under DOP's Administrative Rule. See Pridemore v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-561 (Sept. 30, 1996).

Grievant was counselled and subsequently warned that her actions were in violation of the policy, thereafter taking additional leave on September 11, 1995, the day before a scheduled day off. Thus, Sharpe demonstrated by a preponderance of the evidence thatGrievant violated the established Absence Control Policy, and the amended written reprimand issued on October 5, 1995, was not disproportionate to the offense. (See footnote 6)

Consistent with the foregoing discussion, the following conclusions of law are made in this matter.

CONCLUSIONS OF LAW

1. In disciplinary matters, the burden of proof is upon the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Brown v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993).

2. An employee raising an affirmative defense must establish such a defense by a preponderance of the evidence. Shoemaker v. W. Va. Dept. of Transp., Docket No. 95- RMA-218 (Sept. 26, 1995); Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991), aff'd, 192 W. Va. 540, 453 S.E.2d 374 (1994); Morris v. W. Va. Dept. of Health, Docket No. 91-DHS-112 (June 25, 1991).

3. Grievant failed to demonstrate by a preponderance of the evidence that any provision in Sharpe's Absence Control Policy, which was relied upon to reprimand Grievant for excessive absenteeism, was in violation of West Virginia Division of Personnel Administrative Rule § 15.13, as Sharpe's policy neither enhances nor diminishes any specific benefits provided to employees under the Administrative Rule. See Pridemore v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-561 (Sept. 30, 1996). 4. Respondent Sharpe established by a preponderance of the evidence that Grievant engaged in a pattern of not adhering to her work schedule, an action which was prohibited under Sharpe's Absence Control Policy. Further, the penalty imposed, a written

reprimand, was not excessive, under the facts and circumstances presented.

Accordingly, this Grievance is **DENIED**.

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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: January 16, 1997

Footnote: 1

Weston Hospital has since been renamed "William R. Sharpe, Jr., Hospital."

Footnote: 2

"Time days" are scheduled days off.

Footnote: 3

Unfortunately the Level III hearing transcript in this matter is replete with "inaudible" portions, making this document of limited use in adjudicating this grievance.

Footnote: 4

143 C.S.R. 1 (1995).

Footnote: 5

Even if such an argument could be inferred, Grievant failed to demonstrate that such a procedural error was harmful under the circumstances presented by this grievance. See McFadden v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995). See generally Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980).

Footnote: 6

Indeed, the undersigned reads Sharpe's policy to authorize a three-day suspension under the circumstances presented here.