PAUL G. BAIRE,

Grievant,

v v.

DOCKET NO. 97-CORR-129

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

DECISION

___Grievant, Paul G. Baire, initiated this proceeding pursuant to the provisions of W. Va. Code § 29-6A-1, et seq., challenging his termination from employment as a correctional officer at Northern Regional Jail and Correctional Facility. Pursuant to the provisions of W. Va. Code §29-6A-4(e), this grievance was filed directly at level four, where a hearing was conducted in this Grievance Board's office in Wheeling, West Virginia, on April 11, 1997. Thereafter, the grievance was held in abeyance by agreement of the parties. For administrative reasons, the grievance was transferred to the undersigned on September 24, 1997. A conference call was held on November 15, 1997, and the parties agreed to submit this matter for a decision, with proposed findings of fact and conclusions of law submitted by December 19, 1997.

The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant has been employed by the Division of Corrections ('DOC") as a correctional officer since 1987.

2. On September 4, 1993, while working as a correctional officer at the WestVirginia Penitentiary, (See footnote 1) Grievant had to intervene when one inmate attempted to attack another

with a knife, sometimes referred to in the record as a “makeshift hatchet.”

3. The only physical injury Grievant received during the altercation was a sprained left elbow, for which he was treated in the emergency room and released.

4. Grievant was diagnosed as suffering from post-traumatic stress disorder as a result of the September 4, 1993, incident. His symptoms have included depression, crying, physical shaking and tremors, stuttering, and nightmares.

5. Grievant did not return to work after September 4, 1993. He received workers' compensation temporary total disability benefits for an unspecified period of time. Grievant requested and was granted an unpaid leave of absence from his employment while he received workers' compensation benefits.

6. Grievant appealed the Workers' Compensation Division's decision to end his temporary total disability benefits. That decision was affirmed by the Workers' Compensation Office of Judges on June 5, 1996, and by the Workers' Compensation Appeal Board on December 3, 1996. The Appeal Board's decision was appealed to the West Virginia Supreme Court of Appeals on December 31, 1996, and the outcome of that appeal is unknown.

7. Grievant has not received any temporary total disability benefits since some time prior to June 5, 1996.

8. The record does not indicate that Grievant has, to date, received anypermanent award from the Workers' Compensation Division. However, he did apply for a permanent total disability award, which has not yet been decided.

9. Grievant was awarded Social Security disability benefits as a result his post- traumatic stress disorder, with monthly payments beginning in March of 1994.

10. On May 8, 1994, Grievant requested a six-month extension of his leave of absence without pay. George Trent, Warden at the penitentiary, granted Grievant a two- month extension, for the period of May 8, 1994, through July 8, 1994. Warden Trent's letter, dated May 12, 1994, advised Grievant as follows:

> Although you request an additional six months [on your leave of absence], your psychological counselor indicates an estimated date for your return to duty would be in July of 1994. By virtue of your counselor's estimate, I am hereby granting you an extension on your leave of absence for a period of two months. This extension will be effective May 8, 1994, and set your return to duty as on or before July 8, 1994.

> As mentioned previously, under administrative rules and regulations, it is your responsibility to forward a physician's statement to this institution every thirty (30) days to justify the continuation of this leave. Also, if you are unable to return on the date specified, it is necessary for you to produce another physician's statement and another written request for additional leave.

11. Grievant did not submit any further physician's statements to justify a continued leave of absence after May 11, 1994.

12. By letter dated February 10, 1997, Warden Paul Kirby notified Grievant that he had been absent without prior approval since July 8, 1994, had requested no additional leave of absence, and had not provided physician's statements as required. Warden Kirby further advised Grievant that he would be expected to either return to work immediately or provide reasons for his absence, and that "[f]ailure to comply with the directives in this letter will be construed as abandonment of your position, in which case this letter will serveas a fifteen (15) day notice of dismissal, effective February 26, 1997."

13. During the nearly three year-period when Grievant was absent, but still employed by NRJ, he did not provide NRJ with notification of his whereabouts, address or telephone number. Grievant lived with his brother for a time and also with his ex-wife at other times.

14. Because the February 10, 1997, letter was sent to an address where Grievant was not physically living, (See footnote 2) Grievant did not receive the letter until February 26, 1997. He did not attempt to respond to Warden Kirby's letter, but instead filed this grievance directly at level four on March 7, 1997.

Discussion

In disciplinary matters, the burden of proof rests with the employer. W. Va. Code § 29-6A-6. Employees of the Division of Corrections are granted medical leaves of absence pursuant to § 15.08(c) of the Administrative Rule for the Division of Personnel, which states in pertinent part, as follows:

> Medical Leave; Notice to Employee

1.

> An injured or ill permanent employee upon written application . . . shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve month period provided:
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> a.
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> The employee . . . has elected not to use sick leave for a work related injury . . . ;
>
> b.
>
> The employee's absence is . . . verified by a physician . . . stating the employee is unable toperform his/her duties and giving a tentative date for the employee's return to work;
>
> c.
>
> A prescribed physician's statement form is submitted every thirty (30) calendar days to confirm the necessity for continued leave; and
>
> d.
>
> The disability . . is not of such nature as to render the employee permanently unable to perform his/her duties.

In the instant case, DOC does not dispute that Grievant appropriately notified his employer that he wished to be placed on a medical leave of absence due to his work related injury, as is permitted by the above section. However, Grievant clearly failed to follow the requirement of submitting a doctor's statement every thirty days to justify the continued leave of absence. Accordingly, DOC relied upon the following portion of § 15.08(d) in notifying Grievant that he would be dismissed if he did not provide a physician's statement or return to work in its February 10, 1997, letter:

> Failure of the employee to report promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to the appointing authority, is cause for dismissal.

Although Grievant's leave of absence obviously extended beyond the six-month limit specified in § 15.08, extenuating circumstances were involved. DOC knew that, for at least some of the extended

leave period, Grievant was receiving workers' compensation benefits, and later fighting to receive more. Also, during the time period between July of 1994 and early 1997, Grievant had applied for disability retirement from the Public Employees Retirement Board. However, Grievant had failed to appear for a scheduled evaluation by a physician appointed by the Board on several occasions, so he was never awarded disability retirement. Additionally, DOC had difficulty in contacting Grievant,whose living arrangements are still unclear to the undersigned. As stated in Warden Kirby's February 10, 1997, letter to Grievant, NRJ officials were very tolerant of Grievant's unique situation and had “gone to extraordinary lengths to discover your intentions with regard to your future employment.” Quite reasonably, a point was reached when Grievant's continued absence and failure to explain himself were no longer tolerable to his employer. In fact, it is amazing that NRJ continued to retain Grievant in its employ for as long as it did, when he did not contact them in any fashion whatsoever for more than two and one-half years,

Grievant's counsel (See footnote 3) argues that Grievant should be reinstated to his employment in leave of absence status, because he lacks the mental capacity to be responsible for filing doctor's reports every thirty days. He argues that Grievant is still completely unable to work and should be considered on medical leave for an unspecified period of time until he is deemed by a physician to be capable of working. He bases his argument, in part, upon portions of W. Va. Code § 23-5A-3, which prohibits termination of an employee who is “receiving or is eligible to receive temporary total disability benefits” due to a covered workers' compensation injury. Counsel contends that, because the Workers' Compensation Appeal Board's decision regarding the termination of Grievant's temporary total disability benefits is currently on appeal to the Supreme Court, it is not final.

Insofar as the workers' compensation process is concerned, Grievant currently isnot “receiving” temporary total disability benefits. As to his “eligibility” to receive temporary total benefits, counsel's argument is difficult to embrace; the entire workers' compensation litigation process, from the Division to the Office of Judges to the Appeal Board to the Supreme Court always takes years. Certainly, the legislature did not intend for employers to maintain absentee workers on their payrolls for years on end while appeals regarding temporary benefits are pursued. The more plausible explanation of the “eligible to receive” language is that employers should be discouraged from discharging employees who have been injured, but have not yet decided whether to pursue their workers' compensation remedies, including temporary benefits which they may be deemed “eligible” to receive. Moreover,

once temporary benefits have been cut off by the Division, a determination has been made at that time that the claimant is no longer “eligible” for such benefits. Until such decision is overturned, that employee is legally no longer an “eligible” recipient of those benefits. Therefore, DOC's action in terminating Grievant after his temporary benefits had long since ceased was not prohibited by this statute.

Moreover, the Supreme Court has decided that W. Va. Code § 23-5A-1, generally prohibiting discriminatory conduct against employees exercising their rights to workers' compensation benefits, does not prohibit an employer from terminating an employee who “is no longer qualified to perform the duties of his or her job . . . [and] it becomes obvious that the period of disability is not determinable.” Powell v. Wyoming Cablevision, Inc., 403 S.E.2d 717 at 723 (W. Va. 1991). Similarly, the Court recently discussed W. Va. Code § 23-5A-2, which prohibits an employer from cutting off insurance coverage when an employee “is claiming or is receiving benefits under this chapter for a temporary disability.” Rollins v. Mason County Bd. of Educ., 1997 W. Va. LEXIS 128 (S. Ct. 1997). As in theinstant case, the employee in Rollins had been denied further temporary total disability benefits, and was in the process of appealing that determination. In rejecting the employee's argument, the Court found that, although a workers' compensation claimant has the right to protest (appeal) the decision to discontinue temporary benefits, at that point in time, “the claimant is not entitled to further benefits absent a favorable ruling with regard to her protest/appeal.” The Court concluded that the objective of the statute was “to extend health insurance coverage to employees during that time period between an injury and the receipt of benefits,” and found that “there is no corresponding basis for suggesting that health benefits are to continue throughout the entire duration of all the claimant's protests and appeals.” Id. at 7. Furthermore, and of particular import here, the Court stated as follows:

> [W]ere we to interpret the “is claiming” [temporary total benefits] language of West Virginia Code § 23-5A-2 as encompassing the seemingly indefinite length of the appellate stage of the workers' compensation claim, we would be requiring employers to pay for the health insurance premiums of employees who are statutorily no longer entitled to receive TTD benefits.

Id.

The same logic applies here. Although Grievant appealed the decision to discontinue his

temporary benefits, all legal determinations so far have found him to not be entitled, or “eligible” for such benefits. As with insurance coverage, it is logical that the legislature did not intend the “is eligible” for temporary benefits language to require employers to retain employees who have been declared no longer entitled to such temporary benefits. At the time of his discharge, Grievant had been declared not to be entitled to further benefits, which determination has not yet been overturned. Accordingly,no violation of the statute occurred.

The record is devoid of any medical evidence regarding Grievant's current condition, and, in fact, all of the reports date back to 1993 and 1994. (See footnote 4) While it is a sad situation that Grievant is apparently so mentally incapacitated that he cannot understand his responsibility to meet certain requirements to retain his position, this does not place a responsibility upon NRJ or DOC to retain such an individual as an employee. There seems to be no indication that, at this point in time, Grievant's condition is ever going to improve to the point where he will be able to work as a correctional officer, let alone even be capable of functioning independently. Grievant's disability has already spanned over four years, and it would be absurd to expect an employer to keep him on an indefinite leave of absence, which could continue *ad infinitum*. Grievant has received a long-term Social Security disability award, which seems to be the most appropriate solution to his difficult problem. (See footnote 5)

In addition to the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. In disciplinary grievances, the burden of proof rests with the employer. W. Va. Code § 29-6A-6.

2. § 15.08(c) of the Administrative Rule for the Division of Personnel allows an injured employee to be placed on an unpaid medical leave of absence, so long as a physician's statement justifying continued leave is submitted every thirty days. Failure of an employee to report to work at the end of such a leave of absence or to provide proper justification for continued leave is grounds for dismissal.

3. W. Va. Code § 23-5A-3 prohibits termination of an employee who is “receiving or is eligible to receive temporary total disability benefits” under the workers' compensation law.

4. Grievant did not provide justification for a continued leave of absence for at least two years

prior to his termination, which justified his dismissal pursuant to the provisions of § 15.08(c) of the Administrative Rule.

5. Grievant's termination did not violate W. Va. Code § 23-5A-3.

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.

Date: March 11, 1998 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

The West Virginia Penitentiary later closed, and most of its employees were transferred to the newly built Northern Regional Jail and Correctional Facility ("NRJ"). Although not specified in the record, it would seem apparent that, while on his leave of absence, Grievant's employment was transferred to the NRJ.

Footnote: 2

The record is unclear as to whether Grievant maintained a residence at this address, but simply lived somewhere else. Likewise, it is not clear whether Grievant's mail was forwarded or picked up by him or by someone on his behalf.

Footnote: 3

It should be noted that, at the level four hearing, Grievant's attorney stated that Grievant was so "out of it" that he did not even know if Grievant was aware a grievance hearing was going on. He also stated he did not have any written contract of representation with Grievant. Counsel had previously attempted to get a power of attorney to handle Grievant's affairs, which Grievant's relatives allegedly "talked him out of."

Footnote: 4

After the level four hearing, Grievant's attorney submitted a letter dated April 25, 1997, from a psychologist giving opinions regarding Grievant's capacity to file reports every thirty days. However, this document was submitted after the record had been closed and is not appropriate for consideration in this Decision. Nevertheless, the opinions rendered in the report would not change the outcome of this grievance.

Footnote: 5

The record indicates that Grievant did have some sort of anxiety disorder prior to beginning his employment with DOC. It is uncertain how much of his current condition is attributable to that preexisting condition.