

JEFFREY FLOYD,
Grievant,

v. Docket No. 00-BOT-192

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, Jeffrey Floyd, employed by West Virginia University (WVU or Respondent) as a Postal Vehicle Driver, filed a level one grievance on February 9, 2000, following his dismissal on February 4, 2000. Grievant requested reinstatement with back pay. The grievance was denied at levels one and two, and Grievant elected to bypass consideration at level three as is permitted by W. Va. Code §18-29-4(c). Appeal was made to level four on June 7, 2000, and an evidentiary hearing was conducted at the Grievance Board's Morgantown office on August 7, 2000. [\(See footnote 1\)](#) Grievant was represented by Tim Tucker, Business Manager of L.I.U.N.A., Local 814, and Respondent was represented by Assistant Attorney General Samuel R. Spatafore. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before August 22, 2000.

The following facts are derived from the record in its entirety, including the level two transcript and exhibits, and the evidence presented at level four.

Findings of Fact

1. Grievant has been employed by Respondent for approximately four years, and has held the classification of Postal Worker at all times pertinent to this decision.
2. On July 1, 1999, Tim Bostonia, Assistant Director for Business Development, issued Grievant a counseling letter after he had taken a vacation day in June for which he did not have accrued leave time. Mr. Bostonia noted that Grievant had previously taken annual leave in October 1998, when he did not have enough leave accrued, and warned him that future occurrences would result in further disciplinary action.
3. On October 28, 1999, Sandra Dinardo, Supervisor of the WVU Mail Service, issued a first letter of warning to Grievant for his failure to properly report off from work, dishonesty issues, and unauthorized leave.

4. On December 9, 1999, Ms. Dinardo issued a second letter of warning, again citing Grievant's failure to report off from work, dishonesty issues, and use of unauthorized leave.

5. Grievant did not grieve either the counseling letter or the first or second letters of warning, and the contents of those letters are now accepted as true.

6. Grievant's regular work day is from 7:30 a.m. to 3:30 p.m. On January 31, 2000, Grievant reported to work approximately one hour late. On February 1, 2000, Grievant left work at approximately 3:10 p.m. without authorization from Ms. Dinardo or Cindy Gillespie, the Lead Postal Worker. On February 2, 2000, Grievant left work early after advising Ms. Dinardo that he had a doctor's appointment. On February 3, 2000, Grievant called in to report that he did not see a doctor the previous day and was going to try again. Ms. Dinardo directed Grievant to report to work as soon as possible; however, he called later and advised that he would report to work the following day, February 4, 2000. 7. Ms. Dinardo issued a letter on February 4, 2000, notifying Grievant of his dismissal, effective the close of business that day, for failure to call in prior to being absent, misrepresenting his use of leave time, and failing to obtain a supervisor's approval prior to leaving work early.

Discussion

A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Respondent asserts that Grievant's dismissal was pursuant to progressive discipline imposed as a result of his ongoing violations of Respondent's policy relating to absenteeism. Grievant denies any wrongdoing arguing that he notified his supervisor at every opportunity when he was absent from work, and produced a doctor's verification for February 3, 2000, therefore, progressive discipline should not have been imposed.

Grievant and his supervisor offer significantly differing versions of what occurred between January 31 and February 3, 2000. Ms. Dinardo testified that on January 31, Grievant called at 7:30 a.m. to report that his car was in a ditch and was so damaged it could not be driven. She recalled that he reported to work between 8:30 and 8:45 a.m. that day, and no damage to his car was observed.

Grievant states that his car had slid into a ditch, but denies that he called Ms. Dinardo, or claimed any damage had been done to his vehicle. He recalls arriving at work a "little past 8:30". February 1, 2000, Grievant left work prior to the end of his shift. Ms. Dinardo states that Grievant later told her he had advised Ms. Gillespie that he was leaving, but that Ms. Gillespie denied that he requested permission of her to leave early. Grievant testified that his eyes were causing him some discomfort that morning, and that he had advised Ms. Dinardo that he would stay as long as he could. Later, he decided to go home but could not find Ms. Dinardo or Lead Worker Cindy Gillespie, so he told his coworkers that he was leaving. Grievant opines that his actions were not unusual, and that employees leave early from time to time.

February 2, 2000, Grievant left work at 1:30 p.m. Ms. Dinardo states that Grievant represented he had a doctor's appointment, and did not return to work that day. Grievant agrees that he went to Family Practice at the Health Science Center, but denies that he stated he had an appointment. After being advised that a doctor would be unable to see him, he went home at about 3:00 p.m.

February 3, 2000, Grievant did not report to work. Ms. Dinardo testified that Grievant called to report that he did not receive medical treatment the previous day, and would go to another doctor that day. She recalled that she became upset with Grievant and directed him to report to work as soon as possible, but that he called in at approximately 3:00 p.m. and said he would not be in until the following day. Grievant's testimony is consistent, in that he went to a walk-in clinic in Fairmont where he was eventually seen by a doctor and diagnosed with an infection in both eyes. Grievant reports that he did not return to Morgantown until approximately 3:00 p.m., and did not go to work for the remaining 30 minutes of his shift. He opined that Ms. Dinardo was not upset or concerned the following day when he reported to work. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness'

information. See *Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994). Accordingly, it is necessary to discuss the evidence presented by the parties in some detail.

Grievant swears that his testimony is truthful, and suggests that it is Ms. Dinardo who has offered the inaccurate account of facts; however, the evidence of record does not support that claim. Grievant disputes nearly every statement made by Ms. Dinardo, even though her testimony is corroborated by others. For example, Grievant disputes the supervisor's claim that he called her on January 31, 2000, to report that he would be late because his car had slid into a ditch and suffered serious damage. Ms. Gillespie testified that she had asked Ms. Dinardo where Grievant was that morning so that she could cover the work, and Ms. Dinardo informed her that he had called in to report the accident.

At levels two and four Grievant asserted that Ms. Dinardo stated at level one that she had personally observed his car later that day, but later changed her testimony to state that she sent another worker to view the vehicle. At both the level two and level four hearings Ms. Dinardo denied ever stating that she had personally checked his car. Joe Nicholas, a coworker, testified at level two that Ms. Dinardo did request that he check the condition of Grievant's car. He reported seeing no damage to the fender or bumper, or any indication that the car had been in a ditch.

Both Ms. Dinardo and Ms. Gillespie testified that Grievant stated he had a doctor's appointment prior to his leaving work on February 2, 2000, contrary to his claim that he simply stated he was going to see a doctor. Further, Ms. Gillespie testified that she was at work on February 1, 2000, and recalled that she had gone to the restroom following the Fed-Ex pickup at 3:00 p.m., and that Grievant was gone when she returned.

To accept Grievant's claim of truthfulness it would be necessary to find not only the testimony of Ms. Dinardo to be false, but also that of Ms. Gillespie, Mr. Nicholson, and Mr. Bostonia. There is no evidence of a conspiracy to dismiss Grievant. Even Grievant could offer no reason for the false testimony other than one or more of the individuals simply did not like him.

Conversely, Grievant has developed a record of ongoing actions since October 1998, of misusing, and misrepresenting his use of, leave time. Grievant has been counseled and twice warned regarding his actions, yet his behavior in January and February 2000, demonstrate that the deficiencies had not been corrected. Although Grievant indicates that he was totally unaware of his precarious employment situation, and was shocked when he was advised of his dismissal, Respondent has

complied with a progressive discipline procedure, and any lack of understanding by Grievant appears to be his own fault. Grievant testified at level two that he had never read the letters of warning, or the Classified Employees Handbook, which provides information regarding the disciplinary process.

Respondent's "Unauthorized Absence Policy", WVU-HR-53, states in pertinent part:

The University has the right to expect a reliable workforce, and employees are expected to be present and functioning at work as scheduled. Employees are to obtain proper authorization to be away from the work site for any reason. Prior to their normal start time, employees must notify their supervisor if unable to report to work for any reason. Prior to leaving the work site, employees must notify their supervisor if unable to continue work for any reason . . . Failure to comply with any of these expectations results in unauthorized leave.

Respondent has proven that Grievant frequently kept his own hours, did not officially report off when absent, left work without approval, and misrepresented facts surrounding these situations. Because Respondent needs reliable, honest employees, and made an effort to help Grievant correct his deficiencies through progressive discipline, the dismissal was implemented in a proper manner.

In addition to the foregoing findings of fact and discussion, the following formal conclusions of law are appropriate.

Conclusions of Law

1. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.
2. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR- 371 (Oct. 30, 1996); Pine v. W. Va. Dept. of Health & Human Resources, Docket No. 95- HHR-066 (May 12, 1995).
3. The testimony offered by Ms. Dinardo, Ms. Gillespie, Mr. Bostonia, and Mr. Nicholas is consistent, and found to be credible, while that offered by Grievant is unsupported by any evidence, and is contrary to that of all other employees.

4. Respondent has proven that Grievant has continued to violate the Absenteeism Policy, and that counseling and two letters of warning issued pursuant to a progressive discipline policy have failed to correct the deficiency.

5. Respondent has established by a preponderance of the evidence that just cause exists to support the termination of Grievant's employment.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. 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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: August 31, 2000 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

[Footnote: 1](#)

The grievance was erroneously processed under the Docket Number 00-BOT-164.