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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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JOHN W. HORTON

v.

Docket No. 90-H-515

**WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES,
DIVISION OF HEALTH**

D E C I S I O N

On December 3, 1990, John W. Horton initiated the following grievance at Level IV, pursuant to W.Va. Code §29-6A-4(e)'s expedited procedure:¹

Management has decided to terminate my position as Health Service Worker due to my inability to respond to notice and letters because of work-related stress. I request to be made whole in every way including reinstatement to my former position, shift and pay.

Hearing was conducted January 14, 1990, and the parties' January 31 post-hearing submissions have rendered the matter mature for disposition.

The facts underlying this case are fairly straightforward. Grievant, a nine-year employee of Respondent West Virginia Division of Health's Substance Abuse Unit (SAU), which is located on the grounds of Huntington State

¹ Mr. Horton signed the grievance form on November 25 and mistakenly submitted it to his employer; under cover of a November 29 letter, the employer forwarded the form to this Grievance Board, where it was received and docketed December 3.

Hospital, has a history of continuously-treated psychiatric difficulty dating back to 1972 and his involvement in the Vietnam conflict. Although there is no indication that his job performance was ever problematic, at times over the years when Grievant's sick and annual leave was spent but additional health-related work absences were necessary he would be placed on "unauthorized medical leave" which apparently was converted to "medical leave without pay" upon his return to work and presentment of a doctor's excuse.²

On September 21, 1990, Grievant failed to return to work after his lunch break, although he promptly telephoned the SAU to state he had been hospitalized for chest pains. At the time he had no reserves of leave and was placed on unauthorized status. He next worked on October 4 but again on that day did not reappear at the SAU after lunch, although he did call to report his inability to then further

² Resp. Exs. 4, 5, and 6 are memoranda which reveal that, prior to September 1990, Grievant had at least three times been "warned" or "reprimanded" regarding leave-related problems; however, these incidents were not cited in Grievant's termination and will not be considered except perhaps as further evidence that Grievant was familiar with Respondent's requirements regarding leave, which he at any rate readily admits.

In addition, these memos each do advise Grievant of Respondent's Employee Assistance Program (EAP) and of EAP's purpose, "to assist employees in identifying and overcoming problems which prevent them from carrying out their duties and responsibilities." Since Grievant has at all pertinent times been under constant psychiatric supervision, it is understandable and not surprising that he did not take advantage of EAP.

work and his need to consult a physician. On October 5, he once again telephoned the SAU and advised that he would be back at work on October 9. Grievant did not show up at the SAU on October 9 or thereafter, nor did he at any time prior to the institution of this grievance provide notice or explanation of this failure.

Under date of October 16, Respondent informed Grievant, by letter (Resp. Ex. 1), that he was on unauthorized leave "as of 9-28-90 ($\frac{1}{2}$ hr) through 10-3-90 and 10-4-90 (N) to Indefinite."³ The correspondence continued:

The reason for this action is that you had exhausted all sick and annual leave available to you [as of September 28]. Until you apply for a leave of absence, all your time off from work will be documented as Unauthorized Leave. However, you may submit a written request for leave of absence and, if approved, the period of Unauthorized Leave will be converted to a medical or personal leave of absence without pay. A PO-26, Request for Leave of Absence Without Pay, is enclosed for your use. Failure to complete and return this form within 10 days may result in further disciplinary action.

Also note that continued use of the Unauthorized Leave status may result in your being placed on a delayed payroll.

The letter also provided Grievant with the name and telephone number of an individual who was equipped to answer any questions he had about the action it documented.

A blank "PO-26" form was enclosed with this correspondence. This form is replicated below:

³ Apparently, the "(N)" designation is a reference to 12:00 noon.

WEST VIRGINIA BUREAU OF PUBLIC HEALTH

Request for Leave of Absence
Personal/Medical (Without Pay)

To the Local Program Director or Administrator:

I, the undersigned, am requesting a leave of absence for the period _____, 19__ through _____, 19__.

I am requesting the following type of leave of absence (check correct type):

___ Personal (without pay) ___ Medical (without pay)

I am requesting this action for the following reason(s): _____

APPROVED BY:

Program Director or Admin.

Employee Signature

Date

Date

IMPORTANT: Attach copies of all required supporting documents (physician statements, etc.)

APPROVED BY:

Director, Employee Information

Date

Although Respondent's October 16 letter to Grievant was not sent by certified or other return-receipt mail service, it is assumed that Grievant received it, along with the enclosed PO-26, no later than October 17 or 18. Despite this, and the clearly-stated ten-day deadline, Grievant did not mail the PO-26 until November 2. Even then, according to Respondent it was inadequately completed. Resp. Ex. 3 is that form, on which Grievant, rather obviously parroting

Resp. Ex. 1, requested "a leave of absence for the period 9-28-90 (1/2 hr), 1990 through 10-3, 1990. 10-4 (N) Indefinite." He checked the "Medical (Without Pay)" line and made the simple entry "illness" in the space designated for "reason(s)." Other than his signature on the "Employee Signature" line and "11-2-90" on the date line immediately below, the rest of the form, as submitted by Grievant, remained blank; in addition, there were no attachments, e.g., physician statements, to this "completed" PO-26.

Prior to Respondent's receipt of Resp. Ex. 3, however, on October 31 it had already issued another letter. It is Resp. Ex. 2 and reads, in pertinent part, as follows:

You have failed to report to work or notify the . . . [SAU] of your absence since October 4, 1990(N). Furthermore, you have also not responded to our letter to you dated October 16, 1990.

Your negligence has caused a hardship in providing shift coverage. . . . As you have been advised of the proper procedure to use when you will be unable to report to work, this letter. . . [is] written documentation that you are being dismissed from your position as Health Service Worker. . . effective [in] fifteen (15) calendar days. . . .

Resp. Ex. 2, which Grievant stated he received on November 3, also provided Grievant with the name and phone number of an individual for him to contact with questions and advises him, generally, of his rights under the state employees grievance procedure, Code §§29-6A-1 et seq.

One other document generated by Respondent, a letter of December 6, 1990, admitted as Resp. Ex. 7, is worthy of mention. It acknowledges the receipt of Resp. Ex. 3 and

denies Grievant's request for medical leave of absence, citing that:

1. The appropriate supporting documents (physician statements) are not attached.
2. The PO-26. . .has not been signed as approved by the Program Director of [(sic)] Administrator.
3. A medical leave of absence cannot be approved for an indefinite period. The physician must state the estimated term of the leave of absence.

Our records further indicate that you have been dismissed. . .effective November 14, 1990.

At the hearing, these witnesses appeared for Respondent's cause: Robert Nida, a registered nurse and Grievant's immediate supervisor since August 1990; Penny Koontz, Mr. Nida's supervisor; and Jeanne Roberts, Respondent's Director of Employee Information and author of Resp. Ex. 1 and 7. Grievant testified on his own behalf and presented no other witnesses. Although Grievant was chronologically the last individual to offer testimony, some discussion of information gleaned from him will be helpful in analysis of that of Respondent's witnesses.

Grievant opined that the chest pains which precipitated his late September-early October hospitalization were the result of work-related stress from understaffing and other factors. He produced a Workers' Compensation Fund "Report of Occupational Injury" form (Gr. Ex. 1) apparently filled out by him on October 8 and completed by his psychiatrist, Jack E. Dodd, on October 16, and it is noted that Dr. Dodd did certify that Grievant's "bipolar disorder, chronic without psychotic features" was "work-aggravated." Grievant

explained that after his brief return to work on October 4, he felt that he needed to consult with Dr. Dodd but was unable to secure an appointment for earlier than October 9. Despite this appointment and others, continued Grievant, as the month progressed he became "a prisoner in his own home" due to his poor mental health, unable to even walk to the mailbox, watch television, or refrain from crying. Finally, commencing the second week of November, he was hospitalized for about two weeks on the psychiatric floor of a local general-services hospital. Grievant admitted that he did not advise Respondent of this admission and that he forbade his wife, the only person besides himself and hospital staff who knew of his whereabouts, to divulge the information. He added that his condition made him very fearful and that his strong desire at that time was that no one know that he was ill or in the hospital even if not aware of the particulars.

On January 10, 1991, Dr. Dodd penned a letter for Grievant. Admitted as Gr. Ex. 2, it reads in part as follows:

John Wesley Horton has been under my care for some time with a history of Bipolar Disorder, chronic without psychotic features and Mixed Substance Abuse, with a recent admission to. . .[the hospital] in November 1990. John also suffers from Generalized Anxiety Disorder, severe.

Although his illness is considered a "Non-Occupational Condition," in my professional opinion his illness is work-aggravated [(sic)]. Mr. Horton suffers from confusion and poor judgment due to work-related stress.

Grievant cited his persistent failure to contact Respondent during October and November as an example of the "confusion" and "poor judgment" noted by Dr. Dodd.

Mr. Nida, Ms. Koontz and Ms. Roberts, in consultation with Mr. Joe Smith of the West Virginia Division of Personnel, participated to varying degrees in the decision to terminate Grievant. At least the two women were asked, on cross-examination, if knowledge of Grievant's November hospitalization would have "changed things" in their minds, i.e., would they have nonetheless supported the dismissal decision. Ms. Koontz' response was, "I might have tried to contact him," and Ms. Roberts said, "Our October 31 letter gave him an opportunity to discuss, upon his request, the possibility that he might be dismissed."⁴

While Grievant cannot definitively be said to be without fault in this scenario, he is entitled to relief, for Respondent has not adequately met its burden of proof herein. Grievant was terminated because of his failure "to report to work or notify. . .[SAU] of your absence since October 4, 1990 (N)" and to "respond[] to our letter to you dated October 16, 1990." First of all, as Ms. Koontz conceded, the former date is incorrect in that Grievant last contacted the unit October 5; however, this minor discrepancy is meaningless since Grievant confesses that he did not

⁴ These quotes should be understood as approximate, not necessarily verbatim.

make contact with SAU for several weeks. Secondly, although Grievant missed the ten-day deadline for the PO-26's return by a few days, the record strongly suggests that even if he had been timely, Respondent found Resp. Ex. 3 inadequate so that Grievant still would have been dismissed. However, there was much to-do over the unacceptability of Resp. Ex. 3, particularly because it was not signed off by Grievant's "Program Director or Administrator" and not accompanied by a doctor's statement of diagnosis and estimated return-to-work date, but no clear evidence that Grievant understood he had to then seek such a signature or statement; certainly, those requirements are not self-evident from the form. Rather, the document, which is used for more than one type of leave but fails to distinguish prerequisites, does not, for example, even make clear that a physician's statement is always required when one is seeking a medical leave of absence. Nor does it reveal that an guessed return-to-work date must be provided, that that estimate must come from a physician, or that Grievant must obtain his Program Director's signature prior to submission. It is certainly not fair to assume that an employee, particularly one with Grievant's mental-health history, will understand these responsibilities, if they are his, or always have facility to act with dispatch on such understanding.⁵ Further, the uncontroverted evidence is

⁵ Even if Health's practice in this regard was
(Footnote Continued)

that, in the past, Grievant has not had to provide a doctor's excuse until his return to work even after unauthorized absences, and he had no reason to believe the same was not true on this occasion. It is true that he was given the name and number of a person to contact if he had questions, but that he did not have any is not surprising.

At Level IV, Grievant clarified that the relief he now seeks, i.e., what he means by being "made whole," is reinstatement to his former job and approval of his medical leave of absence. Grievant acknowledges that he, if reinstated, is unentitled to back wages since he has been away from work without leave reserves since before his dismissal on November 14. He also stated that he considers himself still unable to work and that he cannot estimate a return date although he declared, "I want to return to work someday and I feel I have a lot to offer. I'm a recovering addict myself."

Inasmuch as Respondent was not aware of the extent of Grievant's then-immediate problems in October and November 1990, and in that the nature of Grievant's condition itself made it exceedingly difficult for him to advise Respondent thereof, Grievant will be reinstated to his position and any

(Footnote Continued)

inconsistent with the applicable internal or West Virginia Division of Personnel leave regulations, Grievant cannot be held accountable therefor. At any rate, no such regulations were cited. Further, although this if true would alone not be controlling, SAU staffers do not have ready access to "policy and procedure" manuals according to Grievant.

mention of discipline against Grievant after October 4, 1990, will be removed from his personnel file. However, because one of the reasons Respondent denied Grievant's medical leave of absence was his prior-in-time termination, and since the undersigned, as was earlier and is perhaps still true of Respondent, does not have adequate information to make a decision whether Grievant is entitled to that leave, no leave-of-absence relief may be granted herein. However, if Grievant still desires such a leave, he and his representative shall cooperate with Respondent and ensure that, within thirty days of the date of this Decision, it is fully advised of all facts necessary for it to make a determination on whether Grievant is entitled to medical leave of absence. If Respondent determines Grievant is not so entitled, it may proceed to whatever other personnel action it deems appropriate.

This case has some similarity to Hayes v. Kanawha Co. Bd. of Educ., Docket No. 90-20-064 (June 26, 1990), in that in Hayes, the employer, relying on in-part incorrect grounds, took disciplinary action against its employee. The Hearing Examiner in Hayes, noting the employer's discretion in personnel matters, granted the grievance to the extent that the employer was directed to review its personnel action for either alteration or affirmation. Because of the peculiar circumstances of this case, including Grievant's condition and his non-entitlement to back wages, a modified approach has been taken and the dismissal declared invalid.

This Decision should not be interpreted to state that an employer must ad infinitum provide extraordinary accommodation for its special-needs employees, for there certainly comes a point when even those employees must bear responsibility for their own actions. Compare Tomasek v. W.Va. Divn. of Rehav. Svcs., Docket No. 90-RS-133 (Nov. 21, 1990); also compare Malhotra v. Mason Co. Bd. of Educ., Docket No. 89-26-189 (July 28, 1989). Case-by-case analysis is necessary; in the within matter, that Grievant's work performance was generally acceptable, that he returned the PO-26, fully completed as far as he reasonably was concerned, only a few days late, and that he started this grievance process two days after his release from the hospital, see n. 1, have been deemed quite significant. This Decision should likewise not be read to indicate that Respondent acted inappropriately in terminating Grievant, since it was not then aware of the mitigating circumstances and under these facts had no affirmative duty to investigate. However, since the mitigating circumstances are weighty, Grievant's reinstatement is appropriate.

One final comment is in order. Although Respondent, at Level IV, vigorously defended its termination of Grievant, it seemed that some of the information divulged by Grievant at the hearing had not previously been provided to Respondent and, had that been accomplished, the grievance might earlier have been settled. The parties are reminded of their continuing obligation to act in good faith toward the

resolution of grievances, see Code §29-6A-7; it is suggested that appropriate disclosure and settlement efforts would be in keeping with this obligation.

In addition to those contained in the foregoing, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. After a series of sudden and often-unexplained absences commencing in late September 1990, Grievant was terminated from his employment with Respondent.

2. For all or most of the period relevant hereto, Grievant was suffering from a debilitating psychological condition which either prevented him from attending work and arranging for leave-time appropriately or made it extremely difficult for him to do so. Grievant was hospitalized for this condition during November 1990.

3. Grievant initiated this claim in late November 1990, roughly two months after the commencement of occurrences relevant to this case.

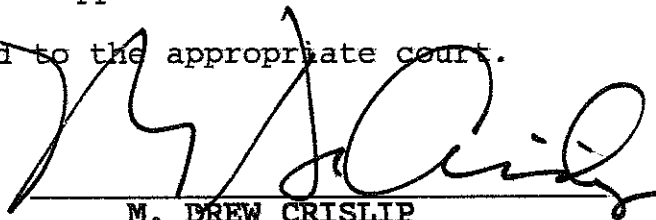
CONCLUSIONS OF LAW

1. In a grievance related to a disciplinary personnel action (e.g., termination), the employer bears the burden of proving its charges by a preponderance of evidence. Schmidt v. DOH, Docket No. DOH-88-063 (Mar. 31, 1989).

2. Respondent failed to adequately meet this burden herein.

Accordingly, this grievance is **GRANTED**, to the extent that Respondent is ORDERED to forthwith reinstate Grievant to his position, retroactive to November 14, 1990, and to remove any mention of disciplinary action taken against Grievant after October 4, 1990, from his personnel file. With regard to any imminent medical leave-of-absence or other personnel action, see the body of this Decision, p. 11.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Cabell County 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 Hearing Examiners is a party to such appeal and should not be so named. This office should be advised of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.



M. DREW CRISLIP
Hearing Examiner

Date: January 31, 1991