SHARON E. THOMAS,

Grievant,

v. Docket No. 98-BOT-274

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Sharon E. Thomas, employed by West Virginia University (Respondent) as a Food Service Assistant I, filed a level one grievance on June 12, 1998, in which she alleged, “I was terminated for gross misconduct. I am seeking to be reinstated with back pay and benefits.” The grievance was denied at levels one and two. The Board of Trustees waived consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and the matter advanced to level four on July 29, 1998. An evidentiary hearing was conducted in the Grievance Board's Morgantown office on September 25, 1998, at which time Grievant appeared pro se, and Respondent was represented by Gregory G. Skinner, Assistant Attorney General. The matter became mature for decision with the submission of post-hearing proposed findings of fact and conclusions of law, and responses, on or before October 28, 1998.

The following findings of fact are made from the testimony and exhibits presented at the level four hearing, as well as the documentation submitted as part of the lower-level record.

Findings of Fact

1. Grievant was employed by West Virginia University as a Food Service Assistant I in 1995, and continued to hold that position at all times relevant to this decision. 2. Grievant is employed under a nine-month contract, but was additionally contracted to work during the summer at Hatfield's, in the Mountainlair.

3. Grievant was scheduled to work May 15, 16, 17, and 18, 1998. This time period, Friday through Monday, included graduation weekend at West Virginia University.

4. Grievant's work schedule was posted in the Administrative Office Area at the Evansdale Residential Complex the week of May 10, 1998.

5. Grievant did not report to work on Friday, May 15, 1998, and was given a written warning.

6. Grievant did not report to work on Saturday, May 16, 1998; however, her spouse called and reported that she was ill.

7. Dining Services requires that employees report sick leave personally. Calls from friends and relatives are not acceptable.

8. Grievant's spouse was advised by Supervisor Lori Compton that it would be necessary for Grievant to present medical verification of her illness upon her return to work.

9. Grievant did not report to work on Sunday, May 17, 1998, nor did she report that she was ill.

10. Grievant did not report to work on Monday, May 18, 1998, and did not call to report that she would need to take leave. Grievant did collect her paycheck that day.

11. Grievant reported to work on Tuesday, May 19, 1998, but did not provide the required medical verification of her illness.

12. On May 19, 1998, Food Service Manager Larry Koay notified Grievant that her employment was terminated.

Discussion

In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). 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 argues that while Grievant initially called to report that she had overslept on May 15, 1998, she stated that she would be at work in an hour, but failed to report at all that day. Regarding her absence of May 16, Respondent notes that Grievant had been warned on several occasions that she must personally call in sick, absent extreme circumstances. Respondent asserts there is no evidence that Grievant was suffering from extreme circumstances, and she did not provide the

medical verification that was properly required by Policy ER-11. Grievant did not report to work, or call in sick, on May 17 and 18. Respondent concludes that Grievant's failure to report to work without proper notice or authorization constitutes gross misconduct and neglect of duty, and establishes good cause for her dismissal.

Grievant argues that the termination of her employment was improper for a number of reasons. First, she had not received the written warning prior to her dismissal. Second, obtaining medical verification was an unreasonable condition for her return to work. Also, because it was a weekend and her insurance would not allow her to go to an emergencyroom for her menstruation problems, she was unable to obtain the medical verification until May 21, 1998. Grievant further argues Respondent's insistence that she obtain the verification excused her from returning to work until such time she could obtain the documentation. Third, the requirement that she must call in sick personally is contrary to the institutional procedure, which does not require a personal phone call. Fourth, she was never confronted with the problem and given an opportunity to explain her absence, as is required by the WVU Handbook. Grievant requests that she be reinstated with back pay.

At level four, only Mr. Koay testified. He stated that graduation weekend is one of the busiest during the year for Food Services. He estimated that forty-five to fifty graduation functions are catered, serving between ten and fifteen thousand guests. He emphasized the importance of personnel to be at work during this weekend, and indicated that annual leave was not granted for this reason. He opined that Grievant's absence on May 15 alone was sufficient to constitute gross misconduct, and that her failure to produce the medical verification four days later, supported the dismissal.

Grievant elected not to testify at level two or level four, consistent with the provisions of W. Va. Code §18-29-6; however, she did present a number of arguments, which she asserts renders the dismissal improper. Her first argument is that she did not receive the warning letter prior to her dismissal. She does not challenge the written warning which was issued after she failed to appear for work, without reason, on May 15, 1998, only the timing, in that she did not receive it first. The fact that she did not receive the letter until she was dismissed the following week, does not render the termination of her employment improper.

Respondent is permitted to require medical verification when an employee utilizessick leave. Board of Trustees Procedural Rules, §128-35-8(5) provides: Sick leave for more than five (5)

consecutive days shall not be granted to an employee for illness without satisfactory proof of illness or injury, as evidenced by a statement of the attending physician or by other proof satisfactory to the institution. . . .” However, Section (6) continues, “[t]he institution may require evidence from an employee for verification of an illness or other causes for which leave may be granted under this policy, regardless of the duration of the leave.” Policy ER-11 essentially restates the BOT policy, and provides that medical verification may be required “regardless of the duration of the leave”. It also defines the verification to include a diagnosis, prognosis, and expected return to work date. Since Grievant's illness occurred at such an inopportune time, the request for verification was not unreasonable.

Grievant's stated belief that the request for medical verification relieved her of any obligation to continue to report to work, or that her illness continued, until such time the document was obtained, is without basis. Although she claimed that her health insurance would not permit her to seek care at an emergency room for menstrual complaints, the undersigned takes administrative notice that local physicians offer clinical hours for walk-in patients on Sundays. The delay in obtaining the document is not justified, and did not validate her ongoing absence from work. Additionally, Grievant's argument is inconsistent with her own action, because she did report to work on Tuesday, May 19, 1998, without the physician's statement. (See footnote 1)

Grievant may be correct that a personal call is not required by the institution toreport sick leave. Nevertheless, she was aware that food services requested their employees to call in personally. There is no indication that she was disabled to the point that she could not comply with her employer's request. The fact that she did not call personally would not merit dismissal, but neither does it render the dismissal invalid.

Addressing Grievant's complaint that she was not given an opportunity to explain her actions prior to the imposition of the dismissal, the Grievance Board has consistently followed the rule stated in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), that public employees are entitled to a measure of pre- termination due process. Specifically, employees must ordinarily be afforded a notice of the charges and an opportunity to respond prior to imposition of the disciplinary action. Mercer County Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994); Scragg v. Bd. of Directors/W. Va. State College, Docket No 93-BOD-436R (Jan. 29, 1996); Lanham v. Putnam County Bd. of Educ., Docket No. 90-40-503 (July 10, 1992); Allen v. Monroe

County Bd. of Educ., Docket No. 90-31-021 (July 11, 1990). Grievant was given notice and an opportunity to respond to the charges during her telephone conversation with Mr. Koay on May 19, 1998.

In conclusion, as a three year employee with Respondent, Grievant knew that graduation weekend was particularly busy for food services, and that she needed to be at work. She provided no reason for her failure to report to work on May 15, and she did not timely provide a physician's verification for her absence on May 16. The only stated reason for her failure to appear at work on May 17 was that she was unable to see a doctor. Grievant claimed that she was not scheduled to work on May 18; however, Respondent Exhibit 2 (level two) established that she was to work in the Mountainlair onthat date.

Based upon the foregoing, the dismissal was consistent with the WVU Classified Employee Handbook (University Exhibit 1 at level two), which provides that “[a]bsence from work for three consecutive workdays without proper notice, explanation and/or authorization shall be deemed gross misconduct and neglect of duty, and the employee's University employment will be terminated.”

In addition to the foregoing findings of fact and discussion it is appropriate to make the following conclusions of law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. Respondent has proven by a preponderance of the evidence that Grievant engaged in gross misconduct when she did not report to work four consecutive days, and did not provide medical verification for illness upon her return, as was required by her supervisor.

3. Respondent has established good cause for the termination of Grievant's employment.

4. Respondent provided Grievant with all required pretermination due process when Mr. Koay advised her of the impending action, and gave her an opportunity torespond during a telephone call on May 19, 1998.

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. 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 30, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant provided a physician's statement for the first time at the level two hearing; however, it did not indicate a diagnosis or prognosis.