MELINDA A. HULL,

Grievant,

v. **Docket No. 98-C&H-360**

DIVISION OF CULTURE & HISTORY,

Respondent.

D E C I S I O N

Following her dismissal, effective September 1, 1998, Grievant, Melinda A. Hull, employed by the Division of Culture & History (Respondent) as an Office Assistant II, filed a complaint directly to level four pursuant to the expedited grievance process set forth in W. Va. Code §29-6A-4(e). Grievant stated the relief she was seeking to be "reinstatement and transfer to other job conditions, or disability retirement". An evidentiary hearing was conducted in the Grievance Board's Wheeling office on December 14, 1998, at which time Grievant was represented by Rick Holroyd, Esq., and Respondent was represented by Jeffrey G. Blaydes, Assistant Attorney General. The case became mature for consideration with the submission of proposed findings of fact and conclusions of law on or before January 22, 1999.

The essential facts of this matter are undisputed and may be set forth as follows.

Findings of Fact

1. The Grave Creek Mound is an historical Indian burial mound. Grievant was first employed at the historical site in Moundsville, on a part-time basis in 1980. She began working full-time in 1981 assisting in the development and management of a museum at the site.

2. Since December 1986 Respondent has been responsible for the GraveCreek Mound site, Over the years it has developed and operates educational tours, a gift shop, and museum displays.

3. When Respondent assumed control of the site, Grievant was retained as an employee, and was classified as an Office Assistant II. Respondent maintains only five employees, including Grievant, at the Grave Creek Mound site. Grievant is the only employee at the site classified as an Office Assistant.

4. As an Office Assistant II, Grievant: (1) provided written or verbal information to the public

regarding tours, lectures, rentals, programs, special events, and other services offered by the facility; (2) explained rules, regulations and fees, maintained the Site's calendar of events, including tours, room bookings, programs, and special events; (3) maintained staff work schedule calendar; (4) answered the telephone, provided information and took messages; (5) maintained office inventory; (6) prepared letters of confirmation and appreciation, room booking contracts, worksheets for setups, public service announcements, special event calendars, and price lists for gallery exhibits and promotional material; (7) maintained card, paper, and computer filing systems; and, (8) worked in the gift shop.

5. On May 20, 1997, Grievant no longer reported to work and began using her accrued sick leave. A physician's statement dated June 9, 1997, stated that Grievant was “unable to perform usual duties due to anxiety - depression - under treatment.” The physician indicated the disability would not permanently prevent Grievant from performing her duties.

6. By letter “To Whom It May Concern”, dated May 6, 1997, Dr. Byron L. VanPelt, diagnosed Grievant with depression and high blood pressure. He opined, “[t]heseproblems for the most part are felt to be related to her present job situation. It is advised, if at all possible, she be changed to a similar or new job within the system.”

7. By letter dated June 16, 1997, Respondent's Personnel Manager, Jenny Boggess, requested that Grievant and/or her physician, provide specific recommendations on how to accommodate her medical condition so that she might resume the essential job functions of her position.

8. On July 28, 1997, Ms. Boggess acknowledged Dr. VanPelt's recommendation that Grievant be transferred to a different job site, and advised Grievant that she might apply for any vacancy within the Division, or with any other agency, at her option. Ms. Boggess offered to mail Grievant copies of vacancies within the Division, and directed her to contact the Division of Personnel for vacancies in other agencies.

9. In a letter dated August 5, 1997, labeled in large print “CONFIDENTIAL”, Grievant advised Ms. Boggess that in response to her request regarding accommodations which would assist Grievant, “[t]he 'essential job functions' are <u>not</u> the cause of my medical problems. The atmosphere/environment, created by Mrs. Yoho at Grave Creek Mound has become for me, unhealthy. It has taken its toll on my mental and physical health. Enclosed are original letters from my

health care team." Grievant both began and ended the letter stressing that its contents should be kept confidential, and particularly should not be shared with "any" Grave Creek Mound site personnel.

10. Grievant attached the following documents to her August 5, 1997, letter:

(A) A letter from Nida Nicasio, M.D., stating that Grievant "had severe problems with depression and anxiety which essentially has improved since she has been off work. She is able to do all the essential job functions and her symptoms were a reaction to herinteraction with her direct supervisor, Ms. Susan Yoho." Dr. Nicasio concluded that he supported Grievant's request for a transfer to a different supervisor, because "she exhibits not only psychological but physical reactions due to that interaction."

(B) A letter from Terry Blon, Outpatient Therapist at Northwood Health Systems. Mr. Blon advised that during a course of treatment for depression, it became clear that "the main stressor associated with both symptoms of depression and anxiety was Melinda's interaction with her direct supervisor at work. This work related problem generated both psychological and physical reactions." He concluded by stating that, in his opinion, Grievant was a competent worker with a strong work ethic, which made it difficult for her to accept the negative impact of her interaction with her supervisor. He concurred that it would be beneficial for her to do similar work in a different setting.

(C) Dr. VanPelt stated in a letter dated July 26, 1997, that he had treated Grievant for depression, occasional sleeplessness, and high blood pressure "off and on". He determined the depression and high blood pressure "for the most part are related to her present job situation. There is constant discord with her boss. If at all possible, I feel the best solution is a transfer to a similar job within the system."

11. Throughout this period of time neither Grievant, nor her doctors, stated the specific nature of Grievant's complaints regarding Ms. Yoho, and how they were the cause of her medical problems.

12. As a result of Grievant's August 5, 1997, letter, Respondent's Commissioner Renay Conlin directed Ms. Boggess and Deputy Commissioner Lynn Blackwell to conduct an administrative inquiry at the site to investigate Grievant's concerns.

13. In September 1997, Ms. Boggess and Ms. Blackwell proceeded toMoundsville and interviewed each staff member individually. The atmosphere and work environment were generally discussed, and the employees were asked if they had any concerns. This approach was used to accommodate Grievant's earlier request for confidentiality.

14. Ms. Boggess and Ms. Blackwell were unable to identify any “problems”, and heard no complaints from the employees during their discussions. No comments regarding the working relationship between Grievant and Ms. Yoho were mentioned.

15. Commissioner Conlin reviewed Ms. Yoho's performance evaluations and found them superior. She had received no other complaints regarding Ms. Yoho.

16. On September 29, 1997, Grievant requested that Ms. Boggess begin sending her copies of position vacancies with the Division. Ms. Boggess complied with this request.

17. By letter dated October 1, 1997, Commissioner Conlin advised Grievant that she had directed management personnel to confidentially explore the claim that her medical problems were caused by her supervisor, and that she had been unable to verify the claim. The Commissioner offered to meet with Grievant to further discuss the situation, and again advised her of her right to apply for positions within the Division, and with other agencies.

18. Grievant was unwilling to travel to Charleston, West Virginia, and requested Commissioner Conlin meet with her in Wheeling. The Commissioner did not travel to Wheeling for the meeting, but advised Grievant that she could still meet with her in Charleston, and provided dates and times she was available. Grievant responded that the listed dates were not convenient and she would arrange a meeting date at a later time. Grievant did not follow through on scheduling the meeting. 19. On January 26, 1998, Grievant advised Commissioner Conlin by letter that in lieu of a meeting, she would formally request one the following accommodations be made for health conditions: a transfer to another Division of Culture & History site in Ohio or Marshall counties; a lateral transfer to a comparable state job, within the two listed counties; or transfer Ms. Yoho to another job site. (See footnote 1)

20. By letter dated February 17, 1998, Commissioner Conlin responded to Grievant's request, noting that Culture & History is a small agency with a comparable number of job postings. Grave Creek Mound and Independence Hall in Wheeling are the only sites Respondent maintains in Ohio and Marshall counties, and there were no vacancies at the Wheeling facility. Grievant was advised that it was her responsibility to pursue vacancies at other agencies through the Division of Personnel. The Commissioner concluded, “[t]he third option in your letter to me is not possible.”

21. Throughout 1997, Grievant continued to file physician's statements which provided under Limitations/Restrictions the comment, “[r]ecommend transfer to a different job site.”

22. Grievant exhausted her sick leave on January 9, 1998. Grievant then used her accrued annual leave through February 27, 1998.

23. By letter dated February 18, 1998, Grievant requested a medical leave of absence effective March 1, through August 31, 1998.

24. On March 6, 1998, Commissioner Conlin granted Grievant's request for amedical leave of absence without pay through August 31, 1998, pursuant to Division of Personnel Administrative Rule, Section 15.08(c). She reminded Grievant that in response to her request for accommodations relating to health problems, she could apply for any job vacancy with the Division, and would continue to receive job postings. Grievant was again advised that she needed to contact the Division of Personnel to obtain information on positions outside the Division. Commissioner Conlin concluded that Grievant's third option was “not available”.

25. On June 18, 1998, Ms. Boggess met with Grievant to discuss her concerns and options for returning to work. Grievant continued to assert that her medical problems were work related, but emphasized that she did not want to get anyone in trouble and refused to give specific examples other than to relate that on one occasion Ms. Yoho had stated that she wished the place would burn down.

25. On July 8, 1998, Grievant requested a Personal Leave of Absence Without Pay, effective September 1, 1998, “until the time an accommodation has been made for my medical conditions.”

26. By letter dated July 23, 1998, Commissioner Conlin advised Grievant that she was unable to grant her request for a personal leave of absence without pay, for medical reasons. Grievant was further advised that she was expected to return to work on September 1, 1998, and that her failure to do so would result in dismissal.

27. Grievant filed a grievance on August 5, 1998, with Martha McKee, Site Director, protesting Commissioner Conlin's decision to deny her request for a personal leave of absence without pay for medical reasons. This grievance was not pursued.

28. By letter dated September 1, 1998, Commissioner Conlin notified Grievantthat she was dismissed from her position as Office Assistant II, effective that date. The reason given for the dismissal was Grievant's failure to return to duty following the expiration of a leave of absence without pay.

29. Although other agencies advertised Office Assistant positions in Ohio and Marshall

counties during the relevant period of time, Grievant did not submit an application for any of them.

30. Respondent has not had a vacancy in the Office Assistant classification at any time relevant to this matter.

31. Respondent does not employ an Office Assistant at Independence Hall.

Argument

Respondent argues that the termination of Grievant's employment was for cause, as addressed by the Division of Personnel (Personnel) Administrative Rule 15.8(d)(3), which states the "[f]ailure 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." Grievant did not present a satisfactory reason for her inability to return to work, and did not report to work at the designated time. Although Grievant had requested a personal leave of absence without pay for medical reasons, that request was denied. Personnel Rule 15.8(a) provides:

An appointing authority may grant a permanent, probationary, or provisional employee a leave of absence without pay for a specific period of time which normally should not exceed one year. The employee shall apply for the leave of absence in writing to the appointing authority. If the appointing authority approves the request, the approval shall be in writing. A leave of absence without pay may exceed the normal one year limitation and the appointing authority may grant the leave of absence at his or her discretion based onthe agency's personnel needs. Time spent by provisional employees for leaves of absence does not extend the provisional period limitation period. Written approval of the appointing authority is required in all cases. Approval of personal leave is discretionary with the appointing authority.

At level four, Commissioner Conlin testified that she denied Grievant's request for a personal leave of absence without pay because it was for an indefinite period of time and Grievant's absence had created some hardship on the other employees who were required to complete her duties. So long as Grievant remained an employee, another individual could not be hired to complete her duties. While it was permissible to secure a temporary employee from a private agency, funding was not available to do so. Additionally, Respondent was responsible for funding Grievant's insurance benefits at a cost of $400.00 per month. Finally, Grievant could not suggest a reasonable accommodation which would allow her to return to work, making it likely that the leave would last indefinitely. Based upon the foregoing concerns, and considering that Grievant had already been

absent from work for seventeen months, Commissioner Conlin testified that she concluded that an additional leave of absence would not be productive. When Grievant did not report to work on September 1, 1998, the Commissioner determined dismissal was appropriate.

Although Grievant has never alleged a violation of the Americans with Disabilities Act (ADA), Respondent asserts as an affirmative defense that it has attempted to determine what accommodation could be made to allow Grievant to perform her essential job functions, and that none could be identified. Respondent further argues that Grievant does not meet the ADA definition of disabled, and her requests for accommodation are not reasonable.

Grievant does not allege a violation of any statute, rule, regulation or policy relatingeither to the denial of her request for an indefinite leave of absence, or the termination of her employment. She does state that the investigation conducted by Ms. Boggess and Ms. Blackwell was ineffective, and characterizes Respondent's efforts to accommodate her health problems as minimal. Grievant asserts that Respondent's treatment of a long time employee with health concerns cannot be tolerated or condoned.

Discussion

In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of health & Human Resources, Docket No.96-HHR0501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health & Human Serv. Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, supra.

State employees who are in the classified service can only be dismissed for “good cause”, meaning misconduct of a substantial nature directly affecting the rights and interest of the public rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n., 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995). The West Virginia Supreme Court of Appeals has also stated that “the work record of a long-term civil

serviceemployee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Buskirk v. Civil Serv. Comm'n., 175 W. Va. 279, 332 S.E.2d 579 (1985).

Clearly, under the provisions of Personnel Rule 15.8(a), Commissioner Conlin could have granted Grievant's request for a personal leave without pay. It is just as clear under that provision, that the decision was discretionary. The reasons given by the Commissioner, staffing needs, fiscal concerns, and the indefinite nature of the request, constitute a valid and substantial basis for the decision to deny the request. Similarly, Grievant was advised that she was expected to return to work September 1, and that her failure to do so would result in the termination of her employment. Grievant intentionally and willfully did not return to work as directed. When an employee does not appear for work as scheduled, she has effectively abandoned her position, and established good cause for her dismissal. Respondent has established good cause in the present matter.

The undersigned may mitigate the discipline if the imposed penalty is clearly excessive or disproportionate to the offense. Worden v. W. Va. Dept. of Health and Human Resources/ Huntington State Hosp., Docket No. 98-HHR-282 (Jan. 27, 1999). In assessing whether the discipline was clearly excessive or disproportionate, the totality of the circumstances will be evaluated. Grievant had accrued approximately ten years seniority prior to the onset of her difficulties, and her past performance was apparently satisfactory. However, Respondent had engaged in ongoing attempts to find an accommodation to enable Grievant's return to work. These efforts were hampered by the fact that Grievant would not specifically define her problem with Ms. Yoho and requested confidentiality regarding the information she had provided. Although Grievant complained that the investigation conducted by Respondent was inadequate, it is important to note that had Grievant simply stated why her interaction with Ms. Yoho was causing her to suffer from stress and depression, there would have been no need for an investigation. Further, Grievant's requested accommodations were not viable. Respondent does not have any other Office Assistant II positions in the limited geographic area Grievant would consider, and had no vacant position in any classification during the time relevant to this matter. Other agencies posted openings for Office Assistants; however, Grievant admitted she did not apply for them. Transferring Ms. Yoho was not considered by Commissioner Conlin, and rightly so. If disgruntled employees could obtain the transfer of their supervisors on demand, state government would be in utter disarray. In summary, Respondent needed Grievant to return to work

and advised her of the consequences if she did not. Because she failed to return to work after a seventeen month absence, with no specific statement of what was causing her health problems, dismissal was not a clearly excessive measure of discipline.

Consistent with the foregoing findings of fact and discussion, the following formal conclusions of law are appropriate.

Conclusions of Law

1. In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of health & Human Resources, Docket No.96-HHR0501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The preponderance standard generally requires proof that a reasonable person would accept as sufficient thata contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health & Human Serv., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, supra.

2. State employees who are in the classified service can only be dismissed for “good cause”, meaning misconduct of a substantial nature directly affecting the rights and interest of the public rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm., 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).

3. Respondent has proven by a preponderance of the evidence that Grievant failed to return to work at the conclusion of a leave of absence, even after being warned of the consequences for such failure.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, andshould 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: February 9, 1999 ____ _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

In addition to the Grave Creek Mound site, Respondent operates historical sites at Independence Hall in Wheeling, Camp Washington Carver in Fayette County, and the Jenkins Plantation Museum in Lesage. Respondent maintains four employees at Independence Hall, none of which are Office Assistants.