REBECCA FOX,

Grievant,

v v.

Docket No. 99-BOD-008

BOARD OF DIRECTORS/FAIRMONT STATE COLLEGE,

Respondent.

D E C I S I O N

Rebecca Fox, employed by the Board of Directors as an Accounting Assistant I at Fairmont State College (Respondent or FSC), filed a level one grievance dated June 4, 1998, and received by Respondent on June 8, 1998, after her employment was terminated on May 22, 1998. Following denials at levels one and two, Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced the complaint to level four on January 7, 1999. A level four hearing was conducted on April 20, 1999, at which time Grievant was represented by LaVerne Sweeney, Esq., and Respondent was represented by Samuel R. Spatafore, Esq., Assistant Attorney General. The grievance became mature for decision with Respondent's submission of proposed findings of fact and conclusions of law on May 21, 1999; Grievant elected not to file post- hearing proposals.

The following findings of fact are derived from the record, including the level two transcript with exhibits, and the level four proceedings.

Findings of Fact

1. Grievant was regularly employed on or about July 1, 1996, as a an Accounting Assistant I in the Accounts Payable Department at Fairmont State College. Prior to July 1996, she had worked for Respondent in this capacity as a Manpower employee, for twelveto eighteen months.

2. On February 3, 1998, Grievant requested a “Medical Leave of Absence Without Pay” from February 3 through March 9, 1998. The request form, signed and dated by Grievant, indicates that she was to notify the Human Resources office of her return to work date by March 2, 1998. Although

not stated on the request form, or any subsequent doctor's slips, Grievant was being treated for depression, and has subsequently been diagnosed with bi-polar disorder.

3. By letter dated March 3, 1998, Director of Human Resources Stephen Leach reminded Grievant that she was to notify Respondent of the date she would return to work, and had failed to do so. He reminded her that compliance was important so that she could be returned to active status on the payroll.

4. On March 9, 1998, at 7:58 a.m., Grievant's spouse left a message on her supervisor's voice mail, advising that Grievant would not be reporting for work that day because she had a doctor's appointment.

5. On March 11, 1998, Mr. Leach advised Grievant by certified letter that Respondent needed a doctor's statement that she was still under care and needed to extend her medical leave of absence. Mr. Leach reminded Grievant that she was to notify Respondent of her anticipated date of return and provide a copy of her most recent doctor's statement. He warned that her continued disregard for established procedures would result in disciplinary action.

6. On April 2, 1998, Respondent received a “Certificate for Return to Work/School”, signed by Dr. Michael Gregory, and dated March 9, 1998, indicating thatGrievant had been under his care from March 9, 1998, and would be able to return to work on May 9, 1998.

7. By letter dated April 24, 1998, Mr. Leach notified Grievant that the return to work slip listed no restrictions, and requested that she provide a statement from the doctor by May 6, 1998, indicating that she was able to fully perform her duties, or listing any restrictions which might apply.

8. On May 8, 1998, Respondent received a note from Dr. Gregory stating that Grievant could return to work with no restrictions.

9. When Grievant did not return to work, or contact Respondent, on May 11, 1998, Mr. Leach advised her by certified letter of the same date, that her continued absence without explanation was being interpreted as a resignation from her employment. He directed her to contact him within three days of receipt of the letter if that assumption was incorrect.

10. Grievant did not respond to the May 11, 1998, letter, and by certified letter dated May 22, 1998, Mr. Leach advised Grievant that her employment was officially terminated.

11. On June 8, 1998, Respondent received a doctor's slip signed by Dr. Goodykoontz, and dated June 8, 1998, stating, “No Work 5/11/ - 6/30/98".

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 simply asserts that Grievant failed to comply with its policy “Medical Leave of Absence Without Pay”, set forth as Title 131, Series 35, §6.2, as follows:

The employee shall be expected to report to work on the first workday following expiration of the disability period. Failure of the employee to report promptly at the expiration of a medical leave of absence without pay, except for satisfactory reasons submitted in advance, shall be cause for termination of employment by the institution. An employee, prior to return to duty, shall obtain satisfactory medical clearance to help ensure adequate protection and which shall indicate the employee's ability to perform his/her duties. Such medical clearance shall be presented in writing.

Grievant's response is set forth on the grievance form as follows:

Linda Postle and/or Rick Porto harassed grievant to the point it triggered a mental illness. Linda Postle is given preferential treatment by Rick Porto because of their relationship. Grievant's termination is the result of her complaints about the actions of other employees that is in violation of the rules of FSC; grievant has been subjected to insulting words; grievant has been discriminated against because of her national origins and possibly her sex; FSC created a hostile work environment; grievant turned in an off work slip showing she was not able to return to work on May 9, 1998.

Grievant's claims arise from a decidedly unpleasant work environment, and appearto be in the nature of a constructive dismissal argument. Holly Fluharty, Accounts Payable Supervisor, testified that there had been ongoing friction between Grievant and her co- worker, Linda Postle. Grievant had complained that Linda tampered with her work, that Linda's son was using the toll free telephone line,

that Linda was playing the radio too loud, had too many visitors, had torn up a magazine order form of Grievant's, slit her leather coat, placed flies on her desk, and called her “a dumb Indian”. Ms. Fluharty stated that she investigated each complaint, but that there was no evidence to support most of them. Ms. Fluharty noted that there were many departmental problems involving time abuse, friction among the employees, and a lack of trust, all of which created the negative environment. In an attempt to allay Grievant's concerned relating to Ms. Postle, Ms. Fluharty stated that she offered to move Grievant to another office, but that the suggestion was rejected. Ms. Fluharty recalled that Grievant had become withdrawn at work, but was not aware that she was suffering from depression.

It is accepted that Grievant was suffering from depression during the time period in question; however, there is no evidence to support her claim that it was brought on by individuals or events at work. Although there was an unpleasant level of interpersonal conflict, Grievant appears to have been a full participant in the situation. Ms. Fluharty issued Grievant a memorandum on September 4, 1997, expressing her concern regarding statements made by Grievant referencing her participation in office relations.

Additionally, Dr. Gregory testified at level four regarding Grievant's condition, but significantly, he did not opine that the depression had been triggered by events at work. Grievant revealed that she had suffered from depression many years ago, havingencountered problems in childhood, but that she had resolved those issues. In consideration of the foregoing, the evidence does not support a finding that the episode of depression was work related.

Grievant also asserts that she did respond to Mr. Leach's letter of May 11, 1998. Michael Fox, Grievant's spouse, testified at level four that he had hand delivered a doctor's slip to a secretary at FSC. He did not recall the date when he delivered the slip, the secretary's name, or even which office she worked in, but commented that he had “delivered slips there before.” When asked why he did not respond to the May 22, 1998, letter which stated that the doctor's slip had not been provided, Mr. Fox stated that he did not believe it was necessary since he had hand-delivered the document. Because this testimony contradicts that offered by Respondent, a determination of credibility is required.

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). This witness' interest in retaining his wife's employment is obvious, and renders his testimony self-serving. However, the content of his testimony is found to be flawed on a more objective basis. He did not know to whom, or in what office, he had delivered the doctor's slip. Since he did recall how to get to this office, he could have reasonably gone back and learned the secretary's identity prior to the hearing. There was also no evidence that any attempt had been made to retrieve a statement from the doctor to the effect that he had provided an excuse slip for Grievant at that time. Because there was no effort made to substantiate the claim that a slip had been delivered in May, the testimony of this witness on that matter is determined not to be credible.

In addition to the foregoing findings of fact and narration it is appropriate to make the following formal 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). 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).

2. Respondent has proven by a preponderance of the evidence that Grievant failed to return to work at the conclusion of a medical leave of absence, and that herdismissal was consistent with the Medical Leave of Absence Without Pay Policy.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court

of Marion County. Any 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: June 18, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE