CALLA PRICE,

Grievant,

v.

DOCKET NO. 98-HHR-498

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES,

Respondent.

D E C I S I O N

Grievant, Calla Price, grieves her dismissal from West Virginia Department of Health and Human Resources ("Respondent"), effective December 31, 1998, for "[a]buse of leave/absenteeism." R. Ex. 10. Pursuant to W. Va. Code § 29-6A-4(3), Grievant filed an expedited grievance at level four on December 16, 1998. A level four hearing was held on February 26, 1999, and this case became mature for decision on March 19, 1999, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant appeared pro se, and Respondent was represented by Tiffany M. Bost, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Respondent's Exhibits

Ex. 1 -

West Virginia Department of Mental Health Monthly Employee Time Record for Calendar Year 1998.

Ex. 2 -

August 28, 1997 memorandum from Quality Council to All Departments/All Employees re: Leave Policy.Ex. 3 -

Signature page of Calla Price dated August 29, 1997, acknowledging receipt of August 28, 1997 memorandum regarding new leave policy.

Ex. 4 -

West Virginia Department of Personnel Administrative Rule, § 15.5, Suspected Leave Abuse (July 1, 1998).

Ex. 5 -

January 1, 1995 memorandum to Department of Health and Human Resources Administrative and Supervisory Staff re: Guide to Progressive Discipline.

Ex. 6 -

West Virginia Department of Health and Human Resources Service Record Form for Calla Price, dated November 5, 1998.

Ex. 7 -

Employee Warning Notices to Calla Price, dated October 6, 1997 and January 20, 1998.

Ex. 8 -

April 7, 1998, three-day suspension letter to Calla Price from James W. Burke, with attachments.

Ex. 9 -

July 23, 1998, ten-day suspension letter to Calla Price from James W. Burke.

Ex. 10 -

December 9, 1998 dismissal letter to Calla Price from James W. Burke.

Ex. 11 -

Personnel Transaction Cards for Calla Price.

Ex. 12 -

Employee Warning Notice to Calla Price, dated July 21, 1998.

Ex. 13 -

July 15, 1998 memorandum from Kim Billups to Keith Stouffer re: Calla Price, with attachment.

Ex. 14 -

Absentee Call-In/Incomplete Work Day Reports for Calla Price.

Ex. 15 -

Employee Warning Notice to Calla Price, dated August 19, 1998.

Ex. 16 -

Handwritten note to Kim Billups from Calla Price, dated March 5, 1998.

Ex. 17 -

Handwritten note from Kim Billups, dated July 22, 1998.

Grievant's Exhibit

Ex. 1 -

List of employees who allegedly received different treatment for leave abuse.

Testimony

Respondent presented the testimony of Keith Stouffer and Kim Billups. Grievant testified in her own behalf.

FINDINGS OF FACT

The material facts are not in dispute, and are set forth in the following findings.

1. Grievant was employed by Respondent as a Health Service Worker from April 1995 until her dismissal effective December 31, 1998. 2. Grievant was terminated by Lakin Hospital Administrator, James Burke, by letter dated December 9, 1998, for “[a]buse of leave/absenteeism”, and according to DHHR Policy Memorandum 2104. Specifically, he detailed the following infractions:

(1)

On October 6, 1997, you received a verbal warning for excessive absenteeism, with a patterned usage of calling-off in conjunction with scheduled days off. R. Ex. 7.

(2)

A written warning was given to you on January 20, 1998, for continued absenteeism, with a patterned usage of calling-off in conjunction with scheduled days off. R. Ex. 7.

(3)

You received a three-day suspension April 28-30, 1998, for continued absenteeism. R. Ex. 8.

(4)

August 1-13, 1998, you were given a ten-day suspension for excessive absenteeism. R. Ex. 9.

(5)

Since your return to work from suspension, you have called-in six times for sick leave days, five times which were hooked with scheduled days off. R. Ex. 1.

R. Ex. 10 (emphasis added).

3. West Virginia Division of Personnel Administrative Rule § 15.05, provides that, "[w]hen an employee appears to have a pattern of leave abuse, including such frequent use of sick leave as to render the employee's services undependable, the appointing authority may request appropriate substantiation of the employee's claim for leave, for example, verification of an illness of less than three days. The appointing authority must give the employee prior written notice of the requirement for appropriate substantiation." R. Ex. 2.

4. Examples of a "pattern" of leave abuse under Section 15.05 include "hooking" or calling-in sick before or after scheduled days off; calling-in on the same day each week; random excessive usage; reporting late for work; and leaving work early. R. Ex. 2. 5. Grievant's leave fell within the definition of a "pattern" of leave abuse.

6. Grievant took 34 unscheduled leave days in 1998, not including days she was off due to workers' compensation. R. Ex. 1.

7. Grievant was terminated in accordance with DHHR Policy Memorandum 2104 (Revised), commonly known as the "Guide to Progressive Discipline." R. Ex. 5.

8. After each instance of discipline, Grievant's supervisor asked her if there was anything the employer could do to help her succeed in improving her leave use. One of the ways Lakin Hospital

attempted to help Grievant was to change her shift from evening to day shift.

9. Grievant's last written warning before suspension was imposed was on January 20, 1998. Between the date of the written warning and the three-day suspension, April 7, 1998, Grievant missed approximately 10 days of work. R. Ex. 8.

10. Between Grievant's three-day suspension and her next disciplinary action, the ten-day suspension, Grievant missed seven days of work. R. Ex. 9.

11. Between the ten-day suspension and Grievant's dismissal, she missed six days of work. R. Ex. 10.

12. None of Grievant's letters of discipline inform her what is considered excessive leave usage, nor any type of objective goal she needed to obtain in order to receive a satisfactory performance rating.

13. Another Lakin Hospital Health Service Worker had received the same progressive discipline as Grievant for excessive absenteeism and leave abuse, up until the ten-day suspension. Following that employee's ten-day suspension, she again wascounseled for excessive leave usage pending termination. Her supervisor, Kim Billups, Director of Nursing, asked that employee what Lakin could do to help her.

14. That employee requested she be given a six-month contract which specified that she would use no more than three days leave during that time, and if she successfully completed the contract, she would not be dismissed. She was given not one, but two, six- month contracts.

15. That employee successfully completed her contracts and was retained on the payroll. However, she has since started abusing leave again, and was recently given another ten-day suspension.

16. Grievant was also asked by Ms. Billups when she counseled her immediately prior to her dismissal if there was anything Lakin could do to help her. Grievant said no, and she was terminated. Grievant did not get additional chances like the employee referenced in Finding of Fact Numbers 13-15.

DISCUSSION

In disciplinary matters, the burden of establishing the charges against a grievant falls on the employer. W. Va. Code § 29-6A-6. An allegation that a particular disciplinary measure is

disproportionate to the offense or otherwise arbitrary and capricious is an affirmative defense, and Grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996). In this case, Respondent has proven that Grievant used excessive leave, and Grievant does not deny the leaveabuse. Rather, Grievant alleges she has been discriminated against because at least one other employee, in similar circumstances, has not been dismissed.

W. Va. Code § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant has established a prima facie case of discrimination under the grievance statute. She has proven she is similarly situated to another employee at Lakin Hospital, who was also

progressively disciplined for abuse of leave and absenteeism. However, inlieu of termination following a ten-day suspension, that employee was given two consecutive six-month contracts, or one year, to improve her leave use record, and was able to continue her employment. Included in those agreements were objective goals which the employee was to attain, specifically, she could not take more than three days leave during a six-month period. Moreover, the evidence shows that the other employee has since lapsed back into her old pattern of leave abuse, and again, in lieu of termination, she was given another ten-day suspension. Grievant was given no such contracts or second ten-day suspension prior to termination.

Respondent argues that Grievant's leave usage was more egregious than the other employee's, but then offers testimony that, had Grievant only asked for a six-month contract like the other employee, she would have been given one. Grievant did not know of this six-month contract at the time of her termination, but only learned of it later. Respondent further tries to alienate itself from Ms. Billups, the Director of Nursing, by arguing that the contract was something drawn up between Ms. Billups and the other employee, and not Respondent. However, it is clear from the testimony of Keith Stouffer, Assistant Administrator at Lakin Hospital, that the other employee was slated for termination, and that knowledge extended beyond the authority of Ms. Billups. Thus, once an agreement had been reached between Ms. Billups and the other employee, higher level administrators would have been aware, and acquiesced, or the agreement could not have been carried out. Respondent further contends that there was “specific present information” about the co-worker that rendered her different than Grievant. Respondent did not elaborate what that specific information might be, claiming that its personnelrecords are confidential. While that may be, Respondent cannot hide behind a cloak of confidentiality, and at the same time, attempt to convince the undersigned that the two employees were significantly dissimilar, so as to render the different disciplinary tracks non-discriminatory.

It is certainly encouraged that employers try to work out personnel matters with their employees on as informal a basis as possible. However, Lakin has a clear-cut progressive discipline policy, which has been followed to the letter for Grievant, but not for another employee. There is nothing in the Policy about six-month contracts, or second ten-day suspensions, and it is to a certain extent, within the discretion of the employer how to distribute these penalties to its employees. However, the employer cannot favor one employee over another, when it has shown no legitimate reason for giving

the other employee at least three more chances, other than “she asked for it.” That response renders the otherwise objective progressive discipline policy somewhat arbitrary.

Finally, Grievant alleged her dismissal was in retaliation for asking administrators to leave an employee staff meeting so the staff could discuss personnel matters openly. This meeting occurred in October 1998, well after disciplinary proceedings had been instituted against Grievant for her excessive leave abuse, and there is nothing in the record to substantiate Grievant's claim that she was dismissed for her outspokenness at this meeting.

CONCLUSIONS OF LAW

1. Respondent has proven by a preponderance of the evidence that Grievant had been progressively disciplined for abuse of leave and absenteeism at the time of her termination, effective December 30, 1998.

2. W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

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that she is similarly situated, in a pertinent way, to one or more other employee(s);

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that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

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that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996);

Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

3. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). 4. Grievant has established a prima facie case of discrimination, which Respondent has failed to rebut with a legitimate, non-discriminatory reason for the employment decision to terminate her, while allowing another employee two additional chances, beyond a ten-day suspension, to correct her leave abuse and absenteeism.

Accordingly, this grievance is **GRANTED** and Respondent is hereby **ORDERED** to reinstate Grievant into her position at Lakin Hospital as a Health Service Worker, with all back pay and benefits, plus interest, to which she is entitled. Nothing in this Decision prohibits Lakin Hospital from setting objective criteria which Grievant must adhere to in order to avoid further disciplinary action for excessive leave abuse and absenteeism.

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, 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: April 6, 1999