JACKIE COOK,

Grievant,

v. **Docket No. 99-HHR-298**

WEST VIRGINIA DEPARTMENT OF
HEALTH & HUMAN RESOURCES,

Respondent.

D E C I S I O N

On July 23,1999, Jackie Cook (Grievant), filed this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., challenging her dismissal by Respondent West Virginia Department of Health and Human Resources (DHHR) due to her alleged inability to return to work and perform the essential duties of her position. On September 20, 1999, a Level IV hearing was conducted in this Grievance Board's office in Beckley, West Virginia. (See footnote 1) At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on October 25, 1999, following receipt of the parties' written post-hearing arguments. Based upon a preponderance of the credible evidence presented at Level IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant was employed by Respondent West Virginia Department of Health and Human Resources (DHHR) as a Protective Service Worker.

2. Grievant began working for DHHR in Mingo County in 1990.

3. On January 2, 1992, Grievant laterally transferred to a similar position in Wyoming County. At that time, Grievant's second-level supervisor was Joyce Phipps, Community Services Manager for Wyoming County.

4. On February 27, 1997, Grievant suffered an on-the-job injury in a motor vehicle accident.

5. Grievant was placed on a medical leave of absence following her on-the-job injury.

6. Margaret Waybright is DHHR's Regional Director for Region IV. At all times pertinent to this grievance, Ms. Waybright was Grievant's third-level supervisor, and served as Appointing Authority over employees in Region IV.

7. In late October or early November 1997, Ms. Waybright wrote to Grievant inquiring as to whether she intended to return to work. On November 14, 1997, Grievant's counsel, David G. Thompson, wrote to Ms. Waybright advising her that Grievant wished to retain her employment with DHHR, and had no intention of abandoning her position. G Ex 3.

8. Grievant returned to work on January 12, 1998. 9. When Grievant returned to work in January 1998, she had a new immediate supervisor, Jerri Sandoval, a Children's Protective Services Supervisor who had transferred from Kanawha County to Wyoming County. In addition, she had a new second-level supervisor, Joseph Bullington, who had replaced Ms. Phipps.

10. When Grievant returned to work in January 1998, she was assigned a new caseload that involved a different category of clients from those she had previously serviced. In addition, she had to learn a new computer system that had been installed in her absence.

11. Grievant perceived her work environment as “hostile,” in part because she was “written up” for a number of mistakes, based upon procedures that had changed in Grievant's absence.

12. Grievant filed a grievance challenging her work assignments. That grievance was resolved at Level I in early 1998, when Ms. Sandoval agreed to consider assigning the same type of youth services cases to Grievant as she had been assigned before her accident. No such cases were assigned to Grievant before she left work on another leave of absence in July 1998.

13. On July 6, 1998, Grievant was granted a six-month medical leave of absence based upon her injuries from the February 1997 accident, and an aggravation of that injury that resulted from a fall in her office. That medical leave of absence expired on January 6, 1999, at which time Grievant was placed on a six-month personal leave of absence for medical reasons. 14. On June 2, 1999, Grievant was awarded a ten per cent (10%) permanent partial disability as a result of the injuries she suffered on February 27, 1997. G Ex 4.

15. On July 7, 1999, Ms. Waybright sent the following dismissal notice to Grievant:

> The purpose of this letter to inform you of my decision to dismiss you from your position as a Protective Service Worker with the Department of Health and Human Resources. Your dismissal is effective July 22, 1999, providing you with a fifteen (15)

day notification period.

According to our records, your last day of work was July 6, 1998 as well as the start of your medical leave of absence. The initial leave of absence was granted for a period of six months, which ended January 6, 1999. Since that time, to date, you have been on a personal leave of absence for medical reasons. Therefore, your six months of personal leave for medical reasons expired July 6, 1999.

The following contains the Administrative Rule in regards to medical leave and personal leave for medical reasons of absence from work.

15.08 LEAVE OF ABSENCE WITHOUT PAY

(A) Personal Leave: 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 must apply for the leave of absence in writing to the appointing authority. If the appointing authority approves the request, the approval must 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/her discretion based on the agency's personnel needs. Time spent by provisional employees for leaves of absence does not exceed the provisional period limitation.

Written approval of the appointing authority is required in all cases. Approval of personal leave is discretionary with the appointing authority.

(C) Medical Leave

I. An injured or ill permanent employee [u]pon written application to the appointing authority, shall be granted a medical leave of absence without pay not to exceed six (5) (sic) months within a twelve month period provided:

(a) The employee (1) has exhausted all sick leave and makes application no later than fifteen (15) calendar days following the expiration of all sick leave or (2) has elected not to use sick leave for a work related injury and makes application no later than fifteen (15) calendar days following the date on which the employee filed a claim for Workers' Compensation;

(b) The employee's absence is due to an illness or injury which is verified by a physician/practitioner on the prescribed physician's statement form stating that the employee is unable to perform his or her duties and giving a tentative date for the employee's return to work.

(c) A prescribed physician's statement form is submitted every thirty (30) calendar days to confirm the necessity for continued leave; and

(d) The disability, as verified by a physician/practitioner on the prescribed physician's statement form, is not of such nature as to render the employee permanently unable to perform his/her duties.

As is our mission (sic) to provide services to the public, I am obligated to ensure the overall efficiency of the full work force. The Department has determined that we can no longer continue your personal leave of absence for medical reasons indefinitely. Your continue (sic) absence from your scheduled job duties, compounded by my inability to employ another staff member in your position, deters the Department from our mission of providing services to the public.

Accordingly, I am requiring you to contact my office within ten (10) calendar days of receipt of this letter in order to advise me of your employment intentions and to submit our prescribed physician's release to return to your full scheduled job duties. Should you fail to contact my office within the prescribed ten (10) days and submit documentation from your physician that you are physically able to fully return to work and perform the essential functions of you position, I will be required to terminate your employment.

Should you not comply with the directives contained herein, this letter will serve as a fifteen (15) day notification of you (sic) dismissal from the Department of Health and Human Resources.

You may respond to the matters of this letter, either in writing or in person, provided you do so within the fifteen calendar notice period.

J Ex 1 (emphasis in original).

16. At some point within fifteen (15) days of receiving the termination notice described above, Grievant called Ms. Waybright to discuss her status. Grievant indicated that she wanted to return to work but was unable to provide a specific date when she would be able to return to work. Ms.

Waybright determined that Grievant had not provided sufficient information to comply with the instructions in the termination letter.

17. All of Grievant's supervisors agreed that it would not be unreasonable to accommodate Grievant's permanent partial disability by allowing her to stand for five (5) minutes during each hour that she was sitting while working, or to sit for five (5) minutes during each hour that she was standing while working. However, as of the Level IV hearing in this matter, Grievant did not provide medical evidence to indicate that she has recovered from her injuries to the point where she is physically able to return to her duties with or without reasonable accommodation.

18. Despite this termination action, Ms. Waybright considers Grievant eligible for reinstatement as a Protective Service Worker whenever she is physically able to perform the duties of her position, and a position in that classification becomes vacant.

19. Prior to Grievant's injury and absence, another Protective Service Worker in the Wyoming County Office, Myra Cook (See footnote 2), was off on a medical leave of absence and a personal leave of absence for medical reasons for over one year. Ms. Cook kept heremployer informed of her status, and her physician indicated when Ms. Cook would be able to return to work. Ms. Cook returned to work consistent with her physician's prognosis.

DISCUSSION

In disciplinary matters, the burden of proof rests with the employer. W. Va. Code § 29-6A-6; Hayden v. Div. of Health & Human Resources, Docket No. 99-HHR-133 (Nov. 30, 1999); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). More particularly, the employer has the burden of proving each element of a disciplinary action by a preponderance of the evidence. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Because Grievant is a permanent, classified employee, DHHR must establish that Grievant's termination for failure to return to work or provide a medical excuse for such failure, was accomplished for good cause. Moore v. W. Va. Div. of Rehabilitation Serv., Docket No. 95-RS-165 (July 31, 1995). See Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965). An employee's failure to return to duty following expiration of a medical leave of

absence may provide a proper basis for the employee's dismissal from employment. Lewis v. W. Va. Dep't ofHealth & Human Resources, Docket No. 94-HHR-1146 (Apr. 25, 1995). See Fox v. Bd. of Directors, Docket No. 99-BOD-008 (June 18, 1999). (See footnote 3)

In this matter, a preponderance of the evidence indicates Grievant was off work for medical reasons for an extended period due to an on-the-job injury. Grievant returned to work temporarily following the injury, but was unable to continue working because she required additional medical treatment. (See footnote 4) DHHR properly granted Grievant a six-month medical leave of absence, followed by a personal leave of absence for medical reasons for another six months.

After Grievant had been away from work a total of approximately 22 months, consistent with the Administrative Rule of the West Virginia Division of Personnel governing leaves of absence, Ms. Waybright wrote to Grievant to ascertain if and when she would be returning to work. As Ms. Waybright explained at the Level IV hearing, the duties of a Protective Service Worker are critical to accomplishing the mission of the agency. Ms. Waybright was not able to allow Grievant to remain in a leave status indefinitely, because she was not able to hire a new employee to do the work while the position was still assigned to Grievant. Although Grievant expressed a desire to return towork with a reasonable accommodation for the permanent disability she suffered as a result of her on-the-job injury, Grievant has not provided the medical opinion of a single physician who is willing to state that she can return to full-time duties with or without such an accommodation. In these circumstances, DHHR acted properly in deciding to terminate Grievant's employment as a Protective Service Worker.

Grievant also contends that she was a victim of discrimination in regard to another Protective Service Worker in the same office who was allowed to remain on an extended medical and personal leave for a back injury, and then return to work. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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." This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 5) of discrimination under Code § 29-6A- 2(d), must demonstrate the following:

(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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992). Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Hickman v. W. Va. Dep't of Transp., Docket No. 94- DOH-435 (Feb. 28, 1995). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981);Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Assuming that Grievant established a prima facie case of discrimination in regard to the treatment of Myra Cook, DHHR explained that Ms. Cook not only kept her employer informed as to her status and her desire to return to work, she provided documentation from her physician indicating when she would be able to return to her duties, and she returned to work on schedule with a medical release to resume her duties. Grievant did not demonstrate that this explanation was merely a pretext for discrimination. Indeed, Grievant did not produce comparable medical evidence indicating that she was physically able to return to work, with or without reasonable accommodation. Therefore, Grievant has not shown that DHHR discriminated against her by affording more favorable treatment to Ms. Cook.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. Where an employee is terminated for failure to return from an approved medical leave of

absence in compliance with Section 15.08 of the Administrative Rule of the West Virginia Division of Personnel, 143 C.S.R. 1 § 15.08 (1998), the employer has the burden of establishing the propriety of such termination by a preponderance of the evidence. Lewis v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-1146 (Apr. 25, 1995). See W. Va. Code § 29-6A-6; Moore v. W. Va. Div. of Rehabilitation Serv., Docket No. 95-RS-165 (July 31, 1995).

2. Grievant was properly terminated after expiration of a six-month medical leave of absence, and a consecutive six-month personal leave of absence for medical reasons, when she failed to provide any medical evidence or medical release to her employer indicating a date when she would be physically able to return to perform the essential duties of her position, with or without a reasonable accommodation for her permanent partial disability she incurred from an on-the-job injury.

3. "Discrimination" is defined by W. Va. Code § 29-6A-2(d) 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."

4. In order to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), a grievant must demonstrate the following:

> (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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

5. Assuming that Grievant established a prima facie case of discrimination under W. Va. Code § 29-6A-2(d) in regard to the employer allowing another employee in the same classification to take an extended medical leave of absence and then return to work, DHHR established legitimate, non-discriminatory reasons for its action by explaining that the other employee provided medical

documentation indicating when she would be able to return to work, and then returned to work consistent with her physician's statement. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995);

Accordingly, this 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 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: November 30, 1999

Footnote: 1

Grievant was represented by Steve Rutledge with the American Federation of State, County, and Municipal Employees. Respondent was represented by counsel, Assistant Attorney General B. Allen Campbell.

Footnote: 2

Grievant is not related to Ms. Cook.

Footnote: 3

Although Grievant proceeded to present her evidence first at the Level IV hearing based upon an interlocutory determination that she had the burden of proof in a non- disciplinary termination, upon further reflection and review of the cases cited, it appears that the proper approach is to place the initial burden of proof on the employer in cases of this nature. See Clark v. W. Va. Dep't of Military Affairs & Public Safety, Docket No. 99- DJS-428 (Nov. 29, 1999). Grievant's termination for failure to follow proper procedures in maintaining her leave of absence status is essentially a termination "for cause."

Footnote: 4

Grievant's complaint that she encountered a "hostile" working environment upon returning to work in January 1998 was the focus of a separate grievance that was not pursued beyond Level I. This collateral issue will not be further addressed in this decision.

Footnote: 5

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).