MARY ANN PRICE,

Grievant,

v. **Docket No. 00-HHR-302**

WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES,
BUREAU FOR CHILDREN AND
FAMILIES,

Respondent.

DECISION

Mary Ann Price ("Grievant") filed this grievance directly at level four on September 18, 2000, alleging her dismissal from employment with Respondent was without just cause. She seeks reinstatement "and to be made whole in every way." A level four hearing was held in the Grievance Board's office in Wheeling, West Virginia, on February 2, 2001. Grievant was represented by Kevin Church, AFSCME representative, and Respondent was represented by counsel, Anthony D. Eates, II. This grievance became mature for consideration upon receipt of the parties' fact/law proposals on March 12, 2001.

The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Prior to her dismissal, Grievant was employed by the Department of Health and Human Resources ("DHHR"), Bureau for Children and Families, as an Economic Service Worker in the Ohio County Office. Grievant had been employed by DHHR for approximately 24 years. 2. On January 23, 1998, Grievant was verbally counseled by her immediate supervisor, Diana Bumgardner, for her chronic tardiness. Ms. Bumgardner explained to Grievant that DHHR policies require that an employee call his or her worksite within 45 minutes of the start of the regular workday when the

employee is going to be absent or late.

3. Grievant's tardiness continued, and she received verbal counseling again from Ms. Bumgardner on February 13, 1998. On February 26, 1998, Ms. Bumgardner issued a written memorandum to Grievant, explaining that tardiness could not be tolerated. She advised Grievant that, effective March 2, 1998, she would be required to sign in with Ms. Bumgardner each day when she arrived for work.

4. On March 19, 1998, and April 7, 1998, Grievant received more verbal counseling from Ms. Bumgardner for continued tardiness. During these sessions, Ms. Bumgardner explained to Grievant that her tardiness adversely affected other employees, who were required to do her work during her absence, along with customers whom Grievant is required to interview as the majority of her daily job duties.

5. On May 7, 1998, Ms. Bumgardner noted in a letter to Grievant that, since Grievant had been required to sign in each morning, she had been tardy on 25 out of 33 work days. She advised Grievant that she would no longer be allowed to use leave to cover her tardiness, and her pay would be docked in 15 minute increments for future incidents of tardiness.

6. On May 20, 1998, Grievant arrived at work 45 minutes late, and her pay was docked.

7. Grievant did not report to work on June 1 and 2, 1998, and she did notcontact her supervisor to report or discuss her absence. By letter dated June 2, 1998, Louis Palma, Regional Director, advised Grievant that she must return to work immediately or notify her supervisor of the reasons for her absence.

8. In response to Mr. Palma's correspondence, Grievant stated that she had been on vacation the week prior to June 1, 1998, and had “experienced some personal problems.” She stated she did not wish to abandon her job and would follow appropriate protocol for requesting leave and reporting off work in the future.

9. Due to her unauthorized absences on June 1 and 2, 1998, Grievant's pay was docked 16 hours, and she was suspended for one working day, effective June 17, 1998. By letter dated June 5, 1998, Mr. Palma advised Grievant of the suspension and warned her that further infractions would result in dismissal.

10. During the latter part of 1998, Grievant took a 99-day unpaid medical leave of absence, during which time she received treatment for depression. Grievant's husband had passed away in

1997, and Grievant was having difficulty dealing with her two teenage children.

10. Grievant was placed on unauthorized leave, because she was absent without sufficient available leave time, on the following occasions: January 8, 1999 (7.03 hours); January 14, 1999, through February 5, 1999 (See footnote 1) ; March 30, 1999 (.5 hours); March 31, 1999 (2.5 hours); April 26, 1999 (7.1 hours); and April 29, 1999 (8 hours).

11. Effective May 17, 1999, Grievant was required to produce a doctor's excusefor any sick leave, due to her excessive use of leave and consequent unauthorized leaves of absence.

12. On May 25, 1999, Grievant did not report for work at 8:30 a.m., as required. She called a supervisor at 10:30 a.m., stating she had overslept, and did not report for work until 12:30 p.m. (See footnote 2) Grievant stated that she had not slept well due to a virus, and that she was further delayed in arriving for work, because she had taken “a couple of important phone calls.” As a result of this incident and Grievant's frequent absences, she was suspended for five days, effective June 23, 1999.

13. On November 29, 1999, Grievant was thirty minutes late for work, and she did not call in to report her tardiness. She received a written warning from Ms. Bumgardner stating that the next occurrence of similar behavior would result in discipline.

14. On January 3, 2000, Grievant did not report for work at 8:30 a.m. and did not call in until 9:47 a.m. When asked for an explanation, Grievant stated she overslept due to not having set an alarm. As a result of this incident, Grievant was suspended for twelve working days without pay, effective January 19, 2000, through February 3, 2000. Grievant was advised at this time by Mr. Palma that this would be her final warning, and that further failures to report off work properly would result in dismissal.

15. On July 26, 2000, Grievant did not report for work and did not call the office. Grievant was incarcerated for driving under the influence and was only allowed to make collect calls, which are not accepted by DHHR's switchboard. Due to these extenuating circumstances, Grievant was not dismissed, but received a written reprimand. The writtenreprimand advised Grievant that Mr. Palma's previous “final warning” was still in effect.

16. On August 29, 2000, Grievant did not report to work until 9:37 a.m. (over one hour after her scheduled time to begin work), and she failed to call her supervisor to explain her tardiness.

17. On September 1, 2000, Ron Pattison, Community Services Manager for DHHR in Ohio County, met with Grievant and Ms. Bumgardner, to discuss Grievant's chronic failure to report to work

as scheduled. When Grievant was informed that dismissal was being considered, she stated that she believed she had a sleep disorder and could possibly supply a physician's statement to that effect. When Mr. Pattison informed her that such a physician's statement would not likely change his mind, because a sleep disorder had never been previously mentioned by Grievant, she replied “Well, fuck it!” and left the meeting.

18. By letter dated September 8, 2000, Mr. Palma informed Grievant she was being dismissed from her employment with DHHR, due to her “chronic and habitual failure to report to work as scheduled, despite the agency's repeated attempts of remediation.”

19. Grievant did not grieve any of the warnings, reprimands, or suspensions discussed above.

20. Grievant's performance evaluations dating back to the 1970's reflect that she has had a periodic problem with reporting to work on time.

21. DHHR has an Employee Assistance Program, which provides counseling and other services to employees who have personal problems which could affect their work performance. Supervisors are instructed to inform troubled employees about the program and give them information regarding whom to contact for help, but employees are not“ordered” to use this service. Prior to her dismissal, Grievant was encouraged by Mr. Pattison and Ms. Bumgardner to utilize the program. It was also mentioned by Mr. Palma in his January 10, 2000, suspension letter.

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; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). 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. Dep't of Health & Human Resources, 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.

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 CSR § 12.2, Administrative Rule, W. Va.

Div. of Personnel (July 1, 1998). The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1,Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); See Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-CORR-197A (May 12, 1999).

Respondent contends that it has easily proven that Grievant's dismissal was for “good cause” and that it complied with the terms of DHHR's “Guide to Progressive Discipline.” Respondent's progressive discipline policy, Policy Memorandum 2104, provides for a verbal warning, written reprimand, suspension and dismissal, as an employee's offenses become repetitive or more serious in nature. Dismissal results only after an employee has been given adequate opportunity to correct his or her deficiencies. Grievant's only defense in this case (See footnote 3) is her allegation that she was not given an adequate opportunity to avail herself of the benefits of DHHR's Employee Assistance Program, rendering her termination arbitrary and capricious. However, in her own testimony she stated that, during the meetings where her absences were discussed, she was informed that the program existed, and she was also given a copy of the policy itself. Grievant has made an allegation that her supervisors were somehow obligated to “force” her into the program, which is not supported by the evidence. DHHR's Policy Memorandum 2120 states that “employees who are experiencing poor job performance which has been noted by their immediate supervisor will be told of the availability of the Employee Assistance Program.” It also states that “employees will be encouraged to seekassistance . . .” and that a supervisor is responsible for “referral of employee to the [program] through supervisory consultation or direct referral to the Employee Assistance Coordinator.” (Emphasis added.) However, at no point does the policy mandate that an employee be placed in the program; they are merely to be told of its existence and availability, when a supervisor believes it would be helpful. In the instant case, both Ms. Bumgardner and Mr. Pattison discussed the program with Grievant and gave her the pertinent information regarding whom to contact for assistance. Mr. Palma also recommended to Grievant that she utilize the program. Accordingly, Grievant has not demonstrated any error by DHHR in this regard.

In cases where a grievant has received numerous warnings, reprimands, and suspensions for the same type of conduct, repeated violations amount to good cause for his or her dismissal. English v. W. Va. Div. of Corrections, Docket No. 98-CORR-082 (June 29, 1998). Employers have a basic right to expect their employees to come to work on time and when expected. Id.; Hatfield v. Dep't of Corrections, Docket No. 98-CORR- 020 (Apr. 30, 1998). In the instant case, Respondent has proven by a preponderance of the evidence that its progressive discipline policy was followed, Grievant was given every possible opportunity to correct her behavior, and her dismissal was for good cause. While it is true that Grievant is a long-term employee with a reasonably good work record, it is quite obvious that this was taken into consideration by Respondent, due to the repeated and numerous warnings and opportunities Grievant was given to improve her behavior before dismissal resulted.

Consistent with the foregoing, the following conclusions of law are made.

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; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. An employee in the classified service may be dismissed for "cause." 143 CSR § 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998). The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); See Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-CORR-197A (May 12, 1999).

3. DHHR Policy Memorandum 2104 provides for progressive discipline, from verbal warning to dismissal, as an employee's conduct fails to improve after he or she has been given ample opportunity to correct the deficiencies.

4. Respondent has proven by a preponderance of the evidence that Grievant was repeatedly

tardy and absent without approval, after numerous warnings, reprimands, and suspensions; therefore, her dismissal was for good cause and in compliance with Policy Memorandum 2104.

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, and 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.

Date: March 19, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was incarcerated for some or all of this period of time and was not allowed to use sick leave for the absence. The reason for her incarceration is not reflected in the record.

Footnote: 2

Grievant lives approximately ten to fifteen minutes from the office.

Footnote: 3

Grievant also made an allegation that Louis Palma, Regional Director, was not present at the level four hearing to authenticate the suspension and dismissal letters he authored. She also objected to Mr. Pattison having signed for Mr. Palma on some of these documents. However, Grievant did not contest the content of these documents, nor did she claim that the matters asserted in them did not occur. Therefore, Mr. Palma's presence at the hearing and the origin of the signatures on the letters are irrelevant.