BILLY JOE FARLEY,

Grievant,

v. **Docket No. 02-HHR-145**

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

WILLIAM R. SHARPE, JR. HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Billy Joe Farley, employed by the Department of Health & Human Resources (DHHR or Respondent) as a Health Service Worker, filed an expedited grievance, consistent with the provisions of W. Va. Code § 29-6A-4(e), to level four on May 20, 2002, following the termination of his employment. Grievant seeks reinstatement and "to be made whole in every way". An evidentiary hearing was conducted in the Grievance Board's Elkins office on July 18, 2002, at which time Grievant was represented by his father, Teddy L. Farley, and DHHR was represented by Darlene Ratliff-Thomas, Assistant Attorney General. (See footnote 1) The matter became mature for decision at the conclusion of the hearing, after both parties waived the opportunity to file proposed findings of fact and conclusions of law.

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

Findings of Fact

1. Grievant was employed by DHHR on November 1, 2000, as a Health ServiceWorker, and was assigned to Unit G2 at the William R. Sharpe, Jr. Hospital (Sharpe Hospital) at all times pertinent to this grievance.

2. By memorandum dated February 8, 2001, Nurse Manager Karen Queen notified Grievant that he had accumulated five occasions of unverified sick leave usage since November 1, 2000, and that six such absences within a six month period would result in disciplinary action, as required by the Sharpe Hospital's Absence Control Policy. (See footnote 2)

3. On September 18, 2001, Ms. Queen advised Grievant by memorandum that he had established a pattern of unverified absences in a six month period, and that he was to consider the memorandum as a verbal warning. Grievant was reminded that another occasion of unverified

absence within the next six month period could result in further disciplinary action.

4. In November 2001, Ms. Queen again reminded Grievant that he was establishing a pattern of unverified absences. She noted that he had two unverified sick leave claims and two emergency vacation leave usages since June 27, 2001.

5. Grievant failed to attend a mandatory Unit Meeting regarding the new State Identification Badges on December 12, 2001. Ms. Queen notified him that his absencewas a form of insubordination, and that he was to consider the memorandum a verbal reprimand.

6. A written reprimand was issued to Grievant on January 25, 2002, following an increase in his absenteeism. Ms. Queen cited twelve verified absences, and six unverified absences, three of which were “absences with time days”, since October 10, 2001. Ms. Queen also advised Grievant that the Employee Assistance Program was available to him, and that further infractions may result in more severe disciplinary action up to and including termination.

7. Ms. Queen met with Grievant informally on April 3, 2002, to discuss his attendance problem. Grievant expressed an understanding that he needed to improve, and stated that he had a drinking problem. He declined referral to the Employee Assistance Program, stating that he “would handle it”.

8. Jack C. Clohan, Jr., Chief Executive Officer of Sharpe Hospital, notified Grievant by letter dated April 5, 2002, that he would be suspended for three days as a result of his failure to meet work expectations. Specifically, Mr. Clohan noted that Grievant had accumulated twenty-one unverified absences and twelve verified absences for which he had been provided a coaching session of February 8, 2001, received a verbal warning on September 18, 2001, had a second coaching session on November 8, 2001, and received a written reprimand on January 25, 2002. In addition, Grievant had received a verbal reprimand for failing to attend a mandatory Unit meeting. Again, Grievant was warned that further infractions could result in more severe disciplinary action.

9. At his request, Grievant was assigned a sixteen hour shift on May 7, 2002. Grievant was scheduled to report to work at 7:15 a.m., but did not report or call off. AfterMs. Queen unsuccessfully attempted to contact Grievant at the residence of his significant other, she contacted his father, who agreed to get him to work. Grievant eventually clocked in at 8:30 a.m.

10. During the afternoon of May 7, 2002, Grievant reported that a patient had accidentally shut his bathroom door on Grievant's right hand. Grievant was excused from work to go to Stonewall Jackson Memorial Hospital to have the hand examined. Upon his return, he indicated that he would

not be able to work as the doctor had told him to elevate his hand/arm above his head and to ice the injury. Because Grievant had not provided a written statement regarding his limitation or need to be off work, with his permission, Ms. Queen called the attending physician. Dr. Shreves reported that Grievant had requested that she excuse him from work, but she had declined, advising him that he could work with the limitations of wearing an ace bandage, and not lifting or responding to a crisis for a few days.

11. The following day, patient B.L. reported to Ms. Queen that he had been talking with Grievant at approximately 3:00 p.m. the previous day, when Grievant stated that he did not want to be at work and wondered what he could do to go home. He first considered hitting the wall with his fist, but then proceeded to a patient's bathroom across the hall, and B.L. heard three cracking noises. Grievant came out of the room and instructed B.L. not to say anything, but if asked, to say that Grievant was taking another patient, K., to the bathroom, and that K. had shut the door on his hand. Grievant then showed B.L. his knuckles, and asked if he thought that would be good enough. 12. Ms. Queen investigated B.L.'s story, and found that K. was asleep at the time Grievant reported the injury. When she confronted Grievant with that fact, he quickly changed the name to K.'s roommate.

13. Ms. Queen reported her findings to Debbie Cook, Human Resources Director at Sharpe Hospital. Ms. Cook also interviewed B. L., and found his statement consistent with that given to Ms. Queen. The matter was then taken to Mr. Clohan.

14. By letter dated May 9, 2002, Mr. Clohan notified Grievant that his employment was terminated, effective that date. The reasons given for the action were Grievant's record of absenteeism, including his failure to timely report to work on May 7, 2002, and his self-inflicted injury to avoid work.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both

sides, the employer has not met its burden. 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 ofemployees 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 Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

DHHR based its decision to terminate Grievant upon provisions of its Absence Control Policy. Respondent has demonstrated that it had "good cause" to dismiss Grievant for his continuous attendance problems. (See footnote 3) Grievant elected not to testify on his own behalf, and has not disputed the absenteeism; however, his representative argues that a ten day suspension would have been a more appropriate level of discipline.

An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the 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." Connor v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995); Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). In assessing whether the decision was excessive or disproportionate the undersigned must look at the totality of the circumstances. Some factors to be considered in the mitigating analysis include the employee's past disciplinary record, the clarity of notice to the employee of the rule violated, whether the employee was warned about the conduct, and other mitigatingcircumstances. See Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991). As stated in Buskirk, supra, "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." See Blake v. Civil Serv. Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (1983); Serreno v. W. Va. Civil Serv. Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (1982).

In regard to these pertinent factors, the undersigned notes that Grievant's performance evaluations were satisfactory, and his supervisor characterized him as an “exceptional worker,” when

present. Unfortunately, Grievant was not a long term employee, and had amassed a substantial disciplinary record relating to his absenteeism, despite numerous counseling sessions and warnings. There is no indication that Grievant misunderstood that he was to report to work as scheduled, yet his absenteeism clearly did not improve. Employers have the right to expect employees to attend work as required. Hatfield v. Dep't of Corrections, Docket 98-CORR-020 (Apr. 30, 1998); See Scarberry v. Bureau of Employment Programs, Docket No. 94-BEP-625 (Jan. 31, 1995); Smith v. Dep't of Corrections, Docket No. 93-CORR-538 (May 17, 1994).

While Grievant suggested that the penalty imposed was more severe than that imposed upon other employees, Grievant's burden of proof on this issue was not met in that there was no evidence of other incidents involving absenteeism for comparison. While DHHR could have elected to impose a ten or more day suspension, the determination that Grievant was not going to improve was reasonable, and Grievant failed to demonstrate that dismissal is a clearly disproportionate penalty in this matter. See Conley v. Div. ofCorrections, Docket No. 00-CORR-109 (June 30, 2000) (dismissal for absenteeism of an employee with physical difficulties).

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

2. Respondent has proven that Grievant established a pattern of unsatisfactory attendance during his employment.

3. 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. Dep't 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).

4. Grievant was terminated for good cause and in compliance with the provisions of Respondent's progressive discipline policy. 5. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the 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." Connor v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995); Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). In assessing whether the decision was excessive or disproportionate the undersigned must look at the totality of the circumstances.

6. Grievant failed to demonstrate the penalty imposed was clearly excessive given the numerous disciplinary actions previously taken against him for excessive and unauthorized absences.

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 §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: July 29, 2002 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

The hearing had been delayed to accommodate the schedule of the union representative Grievant had named on the grievance form as his representative. When that individual did not appear at the hearing, Grievant's father advised the undersigned that Grievant was actually not a member of the union. Grievant was given the option of a continuance to secure other representation, but elected to proceed with his father acting as his representative.

Footnote: 2

This policy was not made part of the record.

Footnote: 3

Grievant's representative indicated a disagreement with the charge that the injury to Grievant's hand had been self-inflicted; however, DHHR stated that even without that incident, Grievant would have been subject to discipline for failing to report to work that morning at the designated hour.