SHARON McCLURE,

Grievant,

v v.

Docket No. 03-HHR-236

WEST VIRGINIA DEPARTMENT

OF HEALTH AND HUMAN RESOURCES/

MILDRED MITCHELL BATEMAN HOSPITAL,

Respondent,

D E C I S I O N

Grievant, Sharon McClure, filed this grievance on June 25, 2003, against her employer, the West Virginia Department of Health and Human Resources ("HHR" or "Agency")/Mildred Mitchell Bateman Hospital ("MMBH"). Her Statement of Grievance states:

> I was dismissed of my job because I have been off work with medical conditions and under Doctors['] care. The CEO wanted me to sign a paper to go to 21 hour position and I refused so I was dismissed of my job. The 21 hour position has no benefits and I can't live on 21 hours a week.
>
> Relief sought: To be re-instated of my fulltime [sic] position with all my benefits.

As Grievant was a probationary employee, she initiated this dismissal grievance at Level II. This grievance was denied at Levels II and III. Subsequently, Grievant appealed to Level IV on August 7, 2003, and a Level IV hearing was held on October 21, 2003. This case became mature for decision on November 14, 2003, after receipt of HHR's proposed findings of fact and conclusions of law. (See footnote 1) Grievant was to submit a return to work slip from her doctor by November 5, 2003, but this was not received.

Issues and Arguments

Grievant asserts she should not have been terminated from her LPN position as all her multiple absences were due to illness and family problems, and HHR should not have tried to "make" her take a part-time position without benefits.

Respondent indicated it is aware of Grievant's multiple medical and personal problems and is sympathetic, but the agency needed someone in Grievant's position that could come to work and care for the patients at the hospital. Respondent avers it offered Grievant the 21-hour position as an alternative to leaving its employ entirely, but when she did not accept this offer, it had no alternative but to dismiss Grievant from her probationary position.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was first hired by HHR in 1988, and received a written reprimand for attendance problems. She left this employment after several months. (See footnote 2)

2. Grievant was hired as a temporary employee of MMBH in late 2002, and received good evaluations during this time.

3. Grievant's father died on January 15, 2003, and her mother has been seriously ill for many months.

4. On March 17, 2003, Grievant was hired as a full-time, probationary employee. 5. From March 17, 2003, to April 4, 2003, Grievant worked only 84.75 hours. 6. Grievant was granted personal leave on April 4, 2003, due to her medical and personal problems. (See footnote 3) Grievant suffers from many illnesses including an irregular heartbeat, Grave's disease, congestive heart failure, and a hiatal hernia. Grievant has been hospitalized several times.

7. Grievant's stepson died on April 22, 2003, and Grievant's son became depressed over this event worrying Grievant.

8. In a letter to Grievant dated June 17, 2003, Lawrence Ventura, CEO of MMBH, reviewed Grievant's employment history. He noted she was a probationary employee, had been granted a personal leave on April 4, 2003, and had not yet returned to work. He informed Grievant that the Division of Personnel Rules did not require HHR to grant probationary employees medical leaves of absence, and due to staffing conditions and the need to deliver treatment services, he had decided

not to approve any further personal leaves. He directed Grievant to return to work on June 23, 2003, with a statement from her physician releasing her to work without restrictions. If Grievant did not return to work, she would be seen as having abandoned her position, and this letter would serve as her fifteen-day notice of her dismissal. Her dismissal date under this circumstance would be July 3, 2003. This letter also offered Grievant an opportunity to meet with Mr. Ventura.

9. Grievant was unable to obtain a return to work slip from her doctor in the time allotted, but did ask to meet with Mr. Ventura. 10. Grievant met with Mr. Ventura and Kieth Anne Worden, Human Resources Director on June 24, 2003. At this meeting, Grievant explained her multiple medical and personal problems, and was offered a 90-day, exempt position so she could work as her doctor allowed and reapply for full-time when released by her physician and a vacancy occurred. Grievant was informed MMHB could not continue to keep her position unfilled because of staffing problems, and if she did not take the temporary position, she would be dismissed.

11. At the June 24, 2003 meeting, Grievant verbally agreed to take the temporary position, but later decided she would not because she needed the benefits. Grievant also thought it was unfair of MMBH to suggest this action because she believed she would shortly be released by her physician and would be able to work full-time.

12. Grievant filed this grievance, and Ms. Worden met with Grievant on July 1, 2003, for a Level II conference, and this grievance was denied by decision issued July 7, 2003.

13. On July 22, 2003, Grievant's dismissal letter was reissued noting her termination had become effective July 3, 2003.

14. Although Grievant stated she has now been released to return to work, and the record was left open after the Level IV hearing for her to provide a copy of that letter, no document was received.

Discussion

When a probationary employee is terminated on grounds of incompetency or unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the employer carries no burden of proof in a grievance proceeding. Bonnell v. W. Va. Dep'tof Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990). See W. Va. Code § 29-6A-6. The instant case is not one of misconduct; Grievant was dismissed because of her inability to return to work during the probationary period. Dismissal of a probationary employee for excessive absenteeism caused by illness is not disciplinary

in nature. Giberson v. W. Va. Div. of Corrections, Docket No. 98-CORR-002 (May 29, 1998). See Bonnell, supra; Bowman v. W. Va. Educ. Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997); Walker v. W. Va. Pub. Serv. Comm'n, Docket No. 91-PSC-422 (Mar. 11, 1992). Accordingly, Grievant has the burden of proving her grievance by a preponderance of the evidence. (See footnote 4)

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.

Grievant, as a classified employee, was subject to the Division of Personnel's Administrative Rules. Several Rules are applicable to Grievant's dismissal, and they will be enumerated below.

The Division of Personnel's Rule 3.75 defines the "Probationary Period" as "[a] specified trial work period prescribed by the State Personnel Board designed to test thefitness of an employee selected from a competitive list of eligibles for the position for which an original appointment has been received."

The Division of Personnel's Rule 10.1 discusses the "Nature, Purpose, and Duration" of the probationary period and states:

> (a) The probationary period is a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency. It is an integral part of the examination process and the appointing authority shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work.

Section 10.5 discusses "Dismissal during Probation" and states:

> If at any time during the probationary period, the appointing authority determines that the services of the employee are unsatisfactory, the appointing authority may dismiss the employee in accordance with Section 12.2 of this rule. . . .

In turn, Section 12.2, referred to in the above-cited section, provides:

> Fifteen (15) calendar days after notice in writing to an employee stating specific reasons, the appointing authority may dismiss any employee for cause. The

> appointing authority shall allow the employee a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. The appointing authority shall file the reasons for dismissal and the reply, if any, with the Director of Personnel. . . .

In this case, Grievant does not deny she has been off work for an extended period of time, and she has only worked approximately eleven days since she became a probationary employee. However, she contends, that because she had to miss work for family and medical reasons, this should not result in her termination.

Although Grievant has certainly had a rough time, and it is understandable she is not able to work, it is also understandable that HHR elected to exercise its rights underSection 10.5, and dismiss Grievant prior to the end of her probationary period. At the time of her dismissal, HHR had already granted Grievant a discretionary, Personal Leave of Absence Without Pay for more than two months. This action was pursuant to Division of Personnel Rule 14.8 which states:

> (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 shall apply for the leave of absence in writing to the appointing authority. If the appointing authority approves the request, the approval shall 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 or her discretion based on the agency's personnel needs. Time spent by provisional employees for leaves of absence does not extend 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.

(Emphasis added).

Additionally, as noted by Respondent, an agency is not required to grant a medical leave of absence to a probationary employee, as that same Division of Personnel Rule states at (c)(1), "[a]n injured or ill permanent employee upon written application to the appointing authority shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve month period. . . ." (Emphasis added).

In this case, Respondent based its decision to not extend Grievant's discretionary, Personal Leave any longer, based on personnel needs of MMBH. Respondent could no longer do without the services of an LPN to meet the requirements of the patients it cares for, Grievant was unable to return to work, and Respondent could not fill this position until Grievant was terminated. An employer is not obligated to retain an employee who has exhibited an inability to perform the essential duties of his or her position, due to a medicalcondition. Giberson, supra. See Prince v. Bd. of Trustees, Docket

No. 97-BOT-276 (Nov. 5, 1997)(other applicable citations are contained within the Prince grievance decision.) Accordingly, Respondent followed all the applicable Division of Personnel Rules, and its determination must be upheld.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. Bonnell v. W. Va. Dep't of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990).

2. Dismissal of a probationary employee for excessive absenteeism caused by illness is not disciplinary in nature. Giberson v. W. Va. Div. of Corrections, Docket No. 98- CORR-002 (May 29, 1998). See Bonnell, supra; Bowman v. W. Va. Educ. Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997); Walker v. W. Va. Pub. Serv. Comm'n, Docket No. 91-PSC-422 (Mar. 11, 1992).

3. Section 10.5 of the Division of Personnel Administrative Rule allows for dismissal of an employee at any time during the probationary period.

4. Grievant did not establish HHR violated any rules, regulations, or statutes in her dismissal during her probationary period.

5. HHR fully complied with the provisions of Division of Personnel Administrative Rule Sections 10.5 and 12.2 in dismissing Grievant during her probationary employment.

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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: December 17, 2003

Footnote: 1

Grievant represented herself, and Respondent was represented by Robert Miller, Esq., Assistant Attorney General.

Footnote: 2

Grievant did not note this period of employment on her 2002 application for an LPN position at MMBH.

Footnote: 3

Pursuant to Division of Personnel Rule 14.8, probationary employee do not receive medical leaves of absence. See Page 7, infra.

Footnote: 4

Respondent willingly presented its evidence first at both the Level III and Level IV hearings.