RICHARD COURY,

Grievant,

v. Docket No. 01-DOH-588

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Richard Coury (Grievant), employed by the Division of Highways (DOH or Respondent) as a Storekeeper III, filed a grievance directly to level four, as is permitted by W. Va. Code § 29-6A-4(c), following his dismissal. Grievant requests reinstatement to the position of Storekeeper, reinstatement of his annual and sick leave effective May 27, 1999, and either reasonable accommodation in the performance of Storekeeper duties, or similar employment that does not involve heavy lifting. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on March 3, 2003, at which time Grievant was represented by Gerald E. Lofstead III, Esq., of Schrader Byrd & Companion. DOH was represented by Barbara L. Baxter, Esq. The matter became mature for decision upon receipt of the parties' proposed findings of fact and conclusions of law on or before April 8, 2003. (See footnote 1)

The following facts are undisputed.

Findings of Fact

1. Grievant was first employed by DOH as a Guard on or about November 28, 1994. In December 1995, Grievant was hired as a temporary Storekeeper. In March 1996, Grievant's employment with DOH was terminated when he transferred to another state agency. In July 1996, Grievant was re-employed by DOH as a Storekeeper II. He has held the classification of Storekeeper III since July 22, 1996. A Storekeeper must have the ability to safely perform moderately heavy manual labor in lifting and storing materials and equipment.

___2. On or about May 21, 1999, Grievant suffered an injury/aggravation to his neck. While recuperating from the neck injury, Grievant suffered a heart attack. Grievant's physician described Grievant's heart disease as not curable, and in most cases, is progressive. Due to

his condition, Grievant is limited to lifting no more than five pounds.

3. Grievant was granted a six-month medical leave of absence beginning May 27, 1999. He was then granted an eighteen-month personal leave for medical reasons, which extended through May 28, 2001.

4. Grievant returned to the DOH payroll on May 29, 2001, until he exhausted all remaining leave time on August 10, 2001.

5. DOH offered Grievant what District Engineer Robert Whipp described as the easiest and least stressful position in the District, that of Telecommunicator in the Wheeling Tunnel. After reviewing information regarding the position, Grievant's physician advised that it would be too stressful for Grievant.

6. By letter dated November 16, 2001, DOH Director of Human Resources, Jeff Black, notified Grievant that his employment was terminated at the close of business onNovember 30, 2001. The reason for the dismissal was Grievant's failure to return to work at the expiration of the leave of absence, and the lack of availability of any other suitable positions.

Discussion

In disciplinary matters, the burden of proof rests with the employer. W. Va. Code §29-6A-6. State employees who are in the classified service can only be dismissed for "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); W. Va. Code § 29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Section 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993). This Grievance Board has determined that dismissal of an employee for failure to return to his position following a medical leave of absence is a dismissal for cause as set forth in Oakes and Guine, supra. Hayden v. Dep't of Health and Human Resources, Docket No. 98-HHR-133 (Nov. 30, 1999); Clark v. W. Va. Dep't of Military Affairs & Pub. Safety, Docket No. 99-DJS-428 (Nov. 30, 1999).

Employees of DOH are granted medical and personal leaves of absence pursuant to DOH Policies, which provide in pertinent part, as follows: (See footnote 2)

An injured or ill permanent employee upon written application . . . shall be granted a continuous medical leave ofabsence without pay not to exceed six (6) months within a twelve month period provided:

a. The employee . . . [has elected not to use sick leave] ;

b. The employee's absence is . . . verified by a physician . . . stating the employee is unable to perform his/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 . . is not of such nature as to render the employee permanently unable to perform his/her duties.

If an employee is unable to return to work at the conclusion of the six months of medical leave of absence, "it is discretionary by the Division as to whether or not to grant a personal leave of absence." If, after a six month personal leave of absence the employee is still unable to return to work, "it is discretionary by the Division as to whether or not to grant an extension of personal leave. Criteria to be used in determining whether to grant this request are: (1) the likelihood that the employee will be able to return to work in their former position during the extended time period, (2) the work record of the employee, (3) the effect that the continued absence of the employee will have on the organization. Failure of the employee to report promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to the appointing authority, is cause for dismissal.

DOH contends that Grievant's dismissal was proper pursuant to the provisions cited above, along with his obvious inability to perform the essential duties of his position. Grievant does not dispute that he is unable to perform the duties of Storekeeper as he once did, but asserts that Respondent did not make any efforts to return him to work underlight duty, or to find him a similar position which did not require heavy lifting. Grievant also notes that other Storekeepers have assistance in lifting heavy objects while DOH did not attempt to make such reasonable accommodation for him to return to work. (See footnote 3) **Finally, Grievant argues that DOH policies did not require the termination of his employment.**

Respondent has met its burden of proving that Grievant's termination was proper. It has complied with the pertinent policies regarding medical and personal leaves of absence. Granting additional leave time was discretionary, and considering that it was not likely that Grievant would be able to return to work at the end of another leave, and that the Storekeeper is necessary to the daily functioning of DOH, the decision to not grant additional leave time was reasonable. DOH has made an effort to reassign Grievant; however, there are no position openings for which Grievant is qualified. Allowing Grievant to return to the position of Storekeeper would require that another employee be assigned to do his lifting. This does not constitute reasonable accommodation.

Grievant has been granted medical and personal leaves of absence extending twenty-four months, he remains unable to resume his duties as Storekeeper, and he cannot return to work. It has previously been held that employers are not required to maintain disabled workers on their payrolls when it is obvious that the employee is physically unable to perform his job duties and the period of disability cannot be determined. Wyoming Cablevision, Inc. v. Powell, 403 S.E.2d 717 at 723 (W. Va. 1991); Baire v. W. Va. Div. of Corrections, 97-CORR-129 (March 11, 1998). Consistent with the foregoing findings and discussion, the following conclusions of law are appropriate in this case.

Conclusions of Law

1. In disciplinary grievances, the burden of proof rests with the employer, and dismissal for failure to return to work after a medical leave of absence is a disciplinary dismissal. W. Va. Code § 29-6A-6. See Clark v. W. Va. Dep't of Military Affairs & Pub. Safety, Docket No. 99-DJS-428 (Nov. 30, 1999).

2. Grievant was granted all the medical and personal leave to which he was entitled.

3. State employees who are in the classified service can only be dismissed for "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); W. Va. Code § 29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

4. Grievant could not return to his duties as Storekeeper after twenty-four months of personal and medical leave, justifying his termination. See Hayden v. Dep't of Health and Human Resources, Docket No. 98-HHR-133 (Nov. 30, 1999); Cook v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-298 (Nov. 30, 1999)

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 grievanceoccurred. 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.

DATE: APRIL 29, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Proposed findings and conclusions were to be postmarked by April 3, 2003, the date determined by counsel. DOH filed a Motion for Extension of Time to File Findings of Fact and Conclusions of Law, along with said proposals on April 8, 2003. The basis given for the Motion was "excusable neglect". Grievant objected, asserting that DOH had not provided any explanation whatsoever for its "excusable neglect," and that Respondent had gained an unfair advantage since its proposals were a responsive pleading. Upon review of both Grievant's and Respondent's submissions, it does not appear that Respondent benefitted from the late filing. While such actions are not condoned, for the reasons stated by Grievant's counsel, Respondent has the burden of proof in this matter, and Grievant has not suffered any apparent harm from the delay.

Footnote: 2 ***DOH policies essentially restate the Division of Personnel's Administrative Rule, Section 14.8.***

Footnote: 3

[3]Of course, Grievant would need assistance in lifting any item over five pounds, making it necessary to assign another employee for that purpose. Assigning an additional employee to perform the Storekeeper duties is not a

reasonable accommodation.