ROBERT BAISDEN,

Grievant,

v v.

Docket No. 02-HEPC-428

HIGHER EDUCATION POLICY COMMISSION/

SOUTHERN WEST VIRGINIA COMMUNITY

AND TECHNICAL COLLEGE,

Respondent.

D E C I S I O N

Grievant, Robert Baisden, was employed as Building and Grounds Service Worker by Southern West Virginia Community and Technical College ("SWVCTc" or "College"). He filed this grievance on his termination directly to Level IV on December 29, 2002. The Statement of Grievance states:

> Dr. did not release back to work, I gave my comp. Payments to buy my time. And all this was done behind my back. I went in often to the office[.] I talked to Randy Skeens and Debbie Dingess. They knew all information. I never gave any false information. I never lied[.] I'am (sic) disabled. I'm still fighting Comp. I do not fell (sic) I owe $323.23[.] I have no money[.]

Because it was unclear exactly what had happened to Grievant, and what his current status was, Cricket Powell in the Grievance Board's office, called Grievant. This conversation revealed Grievant had been dismissed. A Level IV hearing was scheduled for January 27, 2003. Grievant informed the undersigned Administrative Law Judge he could not travel because he had no transportation, so Grievant participated by phone. (See footnote 1) This case became mature for decision on February 13, 2003, after receipt of theRespondent's proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Respondent asserts it properly dismissed Grievant for dishonesty and job abandonment as he

failed to return to work. Grievant did not wish to testify at hearing, but indicated in his remarks he had done nothing wrong.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. It is noted Grievant chose to present only two statements from his Workers' Compensation claim and no other evidence; thus the Findings of Fact below are based on the credible evidence presented by Respondent.

Findings of Fact

1. Grievant was employed by SWVCTC as a Building and Grounds Service Worker for more than twenty years.

2. In the Spring of 2002 Grievant had surgery on his right wrist, and was off work on Workers' Compensation temporary total disability benefits ("TTD's"). Grievant was having some problems with his left wrist, but Workers' Compensation would not authorize treatment for this wrist as work related. Resp. No. 10, at Level IV.

3. By letter dated August 15, 2002, SWVCTC and Grievant were notified by Workers' Compensation that his TTD's would cease on August 15, 2002, and if further evidence was not received, his claim would be closed for TTD's on September 29, 2002. Resp. No. 4, at Level IV.

4. By letter dated September 19, 2002, SWVCTC and Grievant were notifiedby Workers' Compensation that Grievant had reached his maximum medical improvement, he was able to return to work, and Dr. Padmanaban had released Grievant to return to work on August 6, 2002. Resp. No. 3, at Level IV.

5. Grievant did not return to work, and SWVCTC notified him if he was to remain off work he must complete a "Request for Medical Leave of Absence" and have his doctor complete a "Treating Physician Statement - Medical Leave Verification."

6. Grievant returned these documents on December 2, 2002. Grievant, not Dr. Padmanaban, completed the Physician Statement and Grievant signed Dr. Padmanaban's signature to this document.

7. This fake signature was discovered by Ms. Clay, SWVCTC's Human Resources Administrator. She looked at the documents and noted the writing and signature looked like Grievant's. She contacted Dr. Padmanaban on December 3, 2002, and asked him if he had

completed the form. Resp. No. 7, at Level IV.

8. Dr. Padmanaban responded that same day and was very angry. He informed Ms. Clay that no one in his office had completed this form, and it was not his signature on the treating physician signature line. Resp. No. 8, at Level IV.

9. On December 10, 2002, Dr. Oretha Baker, Vice President for Finance, wrote Grievant informing him his absence without authorization was considered an automatic resignation, and SWVCTC intended to terminate his employment. Dr. Baker noted Grievant's actions were seen as wilful and flagrant and constituted grounds for immediate dismissal. Grievant was given an appointment to meet with President Joanne Tomblin on December 16, 2002. Resp. No. 1, at Level IV.

10. Grievant did not keep this appointment. 11. On December 16, 2002, President Tomblin wrote Grievant that in accordance with the Classified Employees Handbook Sections 10.2 (Types of Disciplinary Action) and 7.3.1 (Automatic Resignation) he was dismissed form employment. President Tomblin noted Grievant's failure to return to work, falsification of the Physician Statement Form, and forgery of Dr. Padmanaban's signature.

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 Classified Employees Handbook Section 7.3.1 states: "[a]bsence from work for three consecutive work days without explanation or authorization may be deemed an automatic resignation." Section 10.2.2 states: "[i]mmediate dismissal may be appropriate in cases of flagrant or wilful violations of rules, regulations, standards of acceptable behavior of performance, or for actions where an investigation proves the employee was in clear violation of policy." Section 10.2.2.1 identifies a limited list of reasons for dismissal. Among the reasons listed that apply to this grievance

are: 1) "refusal to comply with institutional rules"; 2) "dishonesty"; 3) "habitual absence form work without permission or proper explanation." As Grievant did not present any evidence, the testimony and documents presented by Respondent were unrebutted. This testimony and these documents did indeed prove Grievant failed to return to work when released by his treating doctor, falsified the Physician Statement Form, and falsified Dr. Padmanaban's signature. Given the clarity of the facts and evidence presented, Respondent has met its burden of proof and demonstrated it had good cause for Grievant's dismissal and did not violate any rules, regulations, or statues in this termination.

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

Conclusions of Law

1. 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.

2. Respondent has met its burden of proof and demonstrated it had good cause for Grievant's dismissal in that Respondent established Grievant failed to return to work, falsified documents, and falsified his treating physician's signature.

Accordingly, this grievance is **DENIED**. Any party 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: March 11, 2003

Footnote: 1 Grievant sent a document he wished to submit as evidence. This document was prepared by Dr. Ramanathan Padmanaban for Grievant's Workers' Compensation claim. When Grievant was notified he could participate by phone in the grievance hearing, if he wished, it was also clarified with Grievant that this hearing dealt with his termination, and would not deal with his Workers' Compensation claim.

Footnote: 2 Grievant represented himself, and SWVCTC was represented by Attorney Greg Bailey.