BRENDA KUHN,

Grievant,

v.

Docket No. 05-TD-064

DEPARTMENT OF REVENUE/

STATE TAX DEPARTMENT,

Respondent.

DECISION

The grievant, Brenda Kuhn ("Ms. Kuhn"), challenges the action of her employer, respondent State Tax Department ("Tax"), in dismissing her for failing to comply with a directive to return to work after the expiration of her six-month unpaid leave of absence. According to her Level IV statement of grievance, the sole ground upon which this grievance was brought is Ms. Kuhn's claim that she "was dismissed without just cause." (See footnote 1) For relief, she requested "[r]einstatement of benefits, medical, pension, with back pay." Although she did not expressly request reinstatement to employment, it is clear that this is, in fact, part of the relief Ms. Kuhn seeks.

This grievance has a peculiar procedural history. It was initially filed by Ms. Kuhn directly with the West Virginia Education and State Employees Grievance Board ("theGrievance Board") at Level IV on December 26, 2001. Thereafter, at the request of Ms. Kuhn, it was remanded to Level I. The remand order was entered on January 31, 2002. (See footnote 2)

After being remanded this matter languished for an extended period until sometime late in 2004. The parties waived proceedings at Levels I and II and then, on December 15, 2004, this grievance

was brought on for hearing at Level III. (See footnote 3) Ms. Kuhn was represented at Level III by attorney Belinda Morton. Tax was represented by attorney Tim Waggoner. A decision denying the grievance at Level III was issued on February 16, 2005. Ms. Kuhn then submitted her appeal to Level IV, which was received by the Grievance Board on February 23, 2005. (See footnote 4)

A Level IV hearing was begun on April 28, 2005, but was continued to afford Tax additional time to submit the lower level record, including the Level III transcript. The entire lower level record was incorporated at Level IV.

The Level IV hearing resumed on June 28, 2005, at which time Ms. Kuhn was again represented by attorney Belinda Morton. Tax was represented by Assistant Attorney General A.M. “Fenway” Pollack. This grievance matured for decision on August 16, 2005, after both parties had submitted written proposed findings of fact and conclusions of law. After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Ms. Kuhn was employed as a Revenue Agent II by Tax.

2 2. On May 16, 2001, Ms. Kuhn left the office after being involved in an unpleasant confrontation with two of her co-workers.

3 3. Thereafter, upon discussing the matter with Linda Coleman, Human Resources Administrator (“Ms. Coleman”), Ms. Kuhn requested a medical leave of absence without pay.

4 4. By correspondence from Patricia J. Haddy, Director of the Operations Division (“Ms. Haddy”), dated June 13, 2001, Ms. Kuhn was informed that her request for medical leave without pay had been granted, effective May 22, 2001. (See footnote 5) Gr.Exh.1 at IV. In her June 13 correspondence, Ms. Haddy expressly referred Ms. Kuhn “to Section 14.8 paragraphs (c) & (d) of the West Virginia Department of Personnel Administrative Regulations concerning the expiration of your leave of absence.” (See footnote 6) Gr.Exh.1 at IV.

5 5. At periodic intervals throughout her medical leave of absence without pay, Ms. Kuhn was required to submit an update from her physician regarding her status.

6 6. On November 15, 2001, Ms. Coleman advised Ms. Kuhn during a telephone conference that her medical leave was expiring and that she needed to return to work. Tr.39.

7 7. Ms. Kuhn's leave expired on November 22, 2001, but, as of November 28, 2001, she had not returned to work.

8 8. Even when fully staffed, the section in which Ms. Kuhn worked found it difficult to manage the work load. Tr.11-12.

9 9. Correspondence from Mark Muchow ("Mr. Muchow"), dated November 28, 2001, was forwarded to Ms. Kuhn by certified mail. Resp.Exh.1 at III. Mr. Muchow, who was writing in his capacity as Chief Administrator of Revenue Operations, confirmed receipt of information from Ms. Kuhn's physician to the effect that she would not be medically released to return to work until January 2, 2002. Resp.Exh.1 at III.

10 10. In his November 28 correspondence, Mr. Muchow also informed Ms. Kuhn 1) that her six month unpaid medical leave had expired; 2) that she was required to return to work with a medical release by no later than December 5, 2001; and 3) that if she failed to comply with the directive to return to work by that date, she should consider the correspondence in hand to be the required "fifteen (15) calendar day notice" of her dismissal. Resp.Exh.1 at III. In reference to her potential dismissal, Mr. Muchow cited the Division of Personnel's Rule 14.8(d). (See footnote 7) Resp.Exh.1 at III.

11 11. In his November 28 correspondence to Ms. Kuhn, Mr. Muchow had invited her

> to either meet with me in person or to present me with a written explanation of the reason why you think the facts and grounds contained in this letter are in error and why you think this action in is inappropriate, providing that you do so within the eight (8) day notice period.

Resp.Exh.1 at III.

12 12. Ms. Kuhn received Mr. Muchow's November 28, 2001, correspondence on December 4, 2001.

13 13. Ms. Kuhn responded to the November 28 correspondence by sending an e- mail to Mr. Muchow at approximately 10:30 p.m. on December 4, 2001. She also followed up by mailing him a hard copy of this e-mail. Gr.Exh.4 at III. The substance of this communication was that Ms. Kuhn had just been diagnosed with lupus, which she characterized as a "chronic disease." Gr.Exh.4 at III.

14 14. In light of the lupus diagnosis, Ms. Kuhn asked that she be granted "additional time to accept this disease[.]" Gr.Exh.4 at III. Ms. Kuhn did not specify how much additional time she was

requesting or suggest a date by which she expected to be able to return to work.

15 15. Ms. Kuhn failed to report for work on December 5, 2001, as she had been instructed to do in the November 28, 2001, correspondence.

16 16. Mr. Muchow's response to Ms. Kuhn's December 4 e-mail, which was dated December 11, 2001, was forwarded to Ms. Kuhn by certified mail. Gr.Exh.6 at III. The import of his response was that, although he was sympathetic to her medical concerns, Mr. Muchow was unwilling to extend her leave any further “due to the work demands” of Ms. Kuhn's office. Gr.Exh.6 at III. Accordingly, the deadlines set forth in the November 28, 2001, correspondence remained in place.

17 17. Although she claimed that it was with some difficulty, Ms. Kuhn obtained a medical release from her doctor for December 20, 2001.

18 18. As Ms. Kuhn acknowledged in her Level III testimony, she understood that she was expected to return to work on December 5, 2001. Tr.45. No one “in management” had told Ms. Kuhn that she “could return to work on December 20, 2001[.]” Tr.45.

19 19. Ms. Kuhn reported to work on December 20, 2001. Tr.97. She was told that her employment had been terminated, as indicated in the November 28 and December 11, 2001, correspondence from Mr. Muchow.

Discussion

This grievance was brought to challenge Ms. Kuhn's dismissal for failure to report to work, as directed by her employer, at the conclusion of her medical leave of absence. Such dismissal is disciplinary in nature. *Harbert v. Dep't of Revenue/State Tax Dep't*, Docket No. 05-TD-027 (May 24, 2005)(citing *Hayden v. Dep't of Health & Human Res.*, Docket No. 98-HHR-133 (Nov. 30, 1999)). Therefore, the employer bears the burden of proving the grounds for the dismissal by a preponderance of the evidence. W. Va. Code § 29-6A-6(e), *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

A classified employee, such as Ms. Kuhn, “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.” *Walters v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 99-DMV-411 (Oct. 31, 2000) (citing Syl. pt. 1, *Oakes v. W. Va. Dep't of Finance & 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)) (additional citations

omitted). The Grievance Board has previously held 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 & Human Res./Bureau for Children & Families*, Docket No. 98-HHR-133 (Nov. 30, 1999). Upon certain conditions, the administrative rules promulgated by DOP provide that a classified employee "shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve month period[.]" W. VA. CODE ST. R. § 143-01- 14.8(c)(1). While Ms. Kuhn was on unpaid medical leave, she was required to submit a "prescribed physician's statement form" at certain intervals "to confirm the necessity for continued leave[.]" W. VA. CODE ST. R. § 143-01-14.8(c)(1)(c).

DOP's rules also address the requirements for returning to work at the conclusion or expiration of an unpaid medical leave of absence. Specifically, "the employee must furnish from the attending physician/practitioner a prescribed physician's statement form indicating the ability of the employee to return to work." W. VA. CODE ST. R. § 143-01- 14.8(d)(2). As the basis for its dismissal of Ms. Kuhn, Tax relies upon the portion of the DOP rule that provides that "[f]ailure 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." W. VA. CODE ST. R. § 143-01-14.8(d)(3).

Ms. Kuhn, however, claims that she was unfairly caught between the requirement to return to work and the requirement to provide Tax with a physician's statement pursuant to which she was medically released to return to work. This argument might be more persuasive if she had made a greater effort to contact Mr. Muchow and ascertain whether an extension of her leave was going to be authorized. As it was, she was told to report to work on December 5. She did not. She was told if she did not report to work on that date the November 28 correspondence would serve as the requisite fifteen-day notice that she was being dismissed for job abandonment. W. VA. CODE ST. R. § 143-01-12.2(c). Ms. Kuhn claimed to have received the November 28 correspondence on December 4, 2001. (See footnote 8) Fifteen calendar days later falls on Wednesday, December 19, 2001. It is telling that Ms. Kuhn did not report to work until December 20, 2001.

It is true that Ms. Kuhn had sent Mr. Muchow an e-mail (followed by hard copy), dated December 4, 2001, requesting additional leave. Gr.Exh.6 at III. However, she received Mr. Muchow's response denying this request on December 14, 2001, and she still did not report to work. Nor did she contact

Mr. Muchow or Ms. Coleman to let them know that she did not yet have a medical release but was scheduled to see her physician on the evening of December 19, 2001. If Ms. Kuhn was truly interested in returning to work, she certainly did a poor job of communicating that interest to her employer.

Once her six months of medical leave without pay had expired, Tax had the discretion to decide whether to grant Ms. Kuhn additional amounts of unpaid leave. “Personal leave is granted at the discretion of the employer, and extensions of leave given for a specific amount of time may be given, at the discretion of the employer based on the needs of the agency. DOP Administrative Rule § 14.8(a).” *Harbert v. Dep't of Revenue/State Tax Dep't*, Docket No. 05-TD-027 (May 24, 2005). The testimony at Level III established that, even when it was fully staffed, the section in which Ms. Kuhn worked had trouble managing the work load. Tr.11-12. Therefore, it cannot be said that Mr. Muchow's decision to deny Ms. Kuhn's request for additional unpaid leave was an abuseof discretion. To the contrary, it made good managerial sense, especially since Ms. Kuhn did not specify a date by which Tax could expect to have her return to work.

The preponderance of the evidence demonstrates that Ms. Kuhn was dismissed for cause in that she failed to report to work, as ordered, after the expiration of her unpaid medical leave of absence. Her failure to do so, after having been properly and timely warned that it would result in her dismissal, constitutes job abandonment. This grievance must be denied.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. As the employer, Tax bears the burden of proving the grounds for Ms. Kuhn's dismissal by a preponderance of the evidence. W. Va. Code § 29-6A-6(e), *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2 2. “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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

3 3. Pursuant to DOP's administrative rule, a medical leave of absence is limited to six months in any twelve-month period. W. Va. Code St. R. § 143-01-14.8(c)(1). Ms. Kuhn's unpaid

medical leave began on May 22, 2001, and expired on November 22, 2001, at which time she should have returned to work.

4 4. The question of whether to afford an employee additional unpaid leave is vested within the employer's discretion. W. VA. CODE ST. R. § 143-01-14.8(a). Tax did not abuse this discretion in refusing to afford Ms. Kuhn additional unpaid leave, particularly in light of the testimony that the section where Ms. Kuhn was employed had difficulty managing the work load even when fully staffed.

5 5. In addition, Tax's exercise of discretion to deny an extension of Ms. Kuhn's leave is supported by the fact that, when requesting an extension, Ms. Kuhn failed to specify when Tax could expect her to return to work.

6 6. A classified employee, such as Ms. Kuhn, “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.” *Walters v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 99-DMV-411 (Oct. 31, 2000) (citing Syl. pt. 1, *Oakes v. W. Va. Dep't of Finance & 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))(additional citations omitted).

7 7. “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.” W. VA. CODE ST. R. § 143-01-14.8(d)(3). Therefore, Ms. Kuhn's failure to report to work, as directed, after her unpaid medical leave expired provided grounds for her dismissal.

8 8. The “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 & Human Res./Bureau for Children & Families*, Docket No. 98- HHR-133 (Nov. 30, 1999).

9 9. In pertinent part, the administrative rules of the Division of Personnel (“DOP”) provide that a dismissal for job abandonment “is effective fifteen calendar days after the appointing authority notifies the employee of the dismissal.” W. VA. CODE ST. R. § 143-01- 12.2(c). The November 28 correspondence from Mr. Muchow constituted notice to Ms. Kuhn of her dismissal.

10 10. Ms. Kuhn was dismissed for cause, based on job abandonment when she failed to report to work, as instructed by her employer, after having been properly notified fifteen days in

advance that such failure to report would result in her dismissal.

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 West Virginia Code section 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:

October 14, 2005

_____**JACQUELYN I. CUSTER**

Administrative Law Judge

Footnote: 1

Counsel for Ms. Kuhn made arguments relating to issues such as reprisal, discrimination, and harassment. However, at the outset of the Level IV hearing, counsel for Ms. Kuhn stated that she was not attempting to expand the statement of grievance to include such issues. Instead, she expressly limited the scope of the grievance to the procedures through which Ms. Kuhn was dismissed. In particular, counsel stated that Ms. Kuhn had been placed in a "Catch-22" situation in that she was required to report back to work by a particular date but, unless she could present a medical release, she would not be allowed to actually begin work on that date. To the extent that arguments for Ms. Kuhn address extraneous issues, they have not been considered in the resolution of this grievance.

Footnote: 2

The docket number for the initial Level IV grievance was 01-T&R-624.

Footnote: 3

References to pages in the transcript of the Level III hearing shall appear herein as "Tr.__." References to exhibits in the Level III record shall appear with the exhibit designation, such as "Gr.Exh.__" or "Resp.Exh.__" followed by "at III."

Footnote: 4

This was a new Level IV appeal, so it was assigned a new docket number.

Footnote: 5

She had been on paid leave since the May 16, 2001, incident.

Footnote: 6

W. VA. CODE ST. R. § 143-01-14.8(c) and (d).

Footnote: 7

W. VA. CODE ST. R. § 143-01-14.8(d)

Footnote: 8

Counting from the date Ms. Kuhn received the correspondence, as opposed to the date it was written or postmarked, inures to Ms. Kuhn's benefit and alleviates any need to address her complaints that the postmarks on documents mailed by Tax varied from the internal dates on the documents.