CHARLES CARDER,

Grievant,

v. Docket No. 05-HE-092

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Charles Carder ("Grievant"), employed by West Virginia University ("WVU") as a Campus Service Worker assigned to the Physical Plant, filed a level one grievance on November 30, 2004, in which he claimed to have been terminated while on a medical leave of absence, "including F[ederal] M[edical] L[eave] A[ct]" (FMLA). For relief, Grievant requested reinstatement, back pay, benefits, and to be made whole. The grievance was denied at all lower levels, and appeal to level four was made on March 21, 2005. After a number of delays, Grievant's counsel, Roger Curry of Curry and Swisher, PLLC, and WVU counsel, Assistant Attorney General Kristi A. McWhirter, agreed to submit the grievance for decision based upon the record. The grievance became mature for decision upon receipt of WVU's response to Grievant's proposed findings of fact and conclusions of law, on November 10, 2005.

The following facts have been derived from a preponderance of the evidence made part of the record at level three.

Findings of Fact

1. Grievant has been employed by WVU since 1999, and has held the position of Campus Service Worker at all times pertinent to this grievance.

2. WVU Policy HR-53 requires employees to notify his or her supervisor prior to normal starting time when unable to report due to illness or other reason. The failureto "report off" for three consecutive workdays is considered gross misconduct, and neglect of duty, subject to disciplinary action up to and including termination.

3. WVU may require verification for medical leave in excess of five days. The document is to be completed by a physician, and must include the employee's medical condition, diagnosis, prognosis, functional capabilities and limitations, including duration and treatment

plan, if any. Verification is required, regardless of duration, if the employee is informed of such prior to returning to work, and to substantiate a FMLA leave of absence.

4. Initially, Grievant was absent from work September 9 and 10, 2004, and had properly reported off, requesting sick leave. Grievant was also absent on September 13, 14, 15, 16, 17, 20, 21, and 22, 2004, without reporting off. Grievant exhausted his annual leave on or about September 17, 2004, and WVU could not charge his sick leave without the physician's verification.

5. Grievant's immediate supervisor, Domenick Rocca, contacted Grievant on September 22, 2004, to check his status. Grievant stated that he had a doctor's appointment on September 24, and Mr. Rocca advised him that a Medical Verification Form would be required before he could return to work. He further advised Grievant that the form would be placed in his campus mailbox so that he could pick it up on the way to his doctor's appointment. Grievant did not collect the form.

6. Grievant did not report for work, or properly report off, on September 23, 24, 27, and 28. 7. Mr. Rocca contacted the Physical Plant Human Resources department on September 28, 2004, and requested that an "Intent to Terminate" letter be issued to Grievant, based upon his failure to report off work for more than three days.

8. Grievant was absent from work, and did not report off, on September 29 and 30, and October 1 and 4, 2004.

9. Medical Management Secretary Sandy Verma, sent Grievant a Medical Leave Verification Form on October 4, along with a note reminding him that it must be completed after an absence of more than five days.

10. Grievant was absent from work, without reporting off, on October 5, 6, 7, 8, 11, and 12, 2004.

11. On October 12, 2005, Nancy Naylor-Twardus, Senior Program Coordinator of Medical Management, sent Grievant a certified letter, and a third leave verification form. She advised him that his failure to submit a completed form on or before October 20, would result in his benefits being discontinued, and subject him to discipline, up to and including termination.

12. Grievant was absent from work, without reporting off, on October 13, 14, 15, 18, and 19, 2004.

13. Grievant and his spouse met with Ms. Naylor-Twardus on October 19. At this time, Grievant submitted a medical leave verification form dated October 18, 2004, releasing him to work with no restrictions. The doctor who completed the form was not Grievant's regular physician, and the form he provided did not reference Grievant's absences in September and October. 14. Notwithstanding the physician's release, Grievant advised Ms. Naylor-Twardus that he did not feel like returning to work. She advised him that if he did not feel he could work, he needed to get documentation that he could not return, and to cover his absences of the prior two months.

15. Grievant properly reported off work on October 21, but failed to report his absence on October 22 and 25, 2004. He reported off on October 26, but did not call in on October 27, 28, and 29, or November 1 and 3, 2004.

16. On November 4, 2004, Grievant submitted a prescription form on which it was noted that he had been under a doctor's care from September 3, and that Grievant could return to work with no restrictions. The note did not contain a diagnosis, or reason why Grievant had been absent from work.

17. Grievant failed to properly report off from work on November 5, 2004.

18. On November 8, 2004, Mr. Rocca issued Grievant an “Intent to Terminate” letter, advising that his employment would be terminated November 12, 2004, for his failure to comply with various leave policies. Grievant was given until November 11, 2004, to schedule a meeting to discuss the matter prior to a final decision being made.

19. Grievant and his union representative met with Physical Plant administrators on November 11, 2004, at which time his union representative stated that Grievant was unaware of how to apply for medical leave. As a result of the meeting, Grievant agreed to report to work on November 12, and the time frame for termination was extended to allow the administrators an opportunity to consider Grievant's assertion that he was not aware of the process. 20. Grievant did not respond to his supervisor's inquiry as to the nature of his two medical conditions.

21. On November 12, Grievant provided a properly completed Medical Leave Verification Form covering his absence from September 9 to November 11, and releasing him to work on November 12, with no restrictions.

21. Grievant reported to work on November 12, but left after 4.25 hours to keep a doctor's appointment. Grievant reported to work November 15-19, and 22, 2004.

22. WVU terminated Grievant's employment on November 23, 2004.

23. Grievant had applied for, and was granted, intermittent medical leave pursuant to the Family Medical Leave Act in 2001 and 2003.

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

WVU asserts that it was justified in terminating Grievant's employment based on the fact that he had failed to properly report off work many times from September through November, and had failed to timely submit a properly completed Medical Verification Leave Form, resulting in abandonment of his position. Grievant argues that he made a good faith effort to substantially comply with the Family Medical Leave Act and WVU policies. Additionally, Grievant argues that dismissal was an unreasonably severe sanction for his failure to comply with technical policy requirements, particularly in light of his substantial compliance.

The WVU policies at issue in this matter are as follows:

WVU-HR-53 "Unauthorized Absence Policy" requires that an employee notify his or her supervisor if unable to report to work for any reason. An employee's absence from work for three consecutive workdays without proper notice, explanation and/or authorization shall be deemed gross misconduct and neglect of duty, which may result in disciplinary action, up to and including, termination.

WVU-HR-46 "Sick Leave Policy" provides that substantiation to charge sick leave may be required.

WVU-HR-27 "Medical Leave Verification Policy" states that verification of sick leave is required for an absence of more than five consecutive days, and is required regardless of the duration, if the the employee is informed of such prior to returning to work. It is the

responsiblity of the employee to provide written verification, completed by a licensed physician, containing information regarding his or her medical condition, diagnosis, prognosis, functional capabilities and limitations, including duration and treatment plan, if any.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93- HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

The testimony offered by Respondent's witnesses was substantially consistent. Moreover, their demeanor and responses under cross-examination revealed no particular animosity toward Grievant, so as to cause them to fabricate or embellish their statements. By comparison, Grievant's testimony was confusing and conflicting on key points. He frequently responded to questions which could have been answered with a definite “yes” or "no" with “to my knowledge”, "probably", and “I'm pretty sure.” In at least two matters Grievant's testimony was simply implausible. First, Grievant testified that he had great difficulty in getting his doctor to compete the medical verification form; however, one was obtained the very next day following the November 11, 2004, intent to terminate meeting. Second, Grievant's testimony that he always called in to report off is implausible given the record kept by Mr. Rocca. Finally, Grievant's claim that he was not aware of the procedureinvolved in extended absences is contradicted by his prior experiences. Based on the foregoing,

Grievant's testimony is found not to be credible, to the extent it varies from that of WVU's witnesses.

Having established that Grievant did not properly report off work, or provide a correctly completed medical verification report until after he received the intent to terminate letter, WVU has proven violations of policies WVU-HR-53, 46, and 27. Grievant has failed to prove that he ever requested a medical leave of absence under the federal FMLA, or that substantially complied with any requirements of that Act.

The remaining issue is whether dismissal was too severe in this instance. 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 the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45- 105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measureis so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

Grievant was absent from work, without properly reporting off, or providing medical verification for his absences, for the better part of two months. WVU gave him numerous opportunities to comply with requirements which are not unduly burdensome. Even though Grievant had no prior disciplinary record, dismissal was not so disproportionate to his

actions that WVU abused its discretion in determining the level of discipline imposed.

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

2. WVU has proven by a preponderance of the evidence that Grievant failed to report off work as required by policy WVU-HR-53, and failed to timely present a Medical Leave Verification Report, as required by policy WVU-HR-27. 3. 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 the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94- 01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

4. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

5. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the

employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

6. Grievant has failed to prove that WVU abused its discretion in terminating his employment, requiring mitigation of the discipline.

Accordingly, the 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.

DATE: DECEMBER 12, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE