DENA HARBERT,

Grievant,

v. **DOCKET NO. 05-TD-027**

DEPARTMENT OF REVENUE/

STATE TAX DEPARTMENT,

Respondent.

DECISION

Grievant Dena Harbert filed this grievance on January 31, 2005, stating, “I am protesting my dismissal from my position with WV Dept. of Revenue, State Tax Dept. I feel that this action is unwarranted and without just cause.” Her stated relief sought is “I am asking to be reinstated immediately to my position as an employee of WV Dept. of Revenue Tax Dept. and any and all rights as an employee be reinstated.”

A level four hearing was held in the Grievance Board's office on March 25, 2005. Grievant was represented by Fred Tucker of the UMWA/WVSEU, and Respondent was represented by counsel, Ronald R. Brown, Assistant Attorney General. The matter became mature for decision on April 18, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant was dismissed from employment after she failed to return to work after the expiration of her approved leave of absence without pay, and contends her dismissal was unjustified because she was still medically disabled, she has a long history of state service,and she had a desire to return to work as soon as she was able. Respondent stands on its authority to dismiss an employee who is unable to perform the duties of her job and fails to return to work at the expiration of a leave of absence.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Ms. Harbert had been employed by Respondent since May 1994. She began having health

problems in 2001 (anxiety attacks, muscle stiffness, and headaches).

2. In July, 2004, Ms. Harbert was granted an extended medical leave of absence without pay, not to exceed six months.

3. In January, 2005, Ms. Harbert was still unable to return to work, and requested further leave.

4. Ms. Harbert, in March, 2005, requested and has received Temporary Total Disability Social Security benefits.

5. Ms. Harbert's physician, Michelle Burdette, M.D., provided a statement, dated March 21, 2005, concluding, “I do not foresee her being able to return to work.” Her counselors, Scott Spaulding, M.A. and Kay Collins-Ballina, M.A., provided a statement dated March 23, 2005, (two days before the level four hearing), stating that as of March 20, 2005, “Ms. Harbert continued to have significant anxiety and depression. She has and would continue to decompensate under work settings.”

6. Acting Tax Commissioner Christopher Morris denied Ms. Harbert's January 2005 request for an extended leave of absence without pay, based on a statement from Grievant's physician that Ms. Harbert's “disability will permanently prevent [her] fromperforming [her] duties.” He directed Ms. Harbert to contact his office within ten days to advise him of her intentions, and if she wished to return to work, to provide a release from her physician.

7. Grievant responded that she wished to return to work, but was still unable to and could not predict when she would be able to.

8. Commissioner Morris replied, on January 25, 2005, that, in view of Ms. Harbert's inability to return to work, he had not alternative but to dismiss her from employment.

9. Grievant had used all the Family Medical Leave Act benefits to which she was entitled.

Discussion

Dismissal for failure to return to work after a medical leave of absence is a disciplinary dismissal. (See footnote 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. (See footnote 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." *(See footnote 3)*

The Division of Personnel's Administrative Rule addresses this situation. Section 14.8(d) allows an injured (or otherwise disabled) employee to be placed on an unpaidmedical leave of absence, so long as a physician's statement justifying continued leave is submitted every thirty days and the estimated period of disability is defined. Failure of an employee to report to work at the end of such a leave of absence or to provide proper justification for continued leave is grounds for dismissal. (See footnote 4) In addition, section 14.8(a), which discusses leaves of absence, states that a leave of absence should not exceed one year, and specifies that the employer may grant an extension to a leave of absence “at his or her discretion based on the agency's personnel needs.” It is significant that the Rule is written so that the discretion depends on the needs of the agency and not of the employee. This section of the Rule even repeats that “Approval of personal leave is discretionary with the appointing authority.”

Grievant argues that it is unfair for her to be dismissed from employment without any misconduct on her part, while she was off work due to a disability. Grievant contends that the applicable part of the Administrative Rule requires her “to report promptly at the expiration of the leave of absence,” and that she did indeed promptly report -- she reported that she was still unable to work and would be so for the foreseeable future. Section 14.8(d)(3) of the Administrative Rule states, “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.”

The same rule Grievant cites establishes the just cause for her dismissal that she argues is lacking. The requirement “to report promptly” read in context with the rest of the sentence clearly means “to report to work.” The “At the expiration of a leave of absence”establishes that no more leave exists, and the requirement that “satisfactory reasons [be] submitted in advance” shows that the reporting Grievant would have read into the sentence must be done well ahead of time, *not* after all permissible leave is used up. Respondent's position is therefore correct, and the Administrative Rule language gives Respondent the discretion to make the decision whether to retain the employee or extend the leave of absence. The rule does not establish criterion for evaluating the employee's request for an extension, other than that it be “satisfactory” to Respondent.

The following conclusions of law support this discussion:

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 & Public Safety, Docket No. 99-DJS-428 (Nov. 30, 1999)." *Hayden v. Dep't of Health and Human Res.*, Docket No. 98-HHR-133 (1999).

2. Section 14.8(d)(3) of the Administrative Rule for the Division of Personnel allows an injured employee to be placed on an unpaid medical leave of absence, so long as a physician's statement justifying continued leave is submitted every thirty days and the estimated period of disability is defined. Failure of an employee to report to work at the end of such a leave of absence or to provide proper justification for continued leave is grounds for dismissal. *Hayden, supra*. (See footnote 5)

3. 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).

4. Respondent met its burden of proving that Grievant failed to report to work at the expiration of her leave of absence without pay, and that it therefore had grounds to dismiss her from employment.

For the foregoing reasons, this grievance is hereby **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, and 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.

May 24, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Hayden v. Dep't of Health and Human Res., Docket No. 98-HHR-133 (1999).

Footnote: 2

W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

Footnote: 3

Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993)

Footnote: 4

Hayden, supra.

Footnote: 5

The Hayden decision references section 15.08 of the administrative rule; that section has since been replaced by section 14.8(d)(3), which is essentially identical.