THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

SAUL HOLLAND,

Grievant,

v. DOCKET NO. 06-HHR-126

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/MILDRED

MITCHELL-BATEMAN HOSPITAL,

Respondent.

DECISION

Grievant filed four separate grievances on April 7, 2006, seeking to be reinstated to his position as a Health Service Worker after he was terminated. These grievances were consolidated for hearing at level four, and a hearing was held in the Grievance Board's Charleston office on May 26, 2006. Grievant was self-represented and Respondent was represented by Landon R. Brown, Senior Assistant Attorney General. The matter became mature for decision at the conclusion of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant alleges that his termination was based on inaccurate records of his attendance, and that if he had been given copies of his attendance records earlier, he could have corrected any errors and avoided future deficiencies. Respondent contends it properly terminated Grievant following progressive discipline that did not correct Grievant's behavior.

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

Findings of Fact

1. Grievant was employed at Mildred Mitchell-Bateman Hospital (MMBH) as a Health Service Worker.

2. In November 2004,Grievant was placed on a non-disciplinary performance improvement

plan (PIP) as a result of his perpetual tardiness.

3. Between the start date of his PIP and January 18, 2005, he was late for work four times, nine minutes once, eleven minutes twice, and fifty-nine minutes once. He was given a verbal reprimand, the first stage of progressive discipline, on that date.

4. On February 22, 2005, Grievant was verbally counseled regarding his attendance because he had been late on three more days since his reprimand. The following day, Grievant was forty-nine minutes late, so he was issued a written reprimand on March 3, 2005.

5. On March 24, 2005, Grievant was issued a verbal reprimand because he was absent and did not call in to report his absence. He was scheduled to attend a mandatory training session that day and he did not attempt to reschedule it.

6. By July 14, 2005, Grievant was late for work on four more days and he was suspended for six working days.

7. Grievant received an Employee Performance Appraisal on September 20, 2005, for the annual rating period ending August 31, 2005. Although his overall rating was 1.74, “Meets Expectations,” he was rated as “Needs Improvement” in all categories under the “Availability for Work” heading. His supervisor noted in the comments section,

> Saul has had seven unexcused absences in the past 6 months and eleven tardies. Saul has received counseling on absences and tardies. He has received verbal and written reprimand for tardies and was on a PerformanceImprovement Plan, but tardies and absences persisted and a 6 day suspension was given. He has shown some improvement since then. He does at times work additional shifts to help maintain adequate staffing.

8. By October 14, 2005, Grievant was late on five more occasions, and as a result he was suspended for ten working days.

9. Grievant filed a grievance related to the ten-day suspension, but did not claim it was unjustified, only that it was one day too long. He did not pursue the grievance beyond level one. This was the only grievance he filed related to any of the progressive disciplinary actions prior to his dismissal.

10. MMBH uses an automated timeclock system to keep track of employee attendance. Employees scan their identification badges at the beginning and end of their shifts, and a computer records the time. If the scanner is not working, the employee must write their times in a log.

11. Timekeepers employed in the Human Resources Office under the supervision of Human

Resources Director Kieth Anne Worden review the time records monthly and make a report for unit supervisors, who do not have daily access to the records. An employee who is not under disciplinary action is considered tardy if he clocks in more than seven minutes late. The timekeepers report to the supervisors if an employee is tardy four times or more. The timekeepers can alter these records, but Ms. Worden cannot.

12. If an employee is tardy more than six times within six consecutive months, disciplinary action begins with a counseling session.

13. During the last week of November 2005, Grievant requested two new identification badges because his old one was not scanning in the timeclock. They weremade and because he never picked them up, Linda in the Human Resources Department sent them to his unit, where they were given to him. Grievant was late again on December 23 and 28, 2005, and on February 14 and 25, 2006.

14. On March 15, 2006, MMBH Chief Executive Officer Mary Beth Carlisle dismissed Grievant from employment “due to [his] continuing failure to comply with hospital policies regarding attendance.” She noted, “[Y]ou have continued to exhibit an unwillingness to appear for work on time” after numerous counseling and progressive disciplinary actions.

15. Ms. Carlisle, Ms. Worden and Director of Nursing Patricia Ross met with Grievant to discuss the termination and to give him an opportunity to explain any mitigating circumstances. Grievant admitted his attendance problem but suggested his employer's priorities were misplaced, as the focus should be on patient care, something for which Grievant received “Exceeds Expectations” ratings. As an example, he recalled a time when he came to work drunk but was not disciplined. He also stated he had a history of partying, but was settling down. This meeting reinforced Ms. Carlisle's opinion that termination was proper.

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, and that the charges constitute good cause for the action, by a preponderance of the evidence. (See footnote 1) In thiscase, Respondent has presented ample credible evidence that Grievant is either unable or unwilling to conform to the attendance policy under which he works, by repeatedly failing to arrive for work on time. He admitted

his conduct, and knew the consequences. He demonstrated that any expectation that he could remediate his behavior was unfounded. Respondent's progressive disciplinary steps were followed over a long period of time, but failed to cause Grievant to correct his behavior.

It is axiomatic that an employer may expect its employees to arrive at work, and be ready to work, on time at the beginning of their shifts. When an employee fails to arrive, in a setting such as MMBH, the employee he is relieving must stay over until replaced. This can have a direct negative effect on patient care, and certainly is an administrative and logistical nightmare. It is a violation of policy, and a can be a form of insubordination. The practice of MMBH of ignoring minor tardiness and even short trends in repeated tardiness pays heed to the fact that isolated cases can be minor, but the continual, repeated and unrepentant habit exhibited by Grievant in this case rises to the level of a substantial issue, for which termination is a reasonable outcome.

Grievant did raise a few minor points in seeking mitigation of the penalty for his admitted misconduct. An allegation that a particular disciplinary measure is dispropor tionate 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. (See footnote 2) "Considerable deference is afforded theemployer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." (See footnote 3)

Grievant called no witnesses of his own to rebut the allegations of Respondent, and did not testify himself concerning his affirmative defense. He argued that Respondent made errors in his timeclock records, and proved one. However, both questionable cases were part of the basis for his prior, unchallenged disciplinary actions, and so are in effect cemented in the record. The undersigned does take notice that on July 6, 2005, Grievant could not have been both tardy and absent without authorization, and therefore Respondent's record for that day is clearly in error. Likewise, Grievant's leave request for July 6, 2005, which he turned in well ahead of time on June 9, 2005, could be interpreted a requesting leave for that day. Nevertheless, Grievant was not dismissed for this one attendance issue that occurred eight months prior to his dismissal, but for the pattern of attendance issues that remained uncorrected after repeated and exhaustive attempts by his employer.

Grievant does have an exemplary performance record (See footnote 4) in providing care to the patients of MMBH, but that one bright spot in the employment relationship between Grievant and

Respondent is not enough to excuse Grievant's habitual and uncorrected unavailability for work. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether thepenalty 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." (See footnote 5) Grievant's work record establishes a history that supported numerous disciplinary actions for the same conduct. His personnel evaluations advise him of the need to correct his behavior. He was clearly and repeatedly advised that dismissal from employment was a probable result if he did not conform his behavior to the expectations he was given. Additionally, Grievant presented no evidence that other employees who exhibited similar patterns of tardiness were subjected to lesser disciplinary actions, and no evidence Respondent altered his attendance records to support its case against him.

The following conclusions of law support this discussion:

Conclusions of Law

1. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. W. Va. Code § 29-6A-6. *Davis v. W.Va. Dept. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.* 2. Permanent state employees who are in the classified service can only be dismissed for “good 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); *See also* 143 W. Va. C. S. R. 1 §§ 12.02 and 03. The West Virginia Supreme Court of Appeals has also stated that “the work record of a long-term civil service employee is a factor to be considered in determining

whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

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 theemployer 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. Respondent met its burden of proving the charges against Grievant, and that termination from employment was the appropriate disciplinary action.

6. Grievant did not meet his burden of proving the punishment should be mitigated.

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 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 31, 2006

M. Paul Marteney

Administrative Law Judge

Footnote: 1

W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). See also Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

Footnote: 2

Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

Footnote: 3

Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96- HHR-183 (Oct. 3, 1996).

Footnote: 4

It should be noted that his admitted on-the-job drunkenness was apparently unknown to his employer.

Footnote: 5

Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994).