THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

PAMELA CHAPMAN,

Grievant,

v. DOCKET NO. 06-HHR-277

M. Paul Marteney,

Administrative Law Judge

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/BUREAU FOR CHILDREN

AND FAMILIES,

Employer.

DECISION

Grievant filed this grievance on August 14, 2006, challenging the termination of her employment and seeking to be able to return to work after she has recuperated from an on-the- job injury.

A level four hearing was held in the Grievance Board's Charleston office on October 17, 2006. Grievant was self-represented and Respondent was represented by B. Allen Campbell, 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.

Synopsis

Grievant was on a medical leave of absence while receiving temporary total disability benefits following a compensable on-the-job injury. After exhausting all the leave benefits to which she was entitled, her workers' compensation claim was closed. Respondent was unable to grant her additional, discretionary leave and terminated her employment when she did not return to work. Grievant did not meet her burden of proving any impropriety on the part of Respondent.

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

Findings of Fact

1. Grievant was employed by Respondent as a Health and Human Services Aide in Kanawha County. She was originally employed on December 16, 2004, and worked without incident until July 2005, when she injured her back on the job and was rendered unable to work.

2. Grievant filed a Workers' Compensation claim and was granted temporary total disability (TTD) benefits.

3. On or about July 27, 2006, Brickstreet Administrative Services, Respondent's Workers' Compensation insurer, determined after an independent medical evaluation, that “there is insufficient information to pay additional temporary total disability benefits and your claim is now closed.” Resp. Exhibit No. 3.

4. After Respondent received notification that Grievant's Workers' Compensation claim was closed and she was no longer receiving TTD benefits, James Kimbler, Region II Director, sent Grievant a letter stating her approved leave had been exhausted and that she was expected “to return to work on August 7, 2006, with a physician's statement releasing you to return to full duty employment without restrictions.” Resp. Exhibit No. 4.

5. Mr. Kimbler's letter further cited the Division of Personnel rule permitting additional leave in the discretion of the employer, but stated, “Due to current staffing conditions, caseload demands and the need to meet the agency's mandate to deliver Child Protective Services it is not feasible to offer you the opportunity for Personal Leave of Absence Without Pay.” Id. Further, he informed her “If you fail to report to work on August 7, 2006,I will conclude that you have abandoned your position. In such case this letter will serve as a fifteen (15) day notification of your dismissal from the Department of Health and Human Resources, effective August 16, 2006.” Id.

6. After an evaluation on April 7, 2006, at Generations Physical Therapy Center, Therapist Tiffany Bryan, MPT, determined Grievant “may benefit from pain management or physical therapy if these have not been attempted.” Grievant's Exhibit No. 2.

7. Grievant's chiropractor, Dr. Jan A. Harbour, D.C., evaluated her on June 23, 2006 and on July 28, 2006. Both times, he determined she was unable to return to full duty employment, and could not return to work at less than full duty. Resp. Exhibit No. 2.

8. Dr. Harbour provided a statement on October 5, 2006, stating Grievant was “currently

temporarily disabled from work and will remain so until she undergoes rehabilitation." Grievant is currently seeking approval for rehabilitation treatment to be covered under Workers' Compensation, but it has not been approved and she has not begun treatment.

9. Grievant did not return to work, and her employment was terminated on August 16, 2006.

Discussion

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." (See footnote 1) In dismissal cases involvingclassified 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. (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) Where the evidence equally supports both sides, the employer has not met its burden. (See footnote 4)

It is well established that job abandonment is a valid ground for termination, even when the employee expresses a desire to eventually return to her position. Here, Grievant was not accused of any performance-related misconduct, liked her job and wishes to return to her position when she is able. Nevertheless, "[f]ailure 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. 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." (See footnote 5)

In this case, the needs of the agency precluded it from offering additional, discretionary leave. In order to free up Grievant's position so they could hire a worker who could perform the duties of the position, it was forced to terminate Grievant's employment. As there was no misconduct or performance issues involved, after Grievant receives thetreatment she seeks and is released by her doctor to return to work, she will be eligible to apply for another position with Respondent. But as for now, Respondent has met its burden of proving its termination action was proper.

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. Dep't 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).

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* Sections 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998).

3. "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 v. Dep't of Health and Human Res.*, Docket No. 98-HHR-133 (1999).] Personal leave is granted at thediscretion 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)." *Preston v. Dep't of* Transp., Docket No. 05-DOH-319 (June 21, 2006); *Harbert v. Dep't of Revenue*, Docket No. 05-TD- 027 (May 24, 2005).

4. Respondent met its burden of proving Grievant failed to return to work after exhausting her leave, and that her Workers' Compensation Claim was closed, thereby establishing valid grounds for terminating Grievant's 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 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.

October 31, 2006

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M. Paul Marteney

Chief Administrative Law Judge

Footnote: 1

Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

Footnote: 2

W. Va. Code § 29-6A-6. Davis v. W.Va. Dep't 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).

Footnote: 3

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

Footnote: 4

Id.

Footnote: 5

Preston v. Dep't of Transp., Docket No. 05-DOH-319 (June 21, 2006); Harbert v. Dep't of Revenue, Docket No. 05-TD- 027 (May 24, 2005).