WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

FAITH HAYWARD,

Grievant,

v. **Docket No. 07-HHR-086**

Sue Keller

Senior Administrative Law Judge

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

MILDRED MITCHELL-BATEMAN HOSPITAL,

Respondent.

D E C I S I O N

Faith Hayward ("Grievant"), employed by the Department of Health & Human Resources ("DHHR") as a Health Service Worker at Mildred Mitchell-Bateman Hospital ("Hospital"), filed a level one grievance on October 10, 2006, after she was suspended for ten days, without pay. The record does not include a level one decision. The grievance was denied at level two. At Grievant's request, the grievance was dismissed at level three, and consolidated with a second grievance filed directly at level four on March 19, 2007, following her dismissal. An evidentiary hearing was conducted on May 4, 2007, in the Grievance Board's Charleston office. Grievant was represented by Shabnaum Q. Amjad, Esq., of AFSCME, and DHHR was represented by B. Allen Campbell, Esq., Senior Assistant Attorney General. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before June 1, 2007.

The following facts of this matter have been derived from the evidence made part of the record at level four.

Findings of Fact

1. Grievant was first employed by DHHR on November 2, 2001, and has been assigned as a Health Service Worker at the Mildred Mitchell-Bateman Hospital at all times pertinent to this grievance.

2. On July 7, 2005, Grievant received documentation of a verbal reprimand from Debra Craddock, Nurse Manager, for an incident on July 1, 2005, when she failed to give the mandatory two-hour notice that she would not be reporting to work her shift that day.

3. On July 27, 2005, Grievant was counseled after she refused to work mandatory overtime, leaving inadequate staff to cover the midnight shift.

4. By memorandum dated July 29, 2005, Grievant was given a written reprimand, in accordance with DHHR Progressive Discipline and Leave Authorization and Absence Control Policies, after she again failed to timely call in an absence on July 21, 2005.

5. In addition to the written reprimand, Grievant was placed on a Performance Improvement Plan, on August 2, 2005, in an effort to correct the deficient behavior. Expectations listed on the plan included that Grievant attend work as needed; communicate scheduling needs to the nurse manager by the 10th of every month per leave requests; in the event she was unable to attend work, call in at least two hours in advance of scheduled shift. The plan was to be in place for three months.

6. On October 6, 2005, Ms. Craddock notified Grievant by memorandum that she was observed to be establishing a pattern of excessive absences which were having a negative impact on the operation of the unit. Because of her undependability, Grievant was directed to submit a physician's statement for every unscheduled absence due to herpersonal illness, or the injury/illness of a family member, if family sick leave was claimed. Failure to provide the physician's statement would result in Grievant being placed on unauthorized leave, and her pay would be docked for the period of the absence. Grievant was also advised that any leave taken without prior written approval from Ms. Craddock, or in her absence, a designee, would be considered unauthorized leave, and her pay docked. Ms. Craddock included a chart which reflected Grievant's non-compliance with call-in procedures, prior discipline, and eighteen days Grievant had been absent between August 7 and October 4, 2005. Sixteen of the days were missed due to “car trouble,” one day Grievant reported a flood, and one day she reported illness. Finally, Grievant was advised that a continuation of attendance problems would lead to suspension and ultimately, dismissal.

7. In addition to the memorandum, Ms. Craddock revised and extended the Performance Improvement Plan to correct Grievant's attendance problems. The expectations of the plan remained the same, and the plan was extended another three months.

8. By documentation dated December 9, 2005, Ms. Craddock memoralized a verbal reprimand

to Grievant on November 19, 2005, when she refused to work mandatory overtime unless she was flexed off the midnight shift. Grievant was reminded to ensure adequate sleep for possible mandatory overtime incidents considering her request for the midnight shift schedule.

9. Grievant refused to work mandatory overtime on December 2, 2005, and subsequently a written reprimand dated December 5, 2005, was placed in her personnel file. Grievant was additionally advised that the services of the Employee AssistanceProgram were available to assist with any problems that may be causing an adverse effect on the performance of her duties.

10. After an unscheduled absence on October 16, 2005, Hospital Chief Executive Officer Mary Beth Carlisle, suspended Grievant for three working days, without pay, beginning December 17 through December 21, 2005, due to her continuing failure to comply with Hospital policies regarding attendance. Grievant did not grieve the suspension.

11. On January 24, 2006, the October 2005 Performance Improvement Plan was extended for an additional three months after an unscheduled absence on January 18, 2006.

12. A written reprimand was issued to Grievant on August 25, 2006, for insubordination and improper use of facility equipment on August 13, 2006. Ms. Craddock stated that she found Grievant in the Hospital using the facility copier at a time she was not scheduled to be at work. Grievant admitted she was using the copier for personal business. Ms. Craddock advised Grievant that it was inappropriate for her to be on facility property, using facility equipment. She immediately thereafter found Grievant on another floor using another copier.

13. Grievant was next suspended for ten days, without pay, beginning September 26, 2006, after unscheduled absences on February 22, March 7, March 29, May 19, May 23, June 9, August 6 & 7, August 25, and September 21, 2006. When asked about mitigating circumstances, Grievant stated that the situations which occurred were beyond her control, that she would “take care” of the problem, and that she was looking for another job. 14. Grievant was absent on unscheduled absences on November 6 & 7. On November 20, 2006, Grievant called in to report that she could not come to work because she had completed Emergency Medical Training class practicals and had glass all over her. She was again on unscheduled absences December 16, 20, 26, and 27, 2006, January 2 - 6, 2007, and January 16, 2007.

15. Ms. Craddock held a predetermination meeting with Grievant on February 14, 2007, at which time she was advised that dismissal was being considered as a result of the continued

attendance problems. Grievant stated that the absences were due to illness she suffered when the floors were stripped. Grievant was reminded that she had been accommodated for this problem by assigning her to an alternate unit whenever the floors were to be stripped. Grievant gave no reason for her continued absences, or for leaving her shift early when no stripping had been completed.

16. CEO Carlisle notified Grievant by letter dated February 15, 2007, that she was dismissed from her employment at the Hospital, effective February14, 2007, due to her continuing failure to comply with attendance expectations, after numerous efforts to correct the behavior through progressive discipline.

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 and Human Res.*, Docket No.92-HHR-486 (May 17, 1993). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.'" Syl. Pt. 2, *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *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). *Scragg v. Bd. of Director. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

DHHR asserts that Grievant was dismissed for excessive unscheduled absenteeism, and her failure to timely report off work, after the behavior was not corrected by progressive discipline. Grievant argues that her use of sick leave was neither excessive, nor did it constitute leave abuse. Rather, she argues that the leave usage was for good cause, and that she provided physician statements, as required. Grievant further notes that she has maintained a balance of more than 230 hours of sick leave throughout this time period.

The record reflects that Grievant used twenty-three (23) days of unscheduled leave in 2005, and eighteen (18) days in 2006. Leave applications for 2006 and 2007 indicate the reasons for Grievant's

unscheduled absences were as follows:

Date	Reason
January 18	child care
February 22	kids were missing
March 7	vehicle broke down on way to work
March 29	sick throwing up
March 30	sick broncitis
May 19	sister had to be taken to ER and someone had to be at home for child
careMay 23	sick had a virus
June 9	vehicle caught fire
August 6-7	personal
August 22	I need Tuesday & Thursday evenings off for school (See footnote 1)
August 24	had to leave work early because of vomiting
August 25	was sick
November 6-7	allergic reaction to floor stripper
November 20	EMT class did practicals_had glass all over me
December 16	sick
December 20	allergic reaction (See footnote 2)
December 26-27	sick
January 2-6	sick
January 16	sick
January 18	child care

Although there was discussion as to whether each absence was, or was not, an occurrence, the controlling factor is that they were all unscheduled absences, which are particularly difficult in a setting which requires around the clock patient care. It is commendable that Grievant continued to carry a substantial number of hours of leave, but her numerous absences caused her to be unreliable as a worker for the past two years. DHHR's determination that Grievant's absenteeism was excessive is accepted since Grievant offered no evidence th²at any other employee at the Hospital was absent to the same extent.

Accepting Grievant's claim that she developed an allergic reaction to chemicals used during floor

stripping, reasonable accommodation was made by DHHR when it assigned to her another floor on those days. If Grievant's continued absenteeism was a result of her work environment notwithstanding the accommodation, then she isunfortunately physically unable to perform the duties of the position, and dismissal is a necessary action so that the position may be filled by an individual who is capable of fulfilling the duties. *See Gregis v. Div. of Labor*, Docket No. 98-DOL-079 (Nov. 12, 1998); *Fullen v. Bd. of Trustees/W. Va. Univ.*, Docket No. 97-BOT-460 (June 18, 1998). The facts of this case establish that despite a prolonged period of progressive discipline, Grievant's compliance with attendance requirements did not improve, and DHHR has proven the existence of good cause for her dismissal.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following 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).

2. "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.'" Syl. Pt. 2, *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *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).

3. DHHR has proven that Grievant engaged in excessive unscheduledabsenteeism which is good cause for dismissal.

Accordingly, the grievance is **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." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See W. Va. Code* § 18-29-7 (repealed) (*but see Executive Order No. 2- 07*, May 8, 2007). 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 circuit court.

DATE: JULY 23, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Grievant enrolled in a Basic Emergency Medical Technician Training class at the Cabell Vo-Tech Center, held on Tuesdays and Thursdays from August 22 through November 30, 2006 from 6:00 to 10:00 p.m.

Footnote: 2

[2]A handwritten note on this form indicates that there was no waxing done on that day.