THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

BEVERLY PRITT,

Grievant,

v. **DOCKET NO. 06-CORR-268**

DIVISION OF CORRECTIONS/

BECKLEY CORRECTIONAL CENTER,

Respondent.

DECISION

Grievant, Beverly Pritt, filed this grievance on July 28, 2006, asserting she was unjustly terminated from her position as a CO 2 at Beckley Correctional Center on July 18, 2006. Her stated relief sought is:

1. To have employment reinstated. 2. To have all my records expunged of [sic] the above action. 3. All back pay, benefits, to include interest and all monies lost. This is to include any overtime lost. 4. For discrimination, harassment, and hostile work environment to be immediately stopped. 5. To be made whole.

A level four hearing was held in the Grievance Board's Beckley office on November 13, 2006. Grievant appeared *pro se*, and Respondent was represented by John Boothroyd, Assistant Attorney General. The matter became mature for decision on December 15, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Synopsis

Respondent asserts it terminated Grievant because she failed to comply with the written request from David Ballard, Administrator of Beckley Correctional Center (See footnote 2), toprovide the Respondent with information relating to her potential secondary employment at Raleigh General

Hospital.

Grievant presented no evidence at the Level IV hearing, and cross-examined witnesses only minimally. However, Grievant's position seems to indicate she was working at the hospital while on sick leave from Beckley Correctional Center ("BCC"), only as a requirement for her college courses. (See footnote 3) She also asserts she only performed light duty work while at the hospital.

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

Findings of Fact

1. Grievant was employed as a Correctional Officer 2 by Respondent at BCC.

2. On March 6, 2006, Corporal Thomas placed Grievant on an improvement period until April 1, 2006 after completing a evaluation of her performance. The evaluation indicated Grievant's performance was fair, but needed improvement. This was prompted by Grievant willfully disrupting a class that was taking place at the institution. It also involved Grievant bringing a lit cigarette into the building, and when asked by her superior if she was smoking in the building, she responded, "No, my cigarette's burning but I'm not smoking."

3. Between February 5 to March 15, 2006, Grievant reported off from work nine our of twenty-nine working days. Four of those days were in conjunction to regular days off. 4. Grievant was absent on March 14 and 15, 2006.

5. By letter dated March 17, 2006, Grievant was placed on leave restriction due to excessive absences.

6. Grievant worked on March 18, 19, and 20, 2006, but did not report to work on March 21, 2006.

7. On March 22, 2006, Grievant reported to BCC wearing a nurse's scrub-type top and presented her supervisor with a physician's certificate for sick leave used on March 14 and 15, 2006. The certificated stated Grievant was able to return to work on light duty. Since Respondent has no provision to permit correctional staff to return to work at less than full duty, Grievant was instructed by her supervisor to return home and not report to work until further notice.

8. On April 4, 2006, Grievant provided Administrator Ballard with a physician's statement which certified that Grievant may be able to resume full duty employment with no restrictions on May 17, 2006. Grievant's absence from March 14, 2006 and ending May 17, 2006, was charged as paid

Family Medical Leave to run concurrently with paid sick and annual leave. During that time, Grievant was required to supply Administrator Ballard with the necessary paperwork every 30 days to confirm she was under a doctor's care.

9. Grievant was not always timely in providing the necessary documentation, and many times the documentation was either late or incomplete.

10. On June 8, 2006, Administrator Ballard sent Grievant a letter informing her that her twelve weeks of Family Medical Leave expired on June 10, 2006. Grievant's sick leave was exhausted on May 28, 2006, and annual leave was being used to cover her absence. Her annual leave was set to expire on July 28, 2006. 11. Sometime prior to July 3, 2006, Corporal Richard Hodges, one of Grievant's co-workers, informed Administrator Ballard that he saw Grievant at Raleigh General Hospital wearing a hospital uniform. (See footnote 4)

12. Administrator Ballard called the hospital and confirmed Grievant was working there. The hospital would not release any additional information without Grievant's permission.

13. On July 3, 2006, Administrator Ballard sent Grievant a letter explaining that, because the appropriate paperwork had not been received, Grievant's absence was being charged as unauthorized leave from June 24, 2006. In this letter Administrator Ballard also explained that it was brought to his attention Grievant was working at Raleigh General Hospital. He explained that without more information, he considered this secondary employment. He directed Grievant to provide him with information concerning her employment at the hospital and gave her fifteen days with which to comply. The letter also explained that failure to follow the directives would result in termination.

14. In accordance with Policy Directive 141.04 “Employee's off-Duty Responsibilities,” employees are required to obtain written approval before beginning secondary employment. Approval is given at the Administrator's discretion, and the secondary employment is not to interfere with the employee's ability to perform his/her duties as a Correctional Officer. To obtain approval, the employee must complete the designated paperwork.

15. Administrator Ballard placed the letter in the mailbox on July 3, 2006. 16. On July 3, 2006, after Administrator Ballard placed the letter in the mailbox, Grievant brought in the required medical documentation. At that time, Administrator Ballard spoke with her concerning her work at the hospital and reiterated he would need her to provide him with additional information.

17. Other than the conversation that took place on July 3, 2006, Grievant never provided

Administrator Ballard with additional information concerning her work at the hospital.

18. On July 26, 2006, Administrator Ballard drafted a letter terminating Grievant on July 18, 2006, for failure to comply with Policy Directive 141.04. (See footnote 5)

19. On October 18, 2006, Wayne Armstrong, Director of Human Resources, drafted a letter to Grievant specifying that she was terminated for failure to comply with Administrator Ballard's written request for information relating to her position at the hospital. This letter was written after the parties engaged in mediation, and there was some indication Grievant was unclear as to the reason for her termination. (See footnote 6)

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 requiresproof 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.*

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). 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).

Policy Directive 141.04 establishes a procedure for employees who desire to work a second job. It reads in pertinent part:

Any employee desiring other employment, in addition to his/her position within the division, must

obtain approval from the Warden/Administrator of his/her institution/facility/center.

1. The employee shall request such approval by completing Section 1 of "Request for Approval of Other Employment," and submitting it to the Warden/Administrator.
2. If the employee takes a second job without first requesting approval for it, the Warden/Administrator may dismiss him/her from employment.

Respondent has established by a preponderance of the evidence that Grievant violated Policy Directive 141.04. Administrator Ballard's assistant phoned the hospital and verified Grievant was working there. The exact nature of the employment is unclear. There appears to have been some assertion by Grievant to Administrator Ballard that her employment at the hospital was a requirement for a college class she was attending. (See footnote 7) Administrator Ballard contacted Grievant's teacher, but the instructor would not provide any information without Grievant's consent.

The July 3, 2006, letter from Administrator Ballard made it very clear that, based on the information he had been provided, he could only assume this was secondary employment. The letter also set forth in no uncertain terms that failure to comply with the directive would result in termination. Grievant's only attempt to discuss her employment at the hospital occurred on July 3rd when she brought the Physician's Statement in to BCC. Grievant never followed up with Administrator Ballard, letting him know she had given consent to either the hospital or her teacher to discuss her employment. Grievant never submitted the required documentation to request secondary employment which violated Policy Directive 141.04. Even when Administrator Ballard brought this information to her attention, she made no attempt to rectify the situation.

This blatant violation is clearly good cause for termination. Grievant had been placed on leave restriction and an improvement period. During the time Grievant was on leave, she was lax about supplying BCC with the required medical documentation. Yet,BCC continually attempted to work with her.

It is understandable that Administrator Ballard would have concern over the possibility that Grievant, who was on medical leave from BCC, would be working at the hospital. Administrator Ballard tried to work with Grievant in every way possible, but Grievant's refusal to follow the policy as set forth showed a blatant disregard for the directives of her supervisor.

Grievant offered no evidence in contradiction to Respondent's case. Respondent has proven by a

preponderance of the evidence Grievant was dismissed for good cause. The following conclusions of law support this discussion:

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). 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* Sections 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998). 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. Pursuant to Policy Directive 141.01 an employee who takes on secondary employment without first obtaining approval from the Warden/Administrator may be dismissed.

4. Respondent met its burden of proof and established Grievant was dismissed for good cause.

For the foregoing reasons, this 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, 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 appealpetition 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: January 12, 2006

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Wendy A. Campbell

ADMINISTRATIVE LAW JUDGE

Footnote: 1

Proposed findings of fact and conclusions of law were only received from Respondent.

Footnote: 2

Mr. Ballard is currently Warden at the Lakin Correctional Center.

Footnote: 3

This was gleaned from testimony provided by Respondent's witnesses concerning discussions with Grievant.

Footnote: 4

Corporal Hodges had been at the hospital visiting a family member.

Footnote: 5

July 18, 2006, was the conclusion of the fifteen days with which to comply. No reason was provided to explain why the termination letter was not drafted until July 26, 2006.

Footnote: 6

The undersigned was not present at mediation and is not privy to what occurred during the mediation.

Footnote: 7

This was gleaned from Administrator Ballard's testimony concerning the July 3, 2006, discussion he had with Grievant.