**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**RACHEL MAE HENDERSON,**
**Grievant,**

**v.** **DOCKET NO. 2010-0130-MAPS**

**DIVISION OF VETERANS AFFAIRS/**
**WEST VIRGINIA VETERANS HOME,**
**Respondent.**

## DECISION

Grievant filed this grievance directly to level three on August 6, 2009, challenging her dismissal from employment after she was unable to return to her position following an on-the-job injury. Her stated relief sought is "reinstated with back pay and any other monies lost or loss of benefits."

A level three hearing was held in the Grievance Board's Charleston office on October 7, 2009. Grievant appeared *pro se* and Respondent was represented by counsel, Nicole Cofer, 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 terminated after she proved unable to return to work after an on-the-job injury. After her recovery period, her physical restrictions rendered her unable to perform the duties of her job. Respondent had no alternate job openings for which she was qualified and able to perform, and terminated her employment after she failed to return to work. Grievant's termination under these circumstances was proper, so her grievance is denied.

## Findings of Fact

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

1. Grievant was employed by Respondent as a Cook at the West Virginia Veteran's Home. She began full-time employment on April 21, 2008, after working there as a temporary worker for a short time.

2. On June 11, 2008, Grievant was injured while working when she slipped and fell on a wet floor. She injured both her left knee and her back.

3. Grievant was scheduled to be off the next two days, after which she returned to work.

4. On or about July 11, 2008, Grievant provided a doctor's excuse stating she should be "off work" for at least two weeks due to her injury, until she could be re-evaluated by the doctor.

5. The injury was deemed compensable by Workers' Compensation.

6. Grievant began receiving Temporary Total Disability Benefits, and during her disability period received treatment, physical therapy and work conditioning in an attempt to rehabilitate her injury. She remained off work with periodic "no work" orders from her physician, until August 2009.

7. At the completion of her rehabilitation, her permanent injuries rendered her unable to perform the essential duties of her job as cook, in terms of standing, lifting, pushing and walking.

8. After Grievant's Temporary Total Disability benefits ceased, Respondent gave Grievant notice that she had exhausted all other forms of leave, her leave of absence

was ending, and that she would need to return to work or be dismissed. Grievant did not respond, and did not return to work.

**Discussion**

"[S]tate employees who are in classified service, as now defined in West Virginia Code § 29-6-2(h) (1996), can be dismissed only for 'good cause'."[1] "Good cause" is normally defined in terms of some sort of misconduct, but inability to perform the basic duties of the job will also amount to good cause.[2] Further, "Failure of the employee to report to work 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."[3]

Respondent bears the burden of proving, by a preponderance of the evidence, that the dismissal of Grievant was justified.[4] At the outset of the hearing, the undersigned informed the parties that the Grievant bore the burden of proof because the dismissal did not appear to be disciplinary in nature. This was incorrect. "The grievant bears the burden of proving the grievant's case by a preponderance of the evidence, except in disciplinary matters, where the burden is on the employer to prove that the action taken was justified."[5] For purposes of this Decision, the evidence taken as a whole was considered in light of the

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[1]*Roach v. Regional Jail Authority*, 198 W. Va. 694, 482 S.E.2d 679 (1996). *See also* 143 C.S.R. 1 § 12.2(a).

[2]*See Adkins v. Div. of Labor*, 04-DOL-071 (Jan. 25, 2005); *Jett v. Div. of Juvenile Svcs./W. Va. Industrial Home for Youth*, Docket No. 2009-0845-MAPS (May 27, 2009).

[3]143 C.S.R. 1 § 14.8(d)(3).

[4]*Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

[5]156 C.S.R. 1 § 3 (2008).

Respondent's burden of proving dismissal was justified, by a preponderance of the evidence. Nevertheless, regardless of the order in which the parties presented their cases, Respondent presented sufficient evidence to meet its burden of proof, and the outcome would be the same.

Grievant filed a lengthy Statement of Grievance asserting the basic facts: She was employed as a Cook at the West Virginia Veteran's Home. She injured her knee and back in a fall at work on June 11, 2008, and a month later her doctor took her off work for treatment and rehabilitation. She had knee surgery in December 2008, and was re-hospitalized two days later due to a blood clot. Thereafter she was treated by physical therapy, and she still has pain in her knee and tailbone, and walks with a limp. The Veteran's Home kept her position open until her doctor released her to return to work, but with severe restrictions that prevented her from doing her job. Grievant wishes to keep her position or return to a position that she can do with the restrictions she is under.

Grievant did not allege "a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee."[6] She states: "All I have been doing is trying to get back to work and now they want to dismiss me from my job. This is not fair to me since I have tried to do everything they asked me to do. I would like to keep my job and benefits, or doing something else at the home I am able to do. So I can return to work." [Statement of Grievance, p.3-4.]

Grievant did not provide any medical records relating to her injuries other than physicians' notices showing that she was to be "off work," and a discharge summary from

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[6] W. VA. CODE § 6C-2-2(I).

her physical therapist, who provided her with work conditioning therapy [See Respondent's Exhibit 1]. This report, which expressly indicated some non-compliance with treatment and which clearly implied at least some malingering, concluded:

> Based on the results of today and what she was willing to do, Ms. Henderson does not meet qualifications of her pre-injury job within the medium physical demand classification as a cook. She did not demonstrate the ability to perform the necessary pushing, pulling, lifting and carrying within the medium physical therapy demand classification on an occasional basis as required by her pre-injury job. It is therefore recommended that she work with her case manager on trying to return to the same employer possibly in a different position or with job modification such as her being able to sit occasionally for food preparation.

The status of her workers' compensation claim was unclear. Normally, an employee cannot be terminated while receiving temporary total disability benefits from a workers' compensation claim, but Grievant testified she had applied for disability and been denied.[7] She did not specify what kind of "disability" she had applied for, and did not seem to know. Respondent provided evidence that Grievant's temporary total disability benefits ceased on May 11, 2009, and that she began receiving rehabilitation temporary total disability benefits on May 15, 2009 through approximately June 30, 2009, at which time those benefits ceased and she no longer had coverage under Workers' Compensation benefits.

Respondent terminated Grievant effective August 11, 2009, more than a year after her injury. Respondent had kept Grievant's position open for about ten months with temporary workers, but at the time Grievant completed her rehabilitation, her former position was filled and Respondent had no openings for which Grievant was qualified and able to do. Respondent sent her a letter on July 27, 2009, giving fifteen days to respond,

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[7] See W. VA. CODE § 23-5A-1, 3.

which letter informed her that she had exhausted all her leave benefits, and informing her of the relevant provisions of the Division of Personnel Administrative Rule, including section 14.8(d)(3), "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 agency, is cause for dismissal."

Grievant was given fifteen days to respond to the letter, and told that if she did not return to work, she would be dismissed per the Administrative Rule. Grievant did not respond, and was therefore dismissed effective August 11, 2009.

Grievant was employed and injured on the job. She was carried on the rolls of her employer until the expiration of her temporary total disability benefits, at which time she was not physically able to return to her position. Her employer had no alternate positions for which Grievant was qualified open at the time she was required to return to work. Grievant ignored her employer's letter asking her to return to work or provide written reasons why she could not.

Grievant also states she "did everything they asked her to do." However, the record does not support her assertion. According to her physical therapist's report, she was not compliant with work conditioning therapy, and she did not respond at all to her employer's letter that told her to return to work or provide satisfactory reasons why she could not. She also apparently ignored her employer's request to work out a repayment scheme for moneys she was paid through sick leave benefits at the same time she was receiving workers' compensation benefits, in violation of law.

Grievant alleged no violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee with regard to the matters

surrounding her absence due to her compensable injury. Respondent showed that it complied with the applicable rules and statutes requiring it to maintain Grievant's position until it became clear she was released to return to employment, and she did not do so. Respondent acted properly in dismissing Grievant from employment.

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. *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." *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. "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. "Failure of the employee to report to work 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." 143 C.S.R. 1 § 14.8(d)(3). *Hayden v. Dep't of Health and Human Res.*, Docket No. 98-HHR-133 (1999).

4. Inability to perform the basic duties of the job will also amount to good cause, because an employee who cannot perform all essential duties of a position by virtue of meeting the established minimum qualifications is not fit. *See Adkins v. Div. of Labor*, 04-DOL-071 (Jan. 25, 2005); *Jett v. Div. of Juvenile Svcs./W. Va. Industrial Home for Youth*, Docket No. 2009-0845-MAPS (May 27, 2009). *See also* 143 C.S.R. 1 § 3.39.

5. At the expiration of Grievant's temporary total disability period and her approved leave of absence, she was physically unable to perform the duties of her job as Cook.

6. Grievant's failure to return to work after her disability period ended and her inability to perform her job was good cause for her dismissal.

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." Any such appeal must be filed within thirty (30) days of receipt of this decision. See W. VA. CODE § 29-6A-7. Neither the West Virginia Public 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 21, 2009**

**M. Paul Marteney**
**Administrative Law Judge**