THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JENNIFER R. DONAHUE,

Grievant,

v. **Docket No. 2009-0154-DHHR**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BEHAVIORAL HEALTH AND HEALTH FACILITIES/MILDRED MITCHELL-BATEMAN HOSPITAL,

Respondent.

DECISION

Grievant Jennifer R. Donahue started her employment with the Department of Health and Human Resources ("DHHR") in 2006, as a Licensed Practical Nurse at Mildred Mitchell-Bateman Hospital ("Hospital"). On July 14, 2008, Grievant was given a letter terminating her employment at the Hospital for repeated violations of agency policies. Ms. Donahue filed a grievance contesting her dismissal on July 31, 2008. She seeks to be restored to her position with backpay. Pursuant to the authority granted in W. VA. CODE § 6C-2-4(a)(4), levels one and two of the grievance procedure were waived and this grievance was originally heard at level three. The level three hearing was held at the Public Employees Grievance Board's Charleston Office on March 23, 2009. Grievant Donahue appeared in person and represented herself. DHHR was represented by Jennifer K. Akers, Assistant Attorney General. The parties agreed to place any post-hearing fact/law proposals in the United States mail no later than April 17, 2009. This grievance became mature for decision on that date. Respondent submitted a post hearing proposal but Grievant did not.

Synopsis

DHHR alleges Grievant habitually violated the attendance and leave policies at the Hospital. Respondent argues that Grievant's employment had to be terminated because she could not be depended upon to regularly be available for work. Grievant counters that she is a single parent and had trouble finding dependable child care while she was at work. She had personal health issues and an ill parent that made it difficult for her to be available for work. Grievant also avers that other nurses had similar attendance problems and were not disciplined. Respondent was able to present significant evidence to support its disciplinary decision and the grievance is denied.

The following findings of fact are based upon a thorough review of the record.

Findings of Fact

1. Grievant was employed by DHHR on October 16, 2006, to be a Licensed Practical Nurse at Mildred-Mitchell Bateman Hospital in Huntington, West Virginia.

2. Grievant was generally considered a competent nurse and was well liked by the patients at the Hospital, but attendance problems eventually overshadowed her job performance.

3. Regular attendance is very important at the Hospital because the patients need care around the clock. If a nurse calls off work and another nurse is not available to take the shift, one of the nurses from the previous shift is required to work an additional shift of overtime. All nurses at the Hospital are required, from time to time, to work mandatory overtime shifts.

4. On June 12, 2007, Grievant's supervisor issued a verbal reprimand to Grievant for taking an extended lunch break and for being insubordinate with the nursing supervisor upon Grievant's return to work. Respondent's Exhibit 9, *Documentation of Verbal Reprimand.*

5. Grievant added a written comment to the "documentation of verbal reprimand form" indicating that she had become ill during the lunch break and had attempted to call the Hospital for thirty minutes but there was no answer.

6. A written reprimand was issued to grievant on July 20, 2007, for failing to come to work when needed. On July 13, 2007, Grievant requested to be given Sunday, July 15, 2007, off work. Her supervisor denied the request because the short notice did not provide time to get another nurse to cover her shift. Grievant stated that another nurse was available for July 14 and she was not going to come to work that day. Her supervisor told Grievant she needed to come to work as scheduled. Grievant called off work for July 14 at 11:15 p.m. as her shift ended on July 13. She called off and missed work on July 15, 2007, as well. Grievant was warned that other similar incidents could lead to further disciplinary action. Respondent's Exhibit 10, *Written Reprimand.*

7. On October 25, 2007, Grievant's supervisor, Susan Shields, held a formal discussion with Grievant regarding problems with tardiness. Ms. Shields noted that during the month of September 2007, Grievant had been tardy six days and in October 2007, Grievant had been tardy five times before the day of the meeting. Shields noted that

Grievant's tardiness was "creating staffing difficulties that impact patient care." Respondent's Exhibit 2, *Documentation of Discussion Form.*[1]

8. Grievant's supervisor held a formal discussion with Grievant on November 1, 2007, about Grievant's failure to take the basic medication and psychotropic medication exam the first year she was employed at the Hospital. Nurses at the Hospital are required to pass this test every year. The test had been offered on more than one occasion during Grievant's first year of employment. Respondent's Exhibit 3.

9. In late November 2007,[2] Nurse Supervisor, Susan Shields, held a formal discussion with Grievant about Grievant's excessive absences. Grievant had called off work for six days between October 18, 2007, and November 25, 2007. Three of the six days were immediately prior to, or following, a scheduled day off. Grievant indicated that she was ill on those days and had gone to the doctor for treatment. However, Grievant did not provide any documentation related to the doctor office visits when given that opportunity. Respondent's Exhibit 4.

10. Grievant and her supervisor had another formal discussion on December 12, 2007. During that meeting it was noted that Grievant had thought that medication was not available for a patient on a previous shift and therefore the patient had missed his prescribed medication until the next dosing time. Ms. Shields reminded Grievant of the

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[1]Each time Grievant's supervisors held a formal discussion with her, it was documented on a *Documentation of Discussion Form*.

[2] The exact date of the discussion was not recorded but the meeting occurred between November 25th, which was the last reported absence, and November 30th, which was the day reported by which Grievant had not submitted documentation supporting her absences.

Doc-U-Med procedure for procuring medication in such situations. If Grievant had followed that procedure the patient would not have missed his prescribed medication for that period. It was also noted that this was a "Category C"[3] error that did not cause harm to the patient. Respondent's Exhibit 5.

11. The Hospital has stringent sign-in procedure for employees. Each employee is given a magnetic pass card. When the employee reports to work, she[4] must scan the card and her time of arrival is recorded by a computer. As a back-up, each employee is also required to manually sign in and write the time of her arrival next to her signature on the sign-in sheet. Upon leaving, the employee must go through the same process to check out. The manual back-up system is important because the cards sometimes malfunction and the employee information is not recorded.

12. The sign-in procedure is not only used for security; it also provides the data upon which employees' time is calculated for pay purposes.

13. During Grievant's tenure with the Hospital she had ongoing problems complying with the sign-in procedure. Her card regularly malfunctioned and she often did not manually sign in. On at least one occasion, this led to a rather heated discussion regarding whether Grievant had received appropriate overtime pay.

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[3] There was no clear explanation as to the definition of a Category C error except that it was a medication error that did not result in harm to a patient.

[4] Because Grievant is a woman all nonspecific gender references used herein will be female.

14. By letter dated January 23, 2008, Grievant was suspended without pay for five work days (forty work hours) from her job at the Hospital. The reasons given for the suspension were Grievant's failure to adhere to the following Hospital policies:

- MMBH060, *Timekeeping Records*, by failing to clock in and out and sign in and out;
- MMBHC016, *Leave Authorization and Absence Control*, by failing to complete a leave request form within the specified time frame;
- *Medication Administration Policy,* by 1) failing to "pull" medication from the Doc-U-Med, erroneously stating the medication was unavailable when it was available, 2) taking the Medication Room keys with you during an errand off the grounds of the facility;
- MMBHF053 *Medication Administration,* by not taking the required psychotropic medication in-service and exam.

15. Grievant's supervisor, Susan Shields, placed Grievant on a Plan of Improvement dated February 13, 2008. The performance areas that were identified as needing improvement were:

- Employee must comply with mandatory overtime requirements;
- Employee will comply with absence control policy;
- Employee will complete assignments and mandatory training per policy;
- Employee will comply with the sign in and out and clock in and out procedure.

Respondent's Exhibit 6, *Performance Improvement Plan*.

16. Grievant acknowledged on the Performance Improvement Plan form, that she would meet with her supervisor bi-weekly for the next three months to monitor Grievant's progress toward meeting her goals. *Id.*

17. On February 26, 2008, Supervisor Shields held a formal discussion with Grievant about her performance progress. Shields noted that Grievant had been late two of the eight days of the plan and had called-off work for one day with appropriate medical

documentation. Grievant had also refused two mandatory overtimes for the 11-7 shift because she had no babysitter for the night shift. Shields reminded Grievant that occasional night shifts were a mandatory part of her job and suggested that Grievant "come up with a back up plan for this." Respondent's Exhibit 7.

18. Grievant received an Employee Performance Appraisal on April 15, 2008. Grievant received an overall rating of "Fair But Needs Improvement." In the "General Comments" section Supervisor Shields wrote the following:

> Jennifer has had a rough 6 months. She has been suspended for 5 days for various issues. She met with nursing and Ms. Carlisle and it was agreed that Jennifer would see Dr. Cody for some short term counseling. Since Jennifer's meeting there has been a significant improvement in her work ethic. We are still working on her tardies and absences.

Grievant's Exhibit 5, *DOP Form EPA-2.*

19. During the months of March and April 2008, Grievant continued to have problems with unscheduled absences and reporting late for work. As a result of these problems, on April 29, 2008, Grievant received an additional suspension without pay for seven work days (fifty-six work hours). Respondent's Exhibit 12.

20. On June 2, 2008, Supervisor Shields gave Grievant a note documenting their formal discussion of Grievant's failure to follow the sign-in policy. The note listed four dates Grievant failed to sign-in between March 25, 2008, and May 11, 2008. Respondent's Exhibit 8.

21. Grievant met with three Hospital officials on July 9, 2008, for a pre-determination meeting to discuss her continuing absence problem. Present at the meeting were: Grievant Donahue; Belinda Ackerson, RN, C; Charlotte Nixon, Assistant Director of

Nursing;[5] and Kieth Anne Worden, Director of Human Relations. When asked if Grievant could think of anything the Hospital management could do to help her get to work on time and on scheduled days, Grievant responded that she could not think of anything, as a single parent, she was doing the best she could.

22. On July 14, 2008, Mary Beth Carlisle, Chief Executive Officer, hand delivered a letter to Grievant dismissing her from her employment as a Licensed Practical Nurse at the Hospital. After recounting Grievant's prior problems and corrective actions that had been taken, Carlisle noted the following:

> May 30, 2008, you called in (before a scheduled day off). On June 2, 2008, you received a counseling for failing to clock in and out. On June 28, 2008 you called in to report your absence for one shift but failed to call in for the other shift leaving the Nursing Supervisor to attempt to fill this shift at the last minute. In addition, this date was before and after two days off. In addition, you appeared late for work on May 7 and 12; June 2, 3, 4, 6, 9, 10 and 11. You also failed to clock in or out on June 9, 11, 22 and 25. In July you called in sick for July 1, 2 and a double shift on July 4.

23. During her employment at the Hospital, Grievant had difficulties in her personal life. Grievant could not find someone to watch her child while she was at work and Grievant's mother was hospitalized.

24. Dr. Cody is a mental health professional who contracts with the Hospital to provide services to the patients. Respondent arranged for Dr. Cody to provide short term counseling with Grievant to help her cope with her personal situation. Supervisor Shields scheduled the first appointment for Grievant. After the first meeting, Grievant did not schedule additional sessions with Dr. Cody.

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[5] Ms. Nixon was sitting in for Susan Shields, Director of Nursing, who was on vacation when the meeting was held.

25. There are other Licensed Practical Nurses employed at the Hospital who have absences issues. However, no other nurse who is still employed at the Hospital has problems with absences that are nearly as significant as Grievant's.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

To meet the burden of proof, the employer must demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "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 Service Comm'n*, 175 W. Va. 279, 332

S.E.2d 579, 581 (1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Service Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965)." *Scragg v. Bd. of Dir. W. Va. State College,* Docket No. 93-BOD-436 (Dec. 30, 1994).

Respondent demonstrated that over the course of roughly twenty-one months of her employment Grievant fell into a pattern of habitual absences and tardiness. While her performance as a nurse was generally competent, it was overshadowed by her unreliability. Because patients at the Hospital need continuous care, when a nurse is absent her shift must be covered by another nurse. For that reason, it is important for a nurse who is going to be absent to give as much advance notice as possible so that a replacement can be contacted. Grievant often called off work at the last minute which did not give her supervisors a chance to get coverage for her shift. If a substitute for an absent nurse is not found, one of the nurses who worked the previous shift may volunteer for a shift of overtime. If there are no volunteers, one of the nurses is forced to work overtime for the next shift. This practice can have an effect on patient care because a nurse working an overtime shift is usually tired and less alert.

Respondent demonstrated that a variety of steps were taken to alert Grievant of her shortcomings and try to correct them. After numerous formal counseling sessions, a verbal and written reprimand, a Performance Improvement Plan and two suspensions, Grievant continued to have a high rate of absences. Additionally, Grievant was not able to document that these absences were the result of illness. In fact, it was fairly common for the absences to precede or follow scheduled days off for Grievant. The Hospital management set up free counseling to help Grievant with her personal issues that might

be affecting her attendance but Grievant failed to follow up with Dr. Cody after her first appointment. Respondent has met the burden necessary to support the termination of Grievant's employment.

Grievant offered two main defenses. She contends that she was not able to maintain good attendance because of her lack of a baby sitter and her mother's illness, and that Respondent discriminated against her because other nurses had similarly poor performance and were not dismissed.

Grievant is a single mother of a small child and cannot leave her child alone while she is at work. She claims that she had to refuse all forced overtime night shifts because she did not have anyone to watch over her child. She often missed work or was late for the same reason. Grievant's mother was suffering from a chronic illness that caused her to be hospitalized. Grievant indicated that this too caused her to miss work. Grievant did not specify how her mother's hospitalization caused her absences but it was inferred that the situation caused Grievant a great deal of stress which led to her missing work.

Unfortunately, these problems are too common in the present workforce.[6] However, the Hospital made it clear to all its staff that regular attendance was critical to good patient care and all nurses were required occasionally to work overtime. It is likely that many other employees had to find solutions for similar problems to maintain their jobs. Additionally,

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[6] The lack of child care for workers has become so acute in the world labor market that some industrialized nations provide state-sponsored child care facilities to accommodate working parents. Some argue that this gives those nations an edge in attracting an increasingly mobile young workforce. T. R. Reid, *The United States of Europe:The New Superpower and the End of American Supremacy,* The Pilgrim Press (2004).

the Hospital is not required to provide child care for employees. While it appeared that Grievant's supervisors were sympathetic, they could not solve these problems for Grievant or others.

Grievant contends that many nurses at the Hospital missed as much work as she did and were not subject to discipline. Therefore, she believes that her dismissal was the result of discrimination. When pressed for an example, Grievant named an employee who had missed several days in a row and had bragged about not getting in trouble. Respondent agreed that some other nurses have excessive absences and that they are taking steps to correct their performance as well. However, the testimony was that no presently employed nurse had missed as much work over as long a period of time as Grievant.

Discrimination is defined in the grievance procedure as "any differences in the treatment of similarly situated employees, unless such differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 221 W. Va. 306, 655 S.E.2d 52(2007);[7] *See*

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[7] *Frymer* was decided based upon the definition of "discrimination" found in the previous grievance statute. W. VA. CODE § 18-29-2 (m). However, the definition found in the present statute is virtually identical. W. VA. CODE § 6C-2-2(d).

Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

Grievant did not provide evidence that there were other nurses with work records similar to hers who were treated differently. While Respondent conceded that other nurses had absentee issues, these problems were not nearly as severe as Grievant's and they were taking disciplinary measures to address the problems. The only example offered by Grievant was the result of a short term event and was not comparable to Grievant's habitual problem that stretched over more than twenty months. Grievant failed to prove that similarly-situated employees were being treated differently than she was and her discrimination claim must fail.

Respondent proved that Grievant's performance shortcomings were substantial and they directly impacted the Hospital's ability to provide quality care for the patients. The grievance is denied.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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 Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579, 581 (1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Service Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965)." *Scragg v. Bd. of Dir. W. Va. State College,* Docket No. 93-BOD-436 (Dec. 30, 1994).

3. Respondent proved that Grievant was habitually absent from work and did not respond to numerous efforts to correct this performance deficiency. Respondent proved that the termination of Grievant's employment was based upon good cause.

4. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Com'n, 221 W. Va. 306, 655 S.E.2d 52(2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

5. Grievant did not prove that the termination of her employment was the result of discrimination as defined in the Public Employees Grievance Procedure. W. VA. CODE § 6C-2-2(d).

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: April 30, 2009.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE