WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

VALERIE EVE BROWN,
Grievant,

v. **Docket No. 2010-0964-DHHR**

DEPARTMENT OF HEALTH
AND HUMAN RESOURCES,
Respondent.

DECISION

Grievant Valerie Eve Brown filed a grievance on January 25, 2010, against her employer, Department of Health and Human Resources. Her statement of grievance reads, "Job terminated 1/13/2010 - harassment due to my submission of a complaint. DHHR made false allegations against me, causing anxiety and work absences. False allegations by employer after being injured on the job. See attached."[1]

For relief, Grievant seeks to be, "Reinstated with benefits, same title and salary. Monetary payment for stress & anxiety from lies.[2] Investigation of immediate supervisor's qualifications in job position to supervise me. No attempt to resolve my complaint. See Attached."

Because this grievance is contesting a dismissal, Grievant elected to file directly to level three of the Public Employees Grievance Procedure. *See* W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held at the Grievance Board's Charleston office on August 26, 2010. Grievant appeared *pro se*, and Respondent was represented by Jennifer Akers, Assistant Attorney General. At the conclusion of the hearing, the parties informed

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[1]There was nothing attached to the grievance form.

[2]*See Spangler v. Cabell County Bd. of Educ.*, Docket No. 03-06-375 (March 15, 2004).

the undersigned that they wished to file proposed findings of fact and conclusions of law. This grievance became mature on September 24, 2010, the due date for the parties' submissions.

Synopsis

Respondent terminated Grievant for leave abuse. Grievant asserts she has been a victim of harassment which has caused her mental anguish. Respondent has met its burden of proof in this matter. This grievance is DENIED.

Findings of Fact

1. Grievant was employed by Respondent as an Office Assistant in its Office of Property Management. Grievant was hired in December 2008, and was supervised by Anne Brack.

2. The office policy for calling in sick requires the employee call and leave a voice mail or to send an email. The sick leave slips must be completed upon the employee's return to the office.

3. Annual leave must be approved and the slips completed prior to taking off.

4. Starting in February 2009, Ms. Brack began to notice a problem with Grievant's attendance. That month Grievant missed two full days of work and a few hours on other days.

5. Grievant did not follow the policies of calling in when she missed work.

6. Grievant continued a pattern of missing work during March 2009, and the problem became worse as time passed.

7. When Grievant did come to work, she would be late for work.

8. On May 22, 2009, Ms. Brack counseled Grievant regarding both Grievant's punctuality and attendance. Ms. Brack requested that Grievant make a conscious effort over the next 30 days not to miss as much work and arrive on time. Ms. Brack also required that Grievant not plan any field work until she could deal with her attendance issue. Ms. Brack explained to Grievant the hardship Grievant's absences caused in performing the duties required by their office.

9. On June 11, 2009, Ms. Brack conducted a follow up meeting. Grievant voiced that she was upset with Ms. Brack and felt Ms. Brack had "treated her like a child" by requesting that she improve her attendance and cancel her field work. Even though it had not been a complete 30 days as discussed in the prior meeting, Ms. Brack lifted the field work restriction, as she believed Grievant was making an effort to improve her attendance. (Respondent's Exhibit 4).

10. In July 2009, Grievant used 12 hours of sick leave and 32 hours of annual leave, missing approximately one week a day.

11. Ms. Brack attempted to allow Grievant to adjust her schedule to make up some of the time missed. She also offered to change Grievant's work hours in an effort to improve her attendance. Grievant declined.

12. On August 31, 2009, Ms. Brack was working at the Barbour County office when she received an email concerning the need to obtain a parking pass for a new employee. As Ms. Brack was out of the office, she called Grievant on both her office and state cell phone. Grievant did not return her calls.

13. Grievant was confronted on September 1, 2009, and she apologized to Ms. Brack stating she had lost her state issued cell phone for the day and had been away from

her desk when Ms. Brack called. Grievant also explained that she had become ill and left early.

14. Ms. Brack checked, and discovered Grievant did not let anyone in the building know she was ill and was leaving early. Ms. Brack also had Grievant's state issued cell phone checked for incoming and outgoing phone calls on that date. The data showed the phone had been in use for the day both receiving and making calls. There was no block of time when the phone was not in use.

15. Grievant took leave on September 10 and 14, 2009, and she requested to be allowed to work over on other days. Ms. Brack agreed. Grievant did not stay late on the following day to make up the time as discussed. Instead, Grievant left at her usual quitting time.

16. Ms. Brack sent Grievant an email requesting her leave slips for September 10th and 14th. Grievant responded with a rather lengthy email.

17. On September 18, 2009, Ms. Brack met with Grievant concerning her emailed response. Ms. Brack also discussed with Grievant the fact that it had come to her attention that Grievant was taking breaks in excess of the 15 minutes allotted. During the meeting, Grievant offered to email Ms. Brack upon her arrival and prior to her departure.

18. Grievant only emailed Ms. Brack upon her arrival on September 21, 2009.

19. Grievant continued to take excessive breaks and lunches.

20. Grievant continued to be absent frequently. In October she was injured while working and missed approximately 60 days due to her injury.[3]

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[3]The days missed as a result of the on-the-job injury is not part of the claim of leave abuse.

21. On November 20, 2009, both Grievant and Respondent received a letter from Brickstreet Mutual Insurance Company informing them that Grievant had reached her maximum medical improvement, and based on a surveillance video of November 16, 2009, Grievant's actions were inconsistent with her restrictions. Grievant's benefits were suspended and would be closed within 30 days without additional medical documentation.

22. Ms. Brack contacted Grievant and inquired as to when she would return to work. It was determined Grievant would return on December 1, 2009. On November 30, 2009, Grievant sent an email to Ms. Brack letting her know she would not be returning to work on December 1, 2009, as she had not been released from her doctor but intended on getting the release at her doctor's appointment the next day.

23. Upon being released from her doctor and returning to work, Grievant's absences continued to be excessive.

24. On December 9, 2009, Grievant left work in the middle of the day without reporting to anyone that she was leaving.

25. On December 16, 2009, Ms. Brack presented Grievant with her Employee Performance Appraisal (EPA) which addressed Grievant's attendance issues, as well as her work performance. Grievant received an overall rating of "Needs Improvement."

26. On December 18, 2009, Grievant sent Ms. Brack an early morning email that indicated Grievant was unsure as to whether she would be coming to work. Grievant did not report for work that day.

27. Sometime during the month of December, Grievant depleted all of her sick and annual leave. Ms. Brack conveyed this to her through emails.

28. On December 22, 2009, Grievant sent Ms. Brack an early morning email saying that she was running late and would be in as soon as she could. A few hours later, Grievant sent Ms. Brack another email stating she would not be in due to an anxiety attack.

29. On December 23, 2009, Grievant sent Ms. Brack an email informing her that she would be unable to come to work due to treatment to her back.

30. On December 28, 2009, Grievant emailed Ms. Brack stating she had a personal meeting in the early morning and would be in after the meeting. Grievant did not report to work and did not let anyone know she would not be coming to work.

31. On December 29, 2009, Grievant did not report for work, and did not let anyone know she would not be in. Grievant was, however, briefly seen in the building at the payroll and personnel sections.

32. On December 30, 2010, there was a predetermination meeting to discuss Grievant's attendance and her failure to inform others when she was not coming to work.

33. On January 7, 2009, Grievant was officially informed by letter that she was being suspended without pay for five working days, effective January 25, 2010, through January 29, 2010.

34. On January 7, 2010, Grievant was 30 minutes late for work and did not submit a leave request or contact her supervisor to explain her absence.

35. On January 8, 2010, Grievant sent an email indicating she was having medical problems but would report to work later that morning. Grievant did not report to work that day and failed to make any further contact with her supervisor to explain her continued absence and failure to submit a formal request for leave.

36. On January 12, 2010, Grievant did not report to work or request leave.

37. On January 13, 2010, Ms. Brack requested that Grievant meet with her for a mandatory predetermination meeting. Grievant refused to meet with her stating in an email that she would not attend “for fear my [Grievant’s] words will be taken out of context, and therefore, I want any response or determination in writing.” (Respondent’s Exhibit 20).

38. Grievant was terminated by letter dated January 13, 2010. The letter cited Grievant’s history of performance failures and misconduct, including the absences that occurred from January 7 through January 12, 2010, as the grounds for termination.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

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 & 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). The issue is whether Grievant abused leave.

Routinely, Grievant did not come to work, and routinely she did not report the absence to her supervisor. Testimony revealed that Grievant would leave work without informing anyone that she was leaving. During the level three hearing, Grievant did not provide any explanation or reason for the excessive amount of sick leave. Grievant also did not provide any reason for not following the proper procedures when taking sick and/or annual leave. Respondent has met its burden of proof regarding Grievant's excessive leave and failure to follow the proper procedures when either taking leave or leaving work early.

Grievant has asserted she is a victim of harassment due to a complaint. West Virginia Code § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform his or her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res.*, Docket No. 98-HHR- 302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998); *Tibbs v. Hancock County Bd. of Educ.*, Docket No. 2009-0375-HanED (Aug. 4, 2009).

Grievant has not met her burden in this matter, as she presented no evidence in this matter. Ms. Brack's expectation that Grievant follow established procedure is not considered harassment, and neither is the fact that Ms. Brack addressed these issues with Grievant. Ms. Brack addressed her concerns in such a way as to inform Grievant there were issues with her behavior, and Ms. Brack made several attempts to assist Grievant in correcting her behavior. Unfortunately for Grievant, the corrective steps were to no avail.

Respondent has met its burden in this matter, and Grievant has failed to prove any harassment. Therefore, this grievance must be DENIED.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. 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 & 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. Respondent has met its burden of proving Grievant took excessive leave and did not follow established leave policies.

4. WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession."

5. What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997).

6. "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform his or her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res.*, Docket No. 98-HHR- 302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998); *Tibbs v. Hancock County Bd. of Educ.*, Docket No. 2009-0375-HanED (Aug. 4, 2009).

7. Grievant did not meet her burden of proving she was a victim of harassment. Accordingly, this grievance must be 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: October 29, 2010

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Wendy A. Elswick
Administrative Law Judge