THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DANNY SANTIAGO,
Grievant,

v. **Docket No. 2011-0189-SU**

SHEPHERD UNIVERSITY,
Respondent.

DECISION

Grievant, a Campus Service Worker, was discharged from employment on August 2, 2010, for tardiness and absences without notice. Grievant seeks that his termination be rescinded, back pay, and to be made whole. Grievant filed an expedited grievance to level three, as is permitted by W. VA. CODE § 6C-2-4(a)(4). The undersigned Administrative Law Judge conducted a level three hearing at Shepherd University, Shepherdstown, West Virginia, on October 29, 2010. Grievant appeared in person, and with his representative, Christine Barr, AFT-West Virginia. Respondent appeared by its general counsel, K. Alan Perdue. The grievance became mature for consideration upon receipt of the parties' proposed findings of fact and conclusions of law on December 13, 2010.

Synopsis

Grievant was dismissed from employment due to his continued failure to adhere to scheduled work attendance. Respondent established just cause for Grievant's dismissal within the meaning of the Shepherd University Staff Handbook by a preponderance of the evidence on the grounds of tardiness and absenteeism. This grievance is denied.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. At the time of his termination, Grievant was employed by Shepherd University as a Campus Service Worker in Dining Services. Grievant's primary job responsibilities and duties were janitorial in nature.

2. Grievant was employed by Shepherd University in early 2006 as a part-time employee. In October 2006 Grievant became employed as a full-time employee working a nine-month period from August to May.

3. During the course of his employment with Respondent, Grievant was evaluated on an annual basis by his supervisor. In the course of this process, Grievant's supervisor frequently identified and counseled Grievant with respect to attendance and punctuality. It was noted on Grievant's 2008-2009 evaluation that he needed improvement on attendance and that "he tends to call off on pay day." Respondent's Exhibit 11.

4. The testimony of the Dining Hall staff at level three revealed that Grievant had a long-standing tardiness and attendance problem beginning shortly after he became a full-time employee.

5. On October 31, 2006, and on February 19, 2007, Grievant received a memorandum from his supervisor, Dee Rivera, Dining Hall Manager, admonishing him for not calling off work and failure to appear for work, known in the service industry as "no call/no show." Respondent's Exhibits 5 and 6.

6. On July 30, 2007, Grievant received a memorandum from Laura Puffenbarger, Dining Hall Manager, regarding another instance of missing work without reporting off work.

7. Grievant received a memorandum on November 26, 2007, from Jack Shaw, Dining Services Director, regarding an incident in which Grievant called two hours after his shift began to ask if he was needed to report to work. While Grievant eventually reported to work, he did not report to the concession area as directed. Respondent's Exhibit 8.

8. Again on March 24, 2008, and October 20, 2008, Grievant was counseled in writing for instances of "no call/no show." Grievant was counseled that this constituted a violation of Respondent's attendance policy, and he was notified that further instances of "no call/no show" would result in progressive discipline up to and including termination. Respondent's Exhibits 9 and 10.

9. On August 5, 2009, Grievant was counseled, in writing, for failing to clean his assigned floors before clocking out and leaving work. As a result, the opening manager was forced to sweep, mop, and vacuum the floors before opening the building. Respondent's Exhibit 12.

10. On March 31, 2010, Grievant was counseled, in writing, for an instance in which he was asked to assist another employee with a catered event. Grievant persisted that another employee be asked to help deliver coffee to the catered event. The co-worker delivered coffee to the event by herself and Grievant did assist in the clean up; however, Grievant's refusal to help with the delivery of coffee created unnecessary delay. Grievant was counseled by the Dining Services Director that any future violation of Shepherd University work policies would likely result in a recommendation of termination. Respondent's Exhibit 13.

11. Grievant received his 2009-2010 evaluation in which it was noted that "Danny's attendance and punctuality in arriving for work could be better. He sometimes

arrives to work late without calling ahead of time to let his supervisor's know that he will be late. His attendance record has created many changes to the schedule which creates a hardship in the operation's [sic] of the Dining Hall." Respondent's Exhibit 1.

12. During the summer months, the Dining Hall area operates with minimum staffing. Schedules are posted on the common area bulletin board one or two weeks in advance. Grievant worked June 1st through June 4th, and was then scheduled to work on June 15, 2010. Grievant did not appear for work on that day, and, thereafter, was late for work on July 19, 2010, and July 20, 2010.

13. On July 22, 2010, Jack Shaw, Director of Dining Services, sent a memorandum to Dr. Sharon Kipetz, Vice President for Student Affairs, recommending the termination of Grievant's employment. The memo notes that the university should schedule a pre-termination hearing for Mr. Santiago at its earliest convenience. Mr. Shaw goes on to note that "[G]iven the past work performance with consistent patterns of poor attendance I do not feel we can correct the issue and the university would be best served by separating employment with Mr. Santiago." Respondent's Exhibit 17.

14. Grievant was terminated from his position.

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 Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 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). In other words, "[t]he 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).

Respondent asserts that the cumulative work history and prior warnings to Grievant about adherence to attendance requirements made dismissal in this case reasonable and justified. Grievant argues that Respondent has not proven by a preponderance of the evidence that Grievant's attendance and tardiness during summer months justified dismissal from his regular nine-month, full-time employment position.

The Shepherd University policy at issue in this grievance reads as follows:

> Notification of an unscheduled absence, prior to an employee's scheduled start time, is of the utmost importance. If for any reason an employee is unable to report to work as scheduled, the employee must notify their supervisor prior to their scheduled start time with the reason and expected duration of the absence. Failure to notify an immediate supervisor concerning an absence can result in discipline to the employee, including termination. It is the obligation of the employee to make certain that the immediate supervisor or designee is notified of an absence prior to the employee's scheduled start time.
>
> Each employee must maintain standards of performance and conduct as outlined by the immediate supervisor and institutional policy and to comply with applicable policies, procedures, and laws. When a classified employee does not maintain the appropriate standards of performance or conduct, disciplinary action, including but not limited to, demotion, suspension, transfer, or dismissal may be taken. The supervisor will give the employee notice of the unacceptable performance, an explanation of the supervisor's concerns, and an opportunity for the employee to provide an explanation for

> the behavior in question. Notice and an opportunity to explain should usually precede major disciplinary actions such as suspension or dismissal.[1]

It is manifestly clear from a review of all evidence of record that Respondent met its burden of proving just cause for Grievant's dismissal by a preponderance of the evidence. There is ample evidence of a chronic tardiness and absentee problem, a serious offense, particularly in the service industry, about which Grievant was repeatedly made aware. The record of this grievance demonstrates that Grievant received numerous counseling sessions in an attempt to improve his attendance and punctuality. In addition, Grievant received numerous written warnings prior to his employment termination for absenteeism and tardiness. Grievant's argument concerning a distinction between his regular employment and his summer employment makes a distinction without any meaningful difference. The record reflects that Grievant's offenses began some years ago, and the summer absenteeism was merely a continuation of the same attendance issues.

Respondent provided Grievant with ample opportunity to improve his performance but Grievant failed to do so. Progressive discipline is generally favored to correct deficiencies, which is what occurred in this case. Once progressive discipline was used to no avail, Respondent was justified in exercising its discretion to terminate Grievant's employment because he continued to be absent from work when he was scheduled to be on the job.

The following conclusions of law support the decision reached.

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[1]Shepherd University Staff Handbook pages 9 and 33, Respondent's Exhibit 18.

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 Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. Respondent established just cause for Grievant's dismissal within the meaning of the Shepherd University Staff Handbook by a preponderance of the evidence on the grounds of tardiness and absenteeism.

Accordingly, this 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: February 10, 2011

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Ronald L. Reece
Administrative Law Judge