THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CRYSTAL LEACH,
Grievant,

v. **Docket No. 2011-0117-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR PUBLIC HEALTH,
Respondent.

DECISION

This grievance was filed by Grievant, Crystal Leach, on July 28, 2010, against Respondent, Department of Health and Human Resources ("DHHR"). Grievant states that she was unjustly terminated and seeks reinstatement to her position along with "compensation for the time I missed, as well as bank fees for returned checks and utilities fees".

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 on February 3, 2011 at the Grievance Board's Charleston office. Grievant appeared *pro se*, and Respondent was represented by Harry C. Bruner, Jr., Esq., Assistant Attorney General. This matter became mature for decision on March 4, 2011, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent terminated Grievant for failure to return to work after a medical leave of absence, failure to complete the proper form to request extension of her medical leave,

and failure to contact her supervisor regarding her continued absence after the expiration of her medical leave of absence. Grievant does not deny that she failed to complete the proper form to request extension of her medical leave. Grievant asserts that although she did not contact her supervisor regarding her continued absence after the expiration of her medical leave of absence, she did telephone the office and notify a coworker. Grievant asserts that she was wrongfully terminated. Grievant also asserts that her civil rights were violated in 1993 during her interview for the Office Assistant II position.[1] Respondent has met its burden of proof. This grievance is DENIED.

Findings of Fact

1. Grievant was employed by Respondent, Department of Health and Human Resources' Bureau for Public Health, as an Office Assistant II.

2. The Office Assistant II position is necessary to assist Grievant's supervisor, Jean H. Khoury, Vaccine Manager/BCF Coordinator in the Division of Immunization Services of the Bureau for Public Health. Mr. Khoury manages the acquisition, storage and dissemination of vaccines to all 55 counties in West Virginia for medical emergencies.

3. On two separate occasions, February 5, 2006 and June 11, 2008, Grievant acknowledged receipt of the Employment Handbook for the State of West Virginia, DHHR, that included the requirements for obtaining a medical leave of absence and using

[1]Grievant alleges discriminatory questions were asked during her job interview in 1993. A grievant must file a grievance within fifteen days of the occurrence of the event or within fifteen days of the date on which the event became known to the grievant. W.Va. Code § 6C-2-4. Because the portion of Grievant's claim alleging discrimination is based upon an event that occurred over 17 years ago, that allegation will not be addressed in this Order as it was untimely raised.

appropriate Division of Personnel forms.[2]

4. On February 22, 2010, Grievant received a letter[3] from Jeffrey N. Necuzzi, Division Director of Immunization Services, reprimanding her for failing to meet acceptable attendance standards. The letter warned of impending additional disciplinary action if her attendance did not improve.

5. The February 22, 2010 letter stated:

> Because your absence from work is occurring so frequently, your attendance cannot be relied upon and your services with the Department are becoming of questionable value.

6. Mr. Khoury testified at the level three hearing that Grievant was advised to specifically call him or Jeffrey N. Necuzzi, regarding absences from work. All employees in the Division, including Grievant, have Mr. Khoury's cell phone number.

7. Grievant's Employee Performance Appraisal[4] ("EPA 2") rating the period from September 1, 2009 through August 31, 2010, stated:

> Your attendance record is not up to the standards and your presence at work is critical to daily program operations, you are encouraged to keep a minimum balance of 40 hours of each Annual and Sick Leave.

Grievant signed and dated the EPA 2 on February 22, 2010.

8. In May 2010, Grievant requested a medical leave of absence without pay.

9. Respondent advised Grievant in a letter[5] dated May 25, 2010, that she must

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[2] *See* Respondent's Exhibit No. 4

[3] Respondent's Exhibit No. 2

[4] Respondent's Exhibit No. 9

[5] Respondent's Exhibit No. 3

submit appropriate Division of Personnel forms for her request for a medical leave of absence without pay. The letter quoted Section 14.8C and 14.8D of the Division of Personnel's Administrative Rule stating that when an employee's absence is due to an illness or injury, a date for the employee's return to work or the date the employee's medical condition will be re-evaluated should be on the prescribed physician's statement form. The letter advised that a prescribed physician's statement form should be submitted each time the employee's condition is re-evaluated to confirm the necessity for continued leave.

10. The May 25, 2010 letter warned:

> **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 authority, is **cause for dismissal**. (Emphasis in the original).

11. Crystal Lowe, DHHR/BPH Office of Epidemiology and Prevention Services Administrative Services Assistant III, testified at the level three hearing that Grievant came to the office to turn in the prescribed physician's statement and at that time Ms. Lowe discussed the requirements for requesting a medical leave of absence without pay with Grievant.

12. Grievant's medical leave of absence without pay was approved from May 19, 2010 through July 5, 2010.

13. A letter[6] with the amended date of June 22, 2010, was mailed to Grievant notifying her that her request for a medical leave of absence without pay had been approved through July 5, 2010. The letter contained the exact same quote of Section

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[6]Respondent's Exhibit No. 5

14.8C and 14.8D of the Division of Personnel's Administrative Rule that had been contained in the letter dated May 25, 2010.

14. The June 22, 2010 letter was sent via certified mail and was returned to sender as unclaimed.

15. A letter[7] dated July 6, 2010, was mailed to Grievant including Division of Personnel forms necessary for an extension of her medical leave of absence without pay scheduled to end on July 5, 2010. The letter advised that if Grievant failed to appropriately request an extension of her medical leave of absence or return to work by July 13, 2010, Respondent will conclude that Grievant abandoned her position.

16. The July 6, 2010 letter was sent via certified mail and was returned to sender as unclaimed.

17. Grievant testified at the level three hearing that she called the office and notified a coworker other than Mr. Khoury or Mr. Necuzzi that she would not be returning to work on July 6, 2010 due to the need of an extension of her medical leave of absence without pay.

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 for the 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). "The preponderance standard generally requires proof that a reasonable

[7]Respondent's Exhibit No. 6

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.*

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).

Grievant has a history of unsatisfactory attendance, as evidenced by her EPA 2 and written reprimand of February 22, 2010. Due to Grievant's attendance record, Grievant was instructed to contact her supervisors, Mr. Khoury or Mr. Necuzzi, regarding absences from work. Grievant requested and was approved for a medical leave of absence without pay from May 19, 2010 through July 5, 2010. Greivant was to return to work on July 6, 2010. In order to receive approval for her medical leave of absence without pay, Grievant had to complete and return the proper Division of Personnel forms. Grievant was advised in the May 25, 2010 letter from Respondent, which she did receive, of the requirements for properly completing and submitting these forms. Ms. Lowe also testified at the level three hearing that when Grievant came to the office to turn in her forms, that Ms. Lowe spoke to Grievant about the requirements for obtaining a medical leave of absence.

Grievant did not return to work on July 6, 2010. Grievant did not submit a prescribed physician's form stating the necessity for continued leave as required under the Division of Personnel's Administrative Rule. Grievant did not contact Mr. Khoury or Mr.

Necuzzi regarding her continued absence. Even though Grievant had Mr. Khoury's cell phone number, Grievant called the office's main telephone number and informed a coworker that she needed to continue her leave of absence.

Grievant asserts that she did not receive Respondent's letters dated June 22, 2010 and July 6, 2010 as they were returned to sender as unclaimed certified mail. The unclaimed letters were mailed to the same address as the February 22, 2010, May 25, 2010 and July 15, 2010 letters, all of which Grievant did receive.

On Tuesday, July 13, 2010, Ms. Lowe called Grievant to inquire about the Division of Personnel forms Grievant would need to submit if she desired to continue her medical leave of absence. Grievant claims she went to the office on Friday, July 16, 2010 to pick up the required forms. It was at that time Grievant learned of her termination.

Grievant's termination for failing to return to work after the end of her approved medical leave of absence without pay was for good cause. Grievant had been advised that her absenteeism was jeopardizing the overall mission of the Division of Immunization Services. Grievant failed to follow directive to contact Mr. Khoury or Mr. Necuzzi regarding absence from work. Grievant failed to return to work on July 6, 2010. Grievant was aware of the leave extension requirements and consequences for failing to meet the requirements through the DHHR Employment Handbook for the State of West Virginia, the letter of May 25, 2010, and her discussion with Ms. Lowe. Grievant failed to submit the necessary Division of Personnel forms for an extension of her medical leave of absence without pay.

For the reasons set forth above, Respondent has met its burden in this matter. Therefore, this 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 for the 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). "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. 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 proof regarding Grievant's failure to return to work at the end of her approved leave of absence without pay, failure to follow the directive to contact Mr. Khoury or Mr. Necuzzi concerning absences, and failure to submit the necessary forms to request an extension of her medical leave of absence.

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 5, 2011

Jennifer Lea Stollings-Parr
Administrative Law Judge