WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

VICTORIA LEIGH WESTFALL
Grievant,

v. **Docket No. 2011-1230-DOR**

WEST VIRGINIA TAX DEPARTMENT,
Respondent.

D E C I S I O N

Grievant, Victoria Leigh Westfall, filed a grievance against her former employer the West Virginia Tax Department, Respondent, on February 18, 2011, protesting her discharge from employment. The statement of grievance alleges "Wrongful termination" and requests as relief, "Reinstatement to job and HR assistance."

Grievant filed an expedited grievance authorized by W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held before the undersigned Administrative Law Judge on May 27, 2011, in the Grievance Board's Charleston office. Grievant appeared *pro se*. Respondent appeared by representative Jeffrey T. Oakes, Acting Deputy Tax Commissioner and was represented by legal counsel Charli Fulton, Senior Assistant Attorney General. This matter became mature for decision on June 23, 2011, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted proposed fact/law documents.

Synopsis

Respondent dismissed Grievant from employment for a demonstrated pattern of continued misuse of leave and for submitting a false physician's statement, which relayed inaccurate information relating to Grievant's latest absences from work. Grievant implies

she should not be held responsible for her actions. Respondent met its burden of proof in this matter and established by a preponderance of the evidence that the disciplinary action taken was justified. Respondent established good cause for termination of Grievant's employment. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was hired by Respondent as a Secretary I on February 1, 2006.

2. Grievant was verbally counseled regarding her leave usage throughout the tenure of her employment with Respondent. Grievant was counseled by Pam Blethen, her direct supervisor, by Michael Coutz, a subsequent direct supervisor, and by Linda Coleman, Human Resources Administrator.

3. The issue with Grievant's usage of annual and sick leave eventually became a disciplinary matter.

4. On April 19, 2007, Grievant received a written reprimand regarding her exhaustion of leave. (R. Ex. 1.)

5. The April 19, 2007 letter stated that Grievant had received prior written notice on April 28, 2006, that her May 31, 2006 paycheck would be docked 6.0 hours and that she would be placed on restricted leave if her performance did not improve. The letter further documented that on January 12, 2007, Linda Coleman and Pam Blethen had met with Grievant to counsel her on this issue.

6. The April 19, 2007 Reprimand Letter informed Grievant that she was placed on restricted leave. (R. Ex. 1.) In accordance with this restricted leave, Grievant was required to present a physician's certificate for each occasion of sick leave that she used. This being for personal or family reasons. Annual leave had to be requested in advance. The restrictions outlined were to continue in effect until July 31, 2007. At that time, Grievant's attendance record would be reviewed to determine whether a lifting of the restrictions was merited.

7. The restrictions on Grievant's leave did not end on July 31, 2007. Grievant's pattern of excessive leave usage continued.

8. On February 22, 2008, Jeff Oakes, Acting Deputy Tax Commissioner sent a letter to the Grievant advising her of his decision to again extend her leave restrictions. (R. Ex. 2.) The letter stated that although Grievant had complied with the instructions by providing doctor's excuses when she was ill, her attendance had not improved.[1] The leave restrictions would continue in effect until the Grievant demonstrated "a sustained, acceptable level of attendance and the ability to meet established standards."

9. Grievant's attendance did not improve. In fact, she was granted a personal leave of absence from June 11, 2008 through June 19, 2008, based on her having exhausted all leave. (R. Ex. 6.) In addition, she was granted a medical leave of absence based on having exhausted all leave from September 3 through September 15, 2008. (R. Exs. 3 and 6.)

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[1] Grievant had also failed to use the required physician's statement form several times.

10. Grievant went off the payroll, having exhausted all of her annual and/or sick leave, 12 separate times. The specific dates are as follows:

Medical leave of absence	04/20/06-04/21/06
Personal leave of absence	04/07/07-04/09/07
Personal leave of absence	06/15/07-06/15/07
Medical leave of absence	06/21/07-06/29/07
Personal leave of absence	06/11/08-06/19/08
Medical leave of absence	09/03/08-09/15/08
Unauthorized leave	06/15/09-06/15/09
Medical leave of absence	11/04/09-11/09/09
Personal leave of absence	12/14/09-12/15/09
Medical leave of absence	06/22/10-06/28/10
Unauthorized leave of absence	08/20/10-08/23/10
Medical leave of absence	11/22/10-11/22/10

(R. Exs. 4, 6, 9-20.)

11. On September 15, 2010, Grievant was given a three-day suspension from work without pay for multiple work infractions, including having taken two (2) hours of unauthorized leave on Friday, August 20, 2010. (R. Exs. 4, 21.)

12. On August 20, 2010, the Grievant asked to take several hours of leave. Authorization for Grievant to use leave was not given.[2] Nonetheless, Grievant left the workplace without approval. (R. Ex. 4.)

13. Grievant was disciplined for this conduct. Originally she was levied a three-day suspension.

14. Grievant requested to have her three-day suspension reduced. Because the suspension occurred during employee appreciation week, Respondent reduced the suspension to 2 days. (R. Ex. 5.)

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[2] Respondent did not grant the request. It was represented that this was due to the workload that day. (R. Ex. 4.)

15. On November 21, 2008, the Grievant received an Employee Performance Appraisal. (R. Ex. 7.) The appraisal stated that Grievant needed improvement in the areas of: (1) employee's attendance supports the expected level of work; (2) employee's presence can be relied upon for planning purposes; and (3) employee is a dependable team member. In addition, her supervisor commented, "[Grievant] has poor attendance. She is a single parent and has medical conditions that contribute to her high absenteeism. She has been counseled and is working on an improvement plan." Grievant signed this form without adding any of her own comments.

16. On Friday, February 4, 2011, Grievant sent an e-mail to Michael Coutz, her direct supervisor. (R. Ex. 8, p. 1.) In the e-mail, Grievant stated that her daughter was sick and Grievant would have to leave early to take her to a doctor's appointment.

17. The following Monday, February 7, 2011, Grievant called her supervisor and provided she could not be at work because her daughter was running a fever. (R. Ex. 8, p. 2.)

18. In connection with these absences, Grievant submitted a State of West Virginia Physician's/Practitioner's Statement. (R. Ex. 8, p. 4.) The statement indicates that the patient, Briana Westfall, was under the professional care of Spring Hill Primary Care from "2/3/11 to 2/14/11."

19. Grievant's supervisor, Michael Coutz, suspected that the physician's statement may have been falsified. Specifically, he believed that a "1" had been inserted to change the date from 2/4/11 to 2/14/11.

20. Grievant submitted two forms applying for sick leave in connection with her absences on Friday, February 4, 2011 and Monday, February 7, 2011. (R. Ex. 8, p. 3.)

21. Based on his suspicion that the Physician's/Practitioner's Statement had been falsified, Mr. Coutz contacted Linda Coleman, Respondent's Human Resources Administrator, and asked her to investigate to determine whether the physician's statement was authentic.

22. Ms. Coleman called Valerie Porter, office manager at Spring Hill Primary Care and inquired as to whether the physician's statement was authentic.

23. Office Manager Porter asked HR Administrator Coleman to fax the document in question. Ms. Coleman faxed the document to Spring Hill Primary Care as requested.

a. Ms. Porter pulled the medical chart of Briana Westfall, the patient. There was no copy of the physician's statement in the file.

b. Ms. Porter then checked with the medical assistant and asked whether she had seen it or signed it. The medical assistant had not.

c. Based on her past experience working with Dr. Criniti, Ms. Porter believed that the signature on the form was not Dr. Criniti's. It was her opinion that Dr. Criniti would not have issued a statement covering such a long period of time (from February 3 to February 14).

d. Based on her investigation, the office manager concluded that the physician's statement had not been prepared by Spring Hill Primary Care and told Ms. Coleman so.

24. Grievant called the Spring Hill Primary Care office on February 10, 2011, and spoke to Dr. Criniti. Grievant asked for a work excuse for February 3, 4 and 7, 2011.

25. Grievant was advised to call the office manager, Valerie Porter, the next day.

26. Grievant did not call Ms. Porter and request the work excuse. Spring Hill Primary Care did not issue a physician's statement to Grievant.

27. Briana Westfall, Grievant's daughter, did have a medical appointment at Spring Hill Primary Care on Thursday, February 3, 2011. She was not accompanied by Grievant during this office visit. Rather, she was accompanied by her grandmother.

28. Respondent's Human Resources Administrator, Linda Coleman having learned that the physician's statement, presented by Grievant, was not authentic, prepared a short memorandum of her findings dated February 10, 2011, and provided this to Respondent's Assistant Director of Compliance & Taxpayers Services Division, Michael Coutz and Acting Deputy Tax Commissioner, Jeff Oakes. (R. Ex. 22.)

29. On February 15, 2011, Respondent held a predetermination meeting with Grievant. Present at the meeting was Michael Coutz, Asst. Compliance Division Director, Linda Coleman, Human Resources Administrator, Jeffrey T. Oakes, Acting Deputy Tax Commissioner and Grievant.

30. Deputy Commissioner Oakes informed Grievant that he was considering dismissing her based on her having submitted a false physician's statement, her having submitted false applications for leave based on the false statement, and on her "demonstrated pattern of continued misuse of leave despite multiple opportunities to correct this behavior." (R. Ex. 6.)

31. During the meeting, Grievant responded that there was a misunderstanding about the physician's statement. She did not mention anything about addiction to alcohol.

32. Later that same day, February 15, 2011, Deputy Commissioner Oakes hand-delivered a letter to Grievant informing her that she was dismissed effective March 2, 2011. (R. Ex. 6.) The letter outlined Grievant's long history of leave problems, her suspension for multiple work infractions including leave problems, and noted the falsified physician's statement.

33. About two days after Grievant received the dismissal letter, Jeff Oakes, Mike Coutz and Linda Coleman met with Grievant at her request. Grievant informed

Respondent's Administrators for the first time that she had an "apparent addiction to alcohol."

34. Further, Grievant presented Respondent with a written statement. The statement, in part, provides,

> Completely unknown to me, my daughter asked her friend and her friend's sister to help her fill out the work paper to give to me to take into [sic] my supervisor on Tuesday. In essence, she was afraid that if I didn't have the proper papers that I would 'get suspended.' Briana has been aware that I have to have sick leave paperwork from the doctor's off [sic] for a number of years.
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> . . . .
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> After a long emotional talk with my daughter, I realized that my apparent addiction to alcohol is and has been having an effect on my family in ways that I did not realize. Coming to this realization, I believe if I'm having this issue at home with my fourteen year old daughter then perhaps this same is also having consequences with my employment.

Gr. Ex. 1.

35. Respondent's Administrators Michael Coutz, Jeff Oakes and Linda Coleman, all testified that prior to Grievant's dismissal, they were unaware that Grievant had a drinking problem or was addicted to alcohol. Grievant had never mentioned this issue or sought assistance identifying alcohol related disability from Respondent prior to the February 15, 2011 notice of her dismissal.

36. Grievant submitted a counterfeit doctor's slip to Respondent in an attempt to deceive her supervisors regarding her absences from the workplace.

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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

"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, 281; 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

Respondent proffers that its decision to terminate Grievant's employment was predicated upon good cause given that Grievant submitted a false physician's statement relating to her latest absences from work, the fact that the document submitted related inaccurate information and that Grievant has demonstrated a pattern of continued misuse of leave despite multiple opportunities to correct the behavior. *See* R. Ex. 6.

At the grievance hearing, in what is perceived as a further attempt to diminish her culpability, Grievant testified that her long history of absenteeism at her job was primarily based on alcoholism. Whether this is or is not a statement of fact is not known to the undersigned. Respondent established that Grievant had a long history of misusing leave, that she had been placed on restricted leave in 2007, and that she never accrued the 40 hours of leave necessary to have the restriction lifted. Despite counseling, Grievant's attendance did not improve. In fact, on one occasion she was suspended for leaving the work-site without authorization after having been told the office workload would not permit her to take leave at the requested time. The problem culminated in Grievant knowingly presenting a false physician's statement to Respondent and requesting paid medical leave based on the false statement.

Grievant does not deny these facts, but claims that a friend of her daughter's fabricated the counterfeit physician's statement and forged the signature. The fact that someone else prepared the false document does not relieve her of responsibility for a form that she presented to her employer as genuine. *Baugess v. Division of Natural Resources,* Docket No. 2011-0410-DOC (Feb. 22, 2011). Moreover, her testimony that it was submitted in error is not plausible. Grievant submitted the form to Respondent in connection with her request for sick leave, knowing that the form was false. She knew that

she had not accompanied her daughter to the doctor's appointment at Spring Hill Primary Care Center on Thursday, February 3; she knew that her daughter's medical appointment on February 4 was not at Spring Hill Primary Care Center; and she knew that Dr. Criniti had not, in fact, placed her daughter under her care from February 3 through February 14. Grievant knowingly attempted to deceive Respondent on multiple points of information and facts. Grievant was aware she was providing her employer with a physician's statement representing fraudulent information, with or without the alleged complicit acts of another (her daughter or her daughter's friend). Respondent proved, by a preponderance of the evidence, that disciplinary action was warranted.

In the facts of this matter, it is not alleged nor established that Respondent has an affirmative duty to seek out and identify employees with substance abuse problems and offer them treatment. Grievant claims she only became aware of her condition by talking to her 14-year-old daughter subsequent to Respondent's latest disciplinary action. (Gr. Ex. 1.) If true, this is disturbing and tragic on several levels.[3] Grievant did not establish that Respondent knew, or should have known, she was addicted to alcohol. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 1-3 (2008). Respondent's witnesses testified that they were unaware Grievant had a drinking problem or was addicted to alcohol. The undersigned finds that Respondent was unaware of Grievant's alleged condition prior to

[3] Grievant's testimony, if true, raises the issue of whether the various other rationales provided for absences with or without physician's statements she submitted while on leave restriction were accurate.

Grievant's dubious admission to "apparent addiction to alcohol," on or about February 15, 2011.

Grievant's testimony that the counterfeit statement was submitted in error is not persuasive. Grievant knowingly attempted to deceive her employer. Considering the long duration of the leave abuse problem, the numerous attempts by Respondent to correct the problem by the use of lesser forms of disciplinary action, the lack of improvement shown by Grievant, and the serious nature of submitting a false physician's statement and requesting leave based on it, Respondent established just cause for disciplinary action. Respondent proved by a preponderance of the evidence that Grievant was guilty of substantial misconduct. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute his judgment for that of the employer. *See Overbee, supra*; *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997); *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

Respondent has met its burden and established that Grievant failed to perform the duties of her position by leaving work without authorization, misusing leave, submitting a false physician's statement, and submitting a request for leave based on that false statement. Respondent established good cause for termination of Grievant's employment.

The following conclusions of law are appropriate in this matter:

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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. Permanent state employees who are in the classified service may 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 and Admin.*, 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, 141 S.E.2d 364 (W. Va. 1965). *See also, Sloan v. Dep't of Health & Human Res.*, 600 S. E. 2d 554, 558 (W. Va. 2004) (per curiam).

3. The misconduct which forms the basis for the dismissal of a tenured state employee must be 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, 281; 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine*

v. Civil Service Comm'n, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

4. Respondent proved by a preponderance of the evidence that Grievant was guilty of substantial misconduct – namely, engaging in a pattern of continued misuse of leave, knowingly submitting a false physician's statement to her employer, and submitting a request for medical leave based on the false information.

5. Considering the totality of the evidence related to Grievant's attendance record and related activities, Respondent proved, by a preponderance of the evidence, that disciplinary action was warranted.

6. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." 156 C.S.R. § 1-3, Procedural Rules of the W. Va. Public Employees Grievance Board. Grievant has failed to meet her burden of proof as to her implied affirmative defense that Respondent should have identified that she was addicted to alcohol and provided treatment to her rather than dismissing her. She provided neither legal authority nor a factual basis for such a claim.

7. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation. *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute his judgement for that of the employer. *See Overbee, supra.*; *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989); *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

8. Respondent established that Grievant failed to perform the duties of her position by leaving work without authorization, misusing leave, submitting a false physician's statement, and submitting a request for leave based on that false statement.

9. Respondent met its burden of proof and established good cause for termination of Grievant's employment.

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: October 31, 2011

Landon R. Brown
Administrative Law Judge