THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

AARON PAYNE[1],
Grievant,

v. **Docket No. 2012-1493-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
MILDRED MITCHELL-BATEMAN HOSPITAL,
Respondent.

DECISION

Grievant, Aaron Payne, was employed by Respondent, Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital. On February 15, 2012, Grievant filed a grievance against Respondent stating, "Verbal suspension given for Feb 7-9, 2012. On return to work told that those days would be charged to annual leave & a 3 day unpaid suspension would start on February 21." For relief, Grievant sought restoration of leave and any loss of pay or benefits. On July 7, 2012, Grievant filed a second grievance against Respondent for dismissal without good cause and for not being given his final wages within seventy-two hours. For relief, Grievant sought back pay with interest, restoration of benefits, and treble final wages.

Both grievances were properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). The grievances were consolidated by order entered July 18, 2012. A level three hearing was held on October 1, 2012, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union, but did not

[1] The February 15, 2012 grievance incorrectly spelled Grievant's name as "Arron," and subsequent documents continued to carry that misspelling. The spelling is corrected herein.

appear in person. Respondent was represented by counsel, Harry C. Bruner, Jr., Assistant Attorney General. This matter became mature for decision on October 31, 2012, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was suspended and later dismissed for violating Respondent's attendance policy. Because of his supervisor's mistake regarding the suspension dates, Grievant served the suspension, was charged annual leave for those dates, and was then required to serve the suspension again. Respondent proved by a preponderance of the evidence that Grievant repeatedly violated the attendance policy, and that it was justified in its disciplinary actions under the policy. Respondent had good cause to dismiss Grievant for his continued violation of the attendance policy despite repeated warnings, as Grievant's failure to provide adequate attendance to his job was not trivial or a technical violation. Respondent was not justified in requiring Grievant to take annual leave for his supervisor's mistake in informing him of his suspension dates. Grievant also alleges and requests damages from Respondent's failure to pay his final wages within seventy-two hours, but provided no evidence of this alleged failure. Therefore, his request for damages must be denied.

Accordingly, the grievance is granted in part and denied in part.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was previously employed as a Health Service Worker at Mildred Mitchell-Bateman Hospital, a psychiatric facility operated by Respondent.

2. On March 25, 2011, Respondent placed Grievant on a three-month performance improvement plan.[2] The plan lists that the performance needing improvement is for Grievant to "report to work at scheduled time for each shift." Grievant was expected to: "Report to work as scheduled. Maintain a copy of monthly work schedule for reference. Meet with the Nurse Manager biweekly to discuss progress. Participate in this performance improvement plan for 3 months. Call in two hours before scheduled shift. In the event of absence, submit documentation of excuse. Not be late for any scheduled work hours." The performance improvement plan was signed by both Grievant and his supervisor, Terrie Collins, RN, MS. Grievant did not file a grievance to protest the performance improvement plan.

3. On the same date, Respondent also issued a written reprimand to Grievant for "unprofessional conduct, related to non-adherence to the Absence Control policy. The specific reasons for this charge on numerous occasions since your initial employment on June, 2010, you have been repeatedly tardy, fail to clock in or out, and call-in."[3] The reprimand does not list specific dates, or even provide an aggregate number of violations, but a subsequent disciplinary document lists thirteen incidents of

---

[2] Respondent's Exhibit No. 2.

[3] Respondent's Exhibit No. 3.

tardiness and two unscheduled absences.[4] The written reprimand was signed by both Grievant and his supervisor, Terrie Collins, RN, MS. Grievant did not file a grievance to protest the written reprimand.

4. On August 16, 2011, Respondent issued a second written reprimand to Grievant for violation of the Absence Control policy.[5] Since the previous written reprimand, Grievant had been tardy nineteen times, and had four unscheduled absences. In addition, Grievant had had three instances of failure to clock in/out properly. The written reprimand was signed by both Grievant and his supervisor, Terrie Collins, RN, MS. Grievant did not file a grievance to protest the written reprimand.

5. On December 23, 2011, Grievant met with his supervisor, Terrie Collins, RN, MS, the Director of Nursing, Patricia Ross, RN, BC, and the Director of Human Resources, Kieth Anne Worden to discuss his attendance and stated he would improve.

6. Sometime thereafter, Grievant's supervisor informed him that he would be suspended on February 7th through the 9th. The supervisor was mistaken regarding the dates, and although Grievant had already served those three days as a suspension, he was charged annual leave for those three days and was required to serve an additional suspension on February 22nd through 24th.[6]

7. On February 15, 2012, Respondent imposed the three-day suspension to be served February 22nd through 24th upon Grievant for his continuing failure to adhere

---

[4] Respondent's Exhibit No. 1.

[5] Respondent's Exhibit No. 4.

[6] Level Three Testimony of Kieth Anne Worden.

to the attendance policy.[7] The suspension letter details the previous performance improvement plan and written reprimands and states that, since the previous disciplinary action, Grievant had failed to clock in/out twenty-six times and had unscheduled absences nine times. The suspension also discusses tardiness, but a hole was punched through the document, obscuring the number of instances of tardiness. A later disciplinary document identifies twenty-four instances of tardiness for this time period.[8]

8. On April 19, 2012 Grievant met with his supervisor, Terrie Collins, RN, MS, the Director of Nursing, Patricia Ross, RN, BC, and the Director of Human Resources, Kieth Anne Worden to discuss his attendance and stated he had difficulty waking up to get to work on time.

9. On May 1, 2012, Respondent imposed a five-day suspension upon Grievant for his continuing failure to adhere to the attendance policy.[9] The suspension letter details the previous disciplinary history and states that, since the previous suspension, Grievant had been tardy nine times and had one unscheduled absence. Grievant did not file a grievance to protest the suspension.

10. On June 26, 2012, a predetermination meeting was held with Grievant, his supervisor, Terrie Collins, RN, MS, the Director of Nursing, Patricia Ross, RN, BC, and the Director of Human Resources, Kieth Anne Worden.

---

[7] Respondent's Exhibit No. 5.

[8] Respondent's Exhibit No. 1.

[9] Respondent's Exhibit No. 6.

11. On July 3, 2012, Respondent terminated Grievant for his continued failure to conform to the attendance policy. The termination letter details the past disciplinary history and states that, since the previous suspension Grievant had two instances where he was a no call/no show[10], two unscheduled absences, and had refused mandatory overtime seven times.

12. Grievant was provided with all relevant policies on February 2, 2010, and acknowledged by his signature that he had received, read, and agreed to comply with all of the policies.[11]

Discussion

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter, and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). 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. W. VA. CODE § 29-6A-6; *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.*

---

[10] Mildred Mitchell-Bateman Hospital policy MMBHC016, *Leave Authorization and Absence Control* defines “nocall/no show” as “[t]he failure to call in to notify the employee’s supervisor or designee of their anticipated absence prior to their appointed work schedule, per the employee’s department procedure.”

[11] Respondent’s Exhibit No. 8.

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.* Grievant bears the burden of proving the failure to pay wages within seventy-two hours and Respondent bears the burden of proving the charges leading to the suspension and termination.

Regarding the dismissal, Respondent must also demonstrate that the misconduct which formed the basis for the dismissal was of a "substantial nature directly affecting rights and interests of the public" as Grievant was a tenured employee in the state's classified service. *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).

As proof of the charges, Respondent provided the relevant disciplinary documents, but did not provide timesheets, and could present only the testimony of the Human Resources Director, as Grievant's immediate supervisor was unavailable due to serious illness. Grievant chose not to appear at the level three hearing and did not present any testimonial evidence. The only evidence submitted by Grievant were documents relating to the court oversight of state hospitals and the applicable absence

control policy of Respondent. There are several problems with the disciplinary documents in that most do not list specific dates for the tardiness/absences, and some do not even list aggregate amounts of tardiness/absences. However, the later disciplinary documents do provide aggregate amounts for the entire period and, in her testimony, Ms. Worden affirmed that the information regarding tardiness/absences in the disciplinary documents is correct by her review of the applicable records and her personal involvement in the discipline. While disturbed by the lack of evidence in this case given the serious nature of the penalty, when faced with a preponderance of the evidence standard, and having no evidence that the disciplinary documents are unreliable, the undersigned must find that Grievant's attendance records were as stated by the disciplinary documents. Therefore, the attendance problems documented from the March 25, 2011 written reprimand through the May 1, 2012 second suspension are that Grievant was tardy fifty-four times, had twelve unscheduled absences, and had twenty-nine instances of failure to clock in or out. By the time of the termination two months later, Grievant's conduct had escalated to where he was no longer just tardy, but twice failed to show up or call in to work at all. The records also show that in the last two months, Grievant refused to work overtime seven times.

Respondent alleges that, by the above actions, Grievant violated Department of Health and Human Resources Policy Memorandum 2108, *Employee Conduct*, and 2107, *Leave Abuse*; and Mildred Mitchell-Bateman Hospital policy MMBHC016, *Leave Authorization and Absence Control*, MMBHCO60, *Timekeeping Records*, and MMBHCO38, *Behavioral Code of Conduct*. For these violations, Grievant received written reprimands on March 25, 2011 and August 16, 2011, a three-day suspension on

February 22, 2012, a five-day suspension on May 1, 2012, and was terminated on July 3, 2012. Grievant grieved neither the March 25, 2011 and August 16, 2011 written reprimands nor the May 1, 2012 suspension. Therefore, those disciplinary actions are presumed valid. *See Teel v. Bureau of Employment Programs/Workers Comp. Div.*, Docket No. 01-BEP-466 (June 10, 2002).

Regarding the February 22, 2012 suspension, at that time Grievant had previously been placed on an improvement plan and had received two written warnings. Grievant's absences had become even more severe since the last written warning in that he had accumulated twenty-four more instances of tardiness, had nine more unscheduled absences, and had failed to clock in/out twenty-six times. Respondent's *Leave Authorization and Absence Control* policy provides for dismissal upon the eighth occurrence of unscheduled absence, or the tenth occurrence of tardiness. Therefore, at the time of the February suspension, Grievant's attendance issues had already risen to the level that Respondent could actually have terminated him at that time under their policy. Respondent was justified in suspending Grievant for violation of the *Leave Authorization and Absence Control* policy. Respondent was not justified in requiring Grievant to take annual leave for his supervisor's mistake in informing him of his suspension dates. Respondent suspended Grievant for three days, which three days he served based on the instructions of his supervisor, on February 7th through the 9th. It was improper for the Respondent to compound the supervisor's mistake by charging annual leave to Grievant for those days and requiring him to serve additional suspension days on February 22nd through 24th.

Grievant failed to correct his behavior from the February suspension and accumulated nine more instances of tardiness and an additional unscheduled absence, resulting in a five-day suspension on May 1, 2012. That action is presumed valid as Grievant did not file a grievance. Following the May suspension, Grievant was a no call/no show twice, and had two additional unscheduled absences. Grievant also refused to work overtime seven times. Respondent did not submit into evidence any policy that requires Grievant to work overtime and the hospital policies cited are not otherwise readily available. Therefore, the refusal to work overtime cannot be used as part of the basis for termination. However, Grievant clearly violated the *Leave Authorization and Absence Control* policy for unscheduled absences and no/call no shows, which clearly allows for termination after the eighth occurrence of unscheduled absence, of which Grievant had twelve. Respondent had good cause to dismiss Grievant for his additional two unscheduled absences and no call/no shows, given his history of absence problems. Grievant's failure to provide adequate attendance to his job was not trivial or a technical violation. Attendance is particularly crucial for a worker employed in direct patient care in a psychiatric hospital. Grievant had repeatedly been warned about the importance of regular and punctual attendance. In response to his second suspension for attendance, he escalated his attendance problems from tardiness or unscheduled absences by failing to report to work at all.

Grievant also alleges and requests damages of treble his final wages for Respondent's failure to pay those wages within seventy-two hours. Grievant provided no evidence of this alleged failure. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Directors/W. Va. Univ. at*

Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998); *See Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995). Therefore, that request for relief must be denied as Grievant has failed to meet his burden of proof.

The following Conclusions of Law support the decision reached.

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. W. VA. CODE § 29-6A-6; *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. Respondent must also demonstrate that the misconduct which formed the basis for the dismissal was of a "substantial nature directly affecting rights and interests of the public" as Grievant was a tenured employee in the state's classified service. *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).

3. Grievant grieved neither the March 25, 2011 and August 16, 2011 written reprimands nor the May 1, 2012 suspension. Therefore, those disciplinary actions are presumed valid. *See Teel v. Bureau of Employment Programs/Workers Comp. Div.*, Docket No. 01-BEP-466 (June 10, 2002).

4. Respondent proved by a preponderance of the evidence that Grievant violated Mildred Mitchell-Bateman Hospital policy MMBHC016, *Leave Authorization and Absence Control* policy, which justified suspending Grievant for three days, and that Grievant continued to violate the policy culminating in his eventual termination.

5. Respondent had good cause to dismiss Grievant for his continued violation of the *Leave Authorization and Absence Control* policy despite repeated warnings, as Grievant's failure to provide adequate attendance to his job was not trivial or a technical violation.

6. Respondent was not justified in requiring Grievant to take annual leave for his supervisor's mistake in informing him of his suspension dates.

7. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998); *See Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995). Grievant failed to present any evidence that Respondent failed to pay his wages within seventy-two hours, therefore, his request for relief of treble his final wages must be denied.

Accordingly, the grievance is **GRANTED** in part, and **DENIED** in part. As Grievant is no longer employed by Respondent, his leave cannot be restored, but unused annual leave is paid out to an employee upon separation. Therefore, Respondent is Ordered to compensate Grievant with three days pay for the improperly charged annual leave that would have been paid out to him upon his termination.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: December 17, 2012

_____

Billie Thacker Catlett
Administrative Law Judge