THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

EVELYN MCMILLION,
Grievant,

v. **Docket No. 2011-1819-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

_____Grievant, Evelyn McMillion, was employed by Sharpe Hospital as a Food Service Worker in Weston, West Virginia. On June 17, 2011, she filed this grievance asserting that she was dismissed from her job without just cause. Grievant seeks as relief to be made whole, including back pay with interest, and benefits. As this grievance concerned a termination, Grievant filed directly to level three following her dismissal.

A level three hearing was held before the undersigned Administrative Law Judge on December 7, 2011, at the Grievance Board's office in Westover, West Virginia. Grievant appeared in person and by her representative, Gordon Simmons, UE170, West Virginia Public Workers Union. Respondent appeared by its counsel, Anne B. Ellison, Assistant Attorney General. This matter became mature for consideration upon the receipt of the last of the parties' proposed findings of fact and conclusions of law on January 17, 2012.

Synopsis

Grievant was charged with falsifying a physician's absence excuse, violating Respondent's policy on leave abuse, and violating the terms of her plan of improvement.

Respondent met its burden of proof and demonstrated by a preponderance of the evidence that Grievant's termination was for good cause.

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

Findings of Fact

1. Grievant had been employed for three years as a Food Service Worker at William R. Sharpe, Jr. Hospital, operated by the West Virginia Department of Health and Human Resources.

2. Grievant was an employee who worked in the Dietary Department. On May 13, 2011, Grievant brought a doctor's excuse to her supervisor, Judy Fisher, for an absence occurring on that day. The doctor's excuse was from Dr. Scott Romesburg's chiropractic clinic located in Bridgeport, WV.

3. Ms. Fisher believed a portion of it appeared to have been altered by the use of white out. Ms. Fisher asked Grievant to bring her a new excuse with a better signature. Ms. Fisher noted on the doctor's excuse that the date for the excused absence had white out on it. Respondent's Exhibit No. 1.

4. Ms. Fisher then took the doctor's excuse to the Human Resources Department due to her concerns of its authenticity. Grievant did not provide Ms. Fisher with another copy of the May 13, 2011-doctor's excuse.

5. Cyndi Drury, Human Resource Manager, indicated that Grievant was on an attendance related Performance Improvement Plan. This plan required Grievant to request annual leave 48 hours in advance, have medical documentation for sick leave absences, and to have no unauthorized leave.

6. Ms. Drury observed that the doctor's excuse appeared to have some of the writing altered by white out and it was a copy of an original. The date of May 13 appeared to be altered in two different areas of the excuse.

7. On May 26, 2011, Ms. Drury sent a fax to Dr. Romesburg asking him to verify that the doctor's excuse was from his office and that Grievant had been seen on that day. Later that day, Ms. Drury spoke with Dr. Romesburg, who specifically told her that the excuse was not his note and that Ms. McMillion was not seen on that day in his office.

8. The Bureau for Behavioral Health and Health Facilities' Absence Control Policy provides that falsification of any portion of a physician's/practitioner's statement is cause for immediate dismissal. Respondent's Exhibit No. 7.

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 Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 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). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Permanent 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 and 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 was employed as a Food Service Worker at William R. Sharpe, Jr. Hospital in Weston, West Virginia. Sharpe Hospital is a state-operated mental health facility. By letter dated June 6, 2011, D. Parker Haddix, Chief Executive Officer, informed Grievant of his decision to dismiss her, citing, in pertinent part, the following:

> Your dismissal is the result of the submission of a fraudulent physicians [sic] note for absence from your job. The date of the absence was May 13, 2011 for 4 hours of which you claimed as leave for a doctor's appointment. You were placed on a Performance Improvement Plan requiring certification of planned or unplanned absence which required a physician's statement. The statement you turned in for May 13, 2011 was obviously a copy and appeared to be altered. Human Resources Director, Cyndi Drury [sic] contacted the physician noted on the form, Dr. Scott Romesburg. Dr. Romesburg confirmed this was not his note, nor was the employee seen in his office on the date in question, May 13, 2011. This act is in violation of your performance improvement plan as well as conduct expected of an employee of William R. Sharpe Hospital.

Respondent has met its burden of proof. Grievant violated Respondent's policy prohibiting the falsification of any portion of a physician's/practitioner's statement, as well as violating the terms of Respondent's policy regarding absence control, and the terms of her plan of improvement. Grievant's actions demonstrated a disregard and clear violation of her employer's policies. The reasons for Grievant's dismissal meet the requirements outlined in *Oakes*, *supra*.

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. Procedural Rules of the W. Va. 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).

2. Permanent 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 and 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 established by a preponderance of the evidence that Grievant was dismissed for good cause.

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 14, 2012

Ronald L. Reece
Administrative Law Judge