THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

STEPHANIE MASTERS,
Grievant,

v. **Docket No. 2011-1895-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
HOPEMONT HOSPITAL.

DECISION

_____Grievant, Stephanie Masters, initially filed a grievance on April 14, 2011,against her employer, Hopemont Hospital, challenging a ten-day suspension. Thereafter, she filed a grievance on October 27, 2011, challenging the termination of her employment. She seeks to have her job restored, including back pay with interest and benefits restored. These grievances were consolidated by the undersigned at the request of both parties. A level three hearing was conducted before the undersigned Administrative Law Judge on March 12, 2012, in the Grievance Board's Westover office location. Grievant appeared in person, and by her representative, Gordon Simmons, UE Local 170. Respondent appeared by its counsel, Harry C. Bruner, Jr., Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on April 13, 2011.

Synopsis

Grievant was terminated for a long pattern of leave abuse. Grievant had a history of leave abuse, and had received reprimands and suspensions. Despite numerous attempts at counseling sessions and a plan of improvement, Grievant continued a pattern

of leave abuse. Respondent met its burden of proof and demonstrated that Grievant was suspended and terminated for good cause. This grievance is DENIED.

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

Findings of Fact

1. Grievant was employed for nine years as a Health Service Worker at Hopemont Hospital, an assisted living facility operated by the West Virginia Department of Health and Human Resources.

2. Beginning in 2010, Grievant missed work frequently enough that she exhausted her available leave.

3. During the 2010 calendar year, Grievant missed 55 days, of which 35 days were off the payroll, because Grievant had exhausted all her annual and sick leave.

4. Grievant used 7 days of medical leave of absence, 14 days of personal leave, and 13 days of unauthorized leave due to not having enough annual or sick leave to cover all the days she was absent.

5. Grievant's excessive absenteeism caused disruption to Hopemont Hospital resulting in other Health Service Workers being required to work double shifts, or to be called back from vacation or holidays to work. In addition, the call nurse could not perform her work because she had to find another Health Service Worker to replace Grievant, or call an off-duty Health Service Worker to provide patient care.

6. Grievant received verbal counseling on January 13, 2010, that she was missing too many days of work. At that counseling session, Grievant was also reminded of the Hopemont Hospital attendance policy.

7. Grievant continued to experience absenteeism and received a verbal warning on March 15, 2010. Subsequently, Grievant was placed on an Attendance Improvement Plan on April 7, 2010. Grievant continued to have excessive absences and failed to follow the guidelines provided in her Attendance Improvement Plan.

8. On July 29, 2010, Grievant had a pre-determination meeting with Respondent's management to discuss her absences. Grievant received a written warning concerning her excessive absenteeism on August 4, 2010.

9. Due to Grievant's continued absence from work, she received a 3-day suspension on September 8, 2010. Additionally, Grievant's Attendance Improvement Plan was extended to December 7, 2010.

10. As a consequence of continued absences from work, Grievant was given a 5-day suspension on December 22, 2010, and Grievant's Attendance Improvement Plan was extended to February 7, 2011.

11. Grievant's work attendance did not improve in 2011. Another pre-determination meeting was held on January 28, 2011, to discuss why Grievant was not following the terms of her Attendance Improvement Plan.

12. Grievant received a 10-day suspension on March 28, 2011, due to her continual pattern of absenteeism.

13. On September 28, 2011, another pre-determination meeting was held with Grievant to discuss her absences. Nevertheless, Grievant continued to be absent from work on days she was scheduled to work.

14. Grievant was aware of Respondent's absence control, leave abuse, and progressive discipline policies. Grievant was also fully aware of the terms and requirements of her Attendance Improvement Plan.

15. Grievant was dismissed from her employment by letter dated October 17, 2011, with the effective date of discharge being November 2, 2011.

16. Concerning a Family Medical Leave of Absence, Grievant acknowledged that her father was placed in a nursing home on September 8, 2010. This undisputed fact would tend to make any issue regarding a Family Medical Leave of Absence irrelevant to the instant grievance.

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).

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). "The 'term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees.' *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002)." *Jaggers-Green v. Bur. of Empl. Programs*, Docket No. 03-BEP-026 (July 30, 2004).

Respondent met its burden of proof and demonstrated that Grievant demonstrated a continuing pattern of inability to work as scheduled which constituted leave abuse as outlined in Respondent's policy. The record is clear that Respondent repeatedly tried to impress upon Grievant the importance of reporting to work, but to no avail. In addition, the record is clear Grievant was counseled on numerous occasions about her excessive absenteeism and that she needed to comply with her Attendance Improvement Plans. Respondent's time and attendance leave records for calendar years 2010 and 2011 document Grievant's excessive absenteeism.

Grievant does make the argument that Respondent failed to timely inform Grievant of her right to coverage for leave under the Family Medical Leave of Absence as allowed by the Administrative Rules of the Division of Personnel. This rule allows the employee a total of 6 months of unpaid leave during a 12 month period, including the 12 weeks allowed by the Family Medical Leave of Absence ("FMLA"). 143 C.S.R. 1 § 14.8(c). Once an employee has exhausted the allotted 6 months of medical leave, the employee may then apply for a personal leave of absence without pay, normally not to exceed one year. The agency is not required to grant a personal leave of absence. The record reflects that Grievant was provided FMLA certification, on September 2, 2010, to be forwarded to her fathers' physician for completion. However, on that date, the record reflects that her father was placed in a nursing home. FMLA is not relevant to this grievance.

It is undisputed in this case that Respondent afforded Grievant progressive disciplinary action beginning with verbal warnings and a plan of improvement. Notwithstanding, Grievant failed to improve her attendance. Grievant received numerous verbal warnings, written warnings, and suspensions, but she continued her pattern of leave abuse. Grievant was well aware her actions were unacceptable. Employers have the right to expect employees to come to work on time and to follow orders that do not impinge on their health and safety. *Page v. W. Va. Dep't of Health and Human Res.*, Docket No. 02-HHR-049 (July 5, 2002); *English v. Div. of Corrections*, Docket No. 98-CORR-087 (June 29, 1998). Respondent has met its burden of proof and demonstrated Grievant abused her leave, and that her grieved 10-day suspension and subsequent termination was warranted in this case.

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 § 156-1-3 (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 met its burden of proof and established by a preponderance of the evidence that Grievant had a long history of leave abuse, which warranted suspension and termination after progressive disciplinary measures were ineffective.

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: June 12, 2012

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Ronald L. Reece
Administrative Law Judge