THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

GLENDA DAVIS,
Grievant,

v. **Docket No. 2012-1131-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/HOPEMONT HOSPITAL,
Respondent.

DECISION

Grievant, Glenda Davis, filed this grievance on March 29, 2012, directly to level three following the termination of her employment at Hopemont Hospital. Grievant alleges that she was dismissed without good cause and seeks to be made whole including all back pay and benefits restored. Previously, on December 21, 2011, Grievant filed a grievance directly to level three challenging an unpaid suspension and written reprimand. These two grievances were consolidated on April 19, 2012, on the motion of the parties. In addition, this grievance was placed in abeyance, on the request of the parties, for sufficient time to explore a possible settlement. The undersigned Administrative Law Judge conducted a level three hearing on May 21, 2013, at the Grievance Board's Westover office location. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. 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 June 25, 2013.

Synopsis

Grievant was terminated from her employment with Hopemont Hospital effective March 29, 2012, for excessive absenteeism. The record established that Grievant was afforded an improvement period and counseling during the probationary period of her employment in an attempt to help her with the attendance issues. The record also established that this discipline was appropriate and that Grievant's excessive absenteeism was of a substantial nature that was affecting the rights and the interests of the patients at the hospital. In short, Grievant was terminated from her employment for good cause.

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

Finding of Facts

1. Grievant was employed as a Health Service Worker at Hopemont Hospital, an assisted living facility operated by the West Virginia Department of Health and Human Resources. Grievant was terminated by letter dated March 13, 2012, with an effective date of March 29, 2012. This termination occurred during her probationary period of employment.

2. During Grievant's probationary period, Respondent became concerned about Grievant's disruption of patient care because of her pattern of absenteeism. Respondent placed Grievant on an Attendance Improvement Plan on or about December 29, 2011.

3. 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.

4. Despite numerous counseling sessions and the Attendance Improvement Plan, Grievant's attendance did not improve. As a result, patient care was being compromised and staff disruption was increasing.

5. On March 8, 2012, Respondent held a predetermination meeting with Grievant. Respondent ultimately terminated Grievant for excessive absenteeism effective March 29, 2012.

6. Grievant's termination letter dated March 13, 2012, contained, in pertinent part, the following reasons for dismissal:

> Grievant used two hours emergency vacation on November 19, 2011, due to car troubles.
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> On December 18, 2011, Grievant called in stating her son was sick. This was in connection with scheduled days off.
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> On December 24, 27, and 28, 2011, Grievant called off work. This was in connection with scheduled days off work.
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> On January 12, 2012, Grievant received unauthorized leave for failing to turn in a medical excuse form.
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> On February 3, 2012, Grievant used emergency annual leave due to a neighbor's house burning down.
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> Grievant called off work on February 25, 26, 27, 28, 2012.
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> Grievant received unauthorized leave on March 4, 2012, when she called off work due to her babysitter not being available.
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> Grievant's evaluations reflected that, when she did appear as scheduled, her work performance did not meet expectations.

Discussion

When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that her services were satisfactory. However, dismissal for misconduct is disciplinary, and excessive absenteeism can be viewed as misconduct, therefore the burden of proof rests with the employer. 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); *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).

The Division of Personnel's Administrative Rule discusses the probationary period of employment, describing it as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency." The same provision goes on to state that the employer "shall use the

probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." 143 CSR 1 § 10.1(a). A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. 143 CSR 1 § 10.5(a).

Respondent easily meets its burden of proof in this case. The record established that Grievant demonstrated a continuing pattern of inability to work as scheduled which constituted leave abuse. 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 Plan. Respondent's time and attendance leave records for the term of her employment document Grievant's excessive absenteeism.

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 warnings and a suspension, 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 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. 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: July 26, 2013

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Ronald L. Reece
Administrative Law Judge