THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

VICKIE COMBS,
Grievant,

v. **Docket No. 2013-0497-DHHR**

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

DECISION

Grievant, Vickie Combs, is employed by Respondent, Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital. On September 19, 2012, Grievant filed this grievance against Respondent stating, "FMLA[1] accommodations not adhered to resulting in increased illness, call ins [sic] and harassment by Nurse Manager pertaining to scheduling and FMLA accommodations; which led me to be unjustly suspended. This writer had entered a verbal agreement with Nurse Manager to adjust my schedule allowing me to report for duty by 0710 rather than 0645 and to 'work out my time'. Nurse Manger now states she has no recollection of this agreement which has resulted in suspension." For relief, grievant seeks removal of suspension with back pay, change of unit assignment, and "adherence to FMLA accommodations and current schedule."

Grievant appealed directly to level three of the grievance process on September 19, 2012. A level three hearing was held on April 1, 2013, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by

[1] "The Family and Medical Leave Act of 1993, as amended, (FMLA or Act) allows ''eligible'' employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months. . ." 29 C.F.R. § 825.100(a) (2013).

Gordon Simmons, UE Local 170, West Virginia Public Workers Union, but did not appear in person. Respondent was represented by counsel, Michael E. Bevers, Assistant Attorney General. This matter became mature for decision on April 29, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was suspended for violation of site-specific attendance policies. Respondent failed to introduce the policies Grievant was alleged to have violated. Respondent cannot meet its burden of proof that Grievant violated policies that were not introduced into evidence. Accordingly, the grievance is granted.

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 has been employed for more than twenty years as a Licensed Practical Nurse for Respondent at Mildred Mitchell-Bateman Hospital ("Bateman").

2. Grievant received an Employee Performance Appraisal on April 11, 2008, which rated her "Fair, But Needs Improvement" stating that Grievant is "competent," "well-liked," and "has few deficiencies, which she corrects in a timely manner." It states she has "ongoing health problems but brings in documentation to explain her absences." Grievant was instructed, among other things to "comply with the absence control policy."

3. Grievant received an Employee Performance Appraisal on March 13, 2009, which rated her "Good; Meets Expectations" stating again that she is "competent"

and “ongoing health problems but brings in documentation to explain her absences.” In addition, it noted that Grievant also has a child with a health problem for which Grievant had provided documentation.

4. On February 11, 2010, Grievant received a verbal reprimand for attendance and failure to follow sign in procedures. The reprimand states in part, “The shifts that you missed were all connected to extended days off which shows a pattern. You also continue to fail to sign in weekly and attend morning report which indicates you are tardy for the start of your shift . . . Last week you did not sign in one time. This total disregard for Policy and Procedures is not acceptable.”

5. Grievant received an Employee Performance Appraisal on February 25, 2010, which rated her “Fair, But Needs Improvement” stating again that Grievant is “competent.” However, the evaluation notes that Grievant “appears to lack motivation and is often heard stating she does not want to come to work.” Grievant had also lost her requested double shifts due to absences. Grievant was instructed, among other things to “comply with the absence control policy.”

6. Grievant received an Employee Performance Appraisal on December 7, 2010, which rated her as “Meets Expectations.” The evaluation states, “Attendance is of concern related to family and personal health related issues.”

7. On February 20, 2011, Grievant received a written reprimand for “continued non-adherence to the Absence Control policy regarding continued attendance issues.” The reprimand lists dates of absence, tardy, and refusal of mandatory overtime from July 7, 2010, through December 17, 2010. Grievant had eight absences, for which one had a doctor’s excuse provided; ten tardies; and five refusals

of mandatory overtime. The reprimand further states, “All employees are expected to arrive to work as scheduled and on time as well as comply with mandatory overtime requirement. All employees are also expected to complete all scheduled shifts in their entirety. Should these problems continue further disciplinary action as severe as demotion, suspension or dismissal may occur.”

8. Grievant received an Employee Performance Appraisal on March 30, 2011, which rated her “Fair, But Needs Improvement,” stating that “[a]ttendance has been addressed and has been supported with medial excuses.” Grievant was instructed, among other things to “comply with the absence control policy,” and that “[c]ontinued improvement is needed with attendance and absence issues.”

9. Grievant received an Employee Performance Appraisal on October 14, 2011, which rated her as “Meets Expectations.” The evaluation states, “Attendance is of concern related to family and personal health related issues.”

10. By letter dated February 2012, Grievant was suspended without pay for three days “due to your continuing failure to adhere to Mildred Mitchell-Bateman Hospital’s policies and expectations of attendance.” The letter lists fifteen absences from January 21, 2011 through November 16, 2011. Of the absences, one was scheduled, with documentation of a medical procedure, and the remainder were unscheduled. Of the unscheduled absences, documentation was provided for five absences. The letter states that Grievant will not be allowed to “make up” tardies and her pay will be docked accordingly. It further states, continued failure to appear for work as scheduled, or failure to strictly adhere to our attendance policies, will result in further disciplinary action as severe as dismissal.”

11. By letter dated September 11, 2012, Grievant was suspended without pay for five days “due to your continuing failure to adhere to Mildred Mitchell-Bateman Hospital’s policies and expectations of attendance.” The letter states that, since the previous suspension, Grievant had had eight unscheduled absences, and eighteen instances of tardiness or leaving early. Of the tardies, almost all were recorded as .25 hours. Of the absences, two were specifically listed as related to Grievant’s asthma. The letter states that Grievant’s supervisor denies granting Grievant permission to be tardy due to her daughter’s daycare not opening until 6:45 am. It further states that “you also discussed your medical condition and your physician’s advice to seek and emergency room and self-care when your condition worsens.”

12. After the grievance was filed, on January 23, 2013, Grievant was transferred to another unit.

13. Respondent did not introduce as evidence any of Bateman’s policies on attendance, discipline, or FMLA.

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. 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.*

Grievant was suspended due to "failure to adhere to Mildred Mitchell-Bateman Hospital's policies and expectations of attendance." Respondent failed to introduce as evidence any of the policies Grievant is alleged to have violated. Respondent presented only the disciplinary history, the suspension letter, and the testimony of Human Resources Director Kieth Anne Worden that the policies had been violated. Also of concern is the documentation of Grievant's continuing health problems, as noted in her evaluations and disciplinary documents, coupled with her allegation that she was granted FMLA accommodation that had been violated. Although Director Worden testified Grievant had previously been accommodated due to her asthma and that there had been a previous FMLA filing, none of the FMLA documentation was presented and Director Worden testified she had not been involved in FMLA issues. This is particularly troubling when several of the absences upon which the suspension was based were related to Grievant's asthma and Grievant had raised her asthma and physician's advice as a defense in her meeting with Bateman officials prior to her suspension. Given Grievant's health issues, especially with such a long history of documentation of said issues, Respondent cannot prove the charges against Grievant by a preponderance of the evidence without presenting the policies Grievant is alleged to have violated. Respondent proved Grievant was absent and tardy, but did not prove that those absences and tardies were in violation of polices that were not presented, or that suspension would have been justified under those policies. Respondent's introduction of general DHHR policies that do not mention attendance is not sufficient to meet the burden.

For relief, grievant seeks removal of suspension with back pay, change of unit assignment, and "adherence to FMLA accommodations and current schedule." It is undisputed that Grievant's unit assignment has already been changed, so that portion of the requested relief is no longer necessary. With the change of unit, adherence to Grievant's "current schedule" can no longer be addressed as it is unclear what her schedule was, or is now, in her new unit. Likewise, as there was no evidence presented as to what, if any, accommodation was made under the FMLA, the request for "adherence to FMLA accommodations" cannot be addressed.

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 cannot meet its burden of proof that Grievant's attendance violated policy when Respondent failed to introduce the policies Grievant is alleged to have violated.

Accordingly, the grievance is **GRANTED.** Respondent is **ORDERED** to pay Grievant back pay, with statutory interest, for the five days she was suspended, to

reinstate Grievant's seniority and tenure, and any benefits lost due to this suspension, and to expunge any reference to this suspension from any and all personnel records maintained on Grievant.

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: September 24, 2013

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Billie Thacker Catlett
Administrative Law Judge