WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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ABIGAIL MAYFIELD

v. **DOCKET NO. 89-DNR-442**

W.Va. DEPARTMENT OF NATURAL RESOURCES

D E C I S I O N

Grievant, Abigail Mayfield, was employed in the classified service by the West Virginia Department of Natural Resources (DNR) as a Secretary I for approximately three years until her dismissal effective on July 31, 1989. She filed a grievance directly with the Grievance Board under the expedited grievance process established by W.Va. Code §29-6A-4(e), and after a hearing on the merits conducted on August 25, 1989, the case was submitted for decision.

At the hearing DNR contended that it had good cause to terminate grievant's employment and that it had complied with all Civil Service regulations. Grievant's representative, Dr. Hawey Wells, the Medical Director of the Mountain High Recovery Center in Richwood, West Virginia, where she had been receiving care, contended that her employment difficulties were directly related to the use of alcohol which DNR should have recognized and dealt with in an

enlightened manner, instead of terminating her due to a medical condition.

DNR introduced the testimony of both grievant's immediate supervisor and the removing official, along with numerous documents containing the chronology of events leading up to the final removal action. Grievant did not seriously dispute the facts relied on by DNR in terminating her employment.

The undisputed facts reveal that the grievant was employed in the Construction Grants Division of DNR in August 1986. She was considered a good employee during the first two years of her employment, but thereafter was absent from work without authorization in violation of Civil Service attendance and leave regulations with such frequency that she exhausted all annual and accrued sick leave, and despite repeated warnings continually failed to properly notify her immediate supervisor that she would be unable to work.

This pattern began when Grievant was granted a medical leave of absence without pay from May 20 through June 3, 1988. This leave of absence was granted because grievant's accrued leave expired on May 24, 1988. Based upon a physician's statement, it was extended from June 6 to July 17, 1988, and was further extended in response to grievant's verbal request until July 31, 1988, or until she was

released by her physician, for a period not to exceed six months.[1]

Grievant returned to work on August 10. Her immediate supervisor met with her twice during that month to advise her of her scheduled work hours, the proper procedures for requesting leave and reporting off work due to illness. She was nonetheless absent in excess of accrued leave during that month, resulting in her pay being docked 21.25 hours.[2] Grievant was verbally reprimanded on August 29 for failure to properly report she would miss work. In a subsequent memorandum dated September 1, 1988, a DNR official listed eight days in which grievant had not properly reported that she would be late for work, told grievant that he hoped this situation did not occur again, and explained that employees are not ordinarily permitted to apply for more leave than has been accrued. She was instructed that a leave without pay must be approved in advance.

A second written reprimand was issued on September 12, 1988, for failure to properly report off work on several occasions during that month and for being absent in excess

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[1] The rules and regulations of the Civil Service System (CSS) allow for a six month medical leave of absence. Series 1, Civil Service Attendance and Leave Regulations § 8.02 (1981).

[2] Section 6.01 of the CSS's attendance regulations provides that the appointing authority may dock the employee's pay in certain circumstances for the period of time an employee is absent from work without authorization.

of accrued leave.[3] The written reprimand informed the grievant that she must take immediate steps to improve attendance, that she was expected to be at work at 8:30 a.m. each work day, that she must report off work due to illness by the beginning of the work day, that future requests for annual leave would not be considered until after 20 hours of leave had accumulated and then must be approved in advance, and that no schedule adjustments for late arrivals would be approved in the future. The written reprimand also noted that grievant's work had not been completed in a timely fashion and had been performed by someone else when the work was urgent in nature, and advised grievant that continued violation of established rules and poor job performance would result in further disciplinary action.

From late September until late January, 1989, grievant's attendance improved. However, she was then absent without prior authorization 11 consecutive work days beginning on January 30. In a February 14 memorandum, she was directed to contact her immediate supervisor by February

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[3] Section 3.03 of CSS's regulation states:

> 3.03 Requesting, Granting. Accrued annual leave shall be granted at such times as will not materially affect the agency's efficient operation. The employee shall request annual leave in advance of taking such leave except as noted elsewhere in this Section. Annual leave may not be granted in advance of the employee's accrual of such leave. Agencies are encouraged to grant annual leave when hazardous conditions make going to and from work difficult.

21 to set up an appointment with the Personnel Office or be dismissed from employment. Grievant contacted her immediate supervisor and, following a meeting with him and two other DNR officials, she submitted a doctor's statement and was granted a medical leave of absence without pay from February 2 through March 1, 1989. It was agreed at the meeting that upon her return to work on March 2nd, she would be permitted to work 32 hours rather than her regular forty-hour work week to permit her to attend therapy sessions.

In a March 1, 1989, memorandum from Dr. Laidley Eli McCoy, the removing official, grievant was encouraged to attend therapy so long as she and her physician felt it necessary and was informed that she would be returned to full-time status upon written request. The requirement that absences must be approved in advance according to established procedures was also reiterated. Grievant was subsequently returned to a full-time schedule effective on June 15, upon a written request indicating she no longer intended to attend afternoon therapy sessions.

In May 1989, grievant either missed or was late for work on several occasions without contacting her immediate supervisor, either at all or at the proper time. As a result she was suspended for 40 working hours or 5 days and her pay was also docked for the unauthorized leave. In a memorandum dated May 22, 1989, Dr. McCoy expressly informed grievant that her suspension was part of a progressive disciplinary approach and that the next time she failed to

notify DNR prior to the beginning of the work day that she would be off work might result in her dismissal. He further stated that she had been given ample opportunity to improve, recounted the fact that she had been placed on 80 percent work schedule to encourage her involvement in therapy sessions, and noted that her failure to comply with attendance and leave regulations had an impact on both her supervisor and co-workers. Grievant was also advised in this memorandum that no annual leave would be approved for the months of June, July, August, 1989, that any absences due to illness during the next three months would have to be verified by a physician's statement and that any medical leave must be properly requested.

Finally, in a July 14, 1989 memorandum, the grievant was terminated effective on July 31, 1989. The memorandum states that grievant had reported to work for 4 hours on a holiday without prior approval to work on a holiday, and on two occasions in July had called in indicating she would be late due to personal reasons but failed to report to work on either day. This memorandum contains essentially the same information as in the previous memorandum of suspension and recounts the fact that she had been warned that the next occurrence would warrant her dismissal.

Mr. McCoy testified that he and others within DNR regretted taking disciplinary action against the grievant but believed that she had been given ample opportunity to improve and had simply failed to do so. He also stated that

the branch in which the grievant had been employed was operating with less secretarial assistance than in the past and grievant's conduct had impaired the efficiency of the DNR.[4]

It is settled law that a permanent employee protected by the civil service law cannot be terminated from employment in the absence of good cause, as stated in Syllabus Point 1 of Drown v. West Virginia Civil Service Commission, ___ W.Va. ___, 375 S.E.2d 775 (1988):

> W.Va. Code, 29-6-15, requires that the dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting the 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. Syllabus Point 1, Oakes v. West Virginia

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[4] The termination memorandum states in this regard:

> West Virginia Civil Service System Attendance and Leave Regulations state that annual leave shall be granted at such times as will not materially affect the agency's efficient operation, and that the employee shall request annual leave in advance. We advised you that annual leave requests would not be approved for a three months' period. Your continued unauthorized absences from work affects your co-workers as your assigned duties must be performed by others. Efficient work and leave scheduling for the office by your supervisor is impossible due to your unauthorized absences. Your failure to report to work adversely affects your ability to perform your duties and impairs the efficient operation of this agency. For these reasons and for your violation of the instructions given you as detailed previously, you are being dismissed from your position as Secretary I, Construction Grants Branch, effective Monday, July 31, 1989, 5:00 p.m., your scheduled last working day.

Dept. of Fin. & Admi., 164 W.Va. 384, 264 S.E.2d 151 (1980).

See also Guine v. Civil Serv. Comm'n, 149 W.Va. 461, 141 S.E.2d 364 (1965).

The Court in Syllabus Point 1 of Bone v. West Virginia Civil Serv. Comm'n, ___ W.Va. ___, 255 S.E.2d 919 (1979), has also held that the "determination of whether an employee protected by Civil Service is guilty of gross misconduct justifying dismissal must be made upon the facts and circumstances which are peculiar to that case."

The Court in Vosberg v. Civil Serv. Comm'n of West Virginia, ___ W.Va. ___, 275 S.E.2d 640 (1981), in a factually similar case, upheld the dismissal of a psychiatric aide who repeatedly failed to notify the hospital that he would not be at work, concluding that the Civil Service Commission's finding that the employee had been negligent in the performance of his duties by failing to report his absences was not clearly wrong. Vosberg establishes that repeated failure to properly report off from work in violation of an employer's directives can constitute good cause to terminate a civil service employee's employment. There the employee's failure to notify his employer was shown to be due to the lack of telephone services in the area where the employee resided, combined with poor road conditions and unreliable vehicles for transportation. Here, there was no showing of any lack of access to communication equipment.

A review of the evidence shows DNR met its burden of proving by a preponderance of the evidence that good cause

existed for terminating grievant's employment from the classified service. Grievant was clearly informed of the procedures for reporting off from work and the civil service attendance and leave regulations but continually failed to comply with them. She was afforded a reduced work day to attend therapy and was afforded an opportunity to improve. Grievant's conduct adversely effected the work of DNR and cannot be characterized as trivial or inconsequential in nature.

Grievant's demonstrated pattern of not properly reporting absences from work and the employer's use of progressive discipline clearly distinguish this case from Moore v. West Virginia Dept. of Health, 89-H-013 (May 22, 1989), in which the dismissal of an employee who failed to report for work without authorization due to a serious medical emergency in her immediate family was held to be without good cause. Furthermore, grievant did not allege or prove any violation of law or Civil Service regulation. Although grievant may have been entitled to an additional medical leave of absence without pay under Section 8.02, she did not make any request for such leave and did not submit a physician's statement in connection with such a request.

The fact that DNR did not actively intervene to help grievant deal with her alcohol and/or drug abuse problem is no basis, in and of itself, to grant the grievance and order reinstatement. It may well be that the State of West Virginia should adopt a pre-discharge intervention policy to

assist employees with alcohol and drug abuse problems, as many employers have done, but the fact remains that such a policy does not exist and the Grievance Board has no authority to require the adoption of such a policy. Moreover, there was no showing in this case that DNR discriminated or had any intent to discriminate against grievant because of her alcohol and/or drug abuse problems.

Grievant's post-discharge behavior and efforts at rehabilitation are laudable but this affords no basis to overturn her discharge. This is a sad situation but the evidence indicates she was treated fairly and in accordance with the law.

In addition to the findings of fact and conclusions of law contained in the foregoing discussion and analysis, the following findings of fact and conclusions of law are also made:

Findings of Fact

1. Grievant, a civil service employee, repeatedly violated DNR directives and CSS attendance and leave regulations by not properly reporting off from work and by being improperly absent in excess of accrued leave.

2. Grievant was progressively disciplined for such a failure by verbal and written reprimands and then by a five-day suspension.

3. Grievant's pattern of failing to notify DNR of absences from work interfered with efficient performance of the portion of DNR in which she was employed.

Conclusions of Law

1. W.Va. Code §29-6A-6 (1988), provides that "[t]he burden of proof shall rest with the employer in disciplinary matters." To the extent that Childers v. Civil Serv. Comm'n, 155 W.Va. 69, 181 S.E.2d (1971), places the burden of proof on a civil service employee to show that a dismissal or other disciplinary action was arbitrary and capricious, it has been overruled by the subsequent enactment of W.Va. Code §29-6A-6 (1988).

2. A permanent employee covered by the civil service law cannot be terminated in the absence of good cause.

3. The employer in a disciplinary proceeding must prove its case by a preponderance of the evidence. Schmidt v. West Virginia Dept. of Highways, DOH-88-063 (March 31, 1989).

4. DNR proved by a preponderance of the evidence that good cause existed for the termination of grievant's employment based upon her repeated failure to comply with DNR directives concerning reporting absences from work and her unauthorized absences in excess of accrued leave. Grievant's continued misconduct was not trivial in nature, and it adversely affected the efficiency of DNR and the rights and interests of the public.

Accordingly this grievance is **DENIED.**

Any party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

C. Ronald Wright

C. RONALD WRIGHT
ADMINISTRATOR/HEARING EXAMINER

Dated: September 29, 1989