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MARY LOU SHELDON

v.

Docket No. 89-ABCC-238

WEST VIRGINIA ALCOHOL BEVERAGE CONTROL COMMISSION

DECISION

On May 17, 1989, Mary Lou Sheldon, a classified employee of respondent Alcohol Beverage Control Commission (ABCC), was advised that she was being suspended for ten days without pay and demoted from assistant manager to cashier at Store No. 84. Her salary was reduced from \$1070.26 to \$996.25 per month. The letter of notification stated, in part:

The reason for this suspension is abuse of leave and falsification of your Monthly Record Sheet for March 16, 1989, which constitutes negligence in the performance of your duties.

. . .

In your position as Assistant Manager, and due to the recent death of the manager, you are responsible for the store's operation and the supervision of the employees. You have received warnings in the past regarding the use of, and possible abuse of, leave time. Your actions reflect negligence in the performance of duties by the falsification of your time records. You have also obtained money by false pretenses by reflecting work hours when you did not work. One day of annual leave will be deducted from your accrued leave to cover for March 16, 1989.

Because of these charges, I do not feel that you are managerial material. Therefore, upon your return to duty on June 5, 1989, you will be demoted to the position of ABCC Cashier

Grievant timely filed a grievance at level four.¹ Due to scheduling difficulties, the matter was not heard until August 8, 1989. After the hearing, the record was left open to permit grievant, who appeared unrepresented, an opportunity to contact AFSCME personnel about further proceedings, if any.² The parties were advised that the record would be closed September 18, 1989, for all matters, including the submission of proposed findings of fact and conclusions of law.³

The underlying facts in this matter are basically undisputed. Grievant did not report to work March 16, 1989. According to store employees, she had called in to report car trouble before the afternoon shift began. She later appeared at the store, sometime in the late afternoon or early evening, but stayed only long enough to pick up her paycheck. District Manager Georgia Zambito testified that grievant took sick leave beginning March 25 and was still off at the end of the month.

¹W.Va. Code §29-6A-4(e) provides an expedited process for an employee to grieve certain final personnel actions including demotion.

²Grievant said she was an AFSCME member; she did not indicate that information on her filing form.

³ABCC's counsel did not present a formal opening or closing statement but reserved the right to do so in his brief. Neither grievant, personally or through AFSCME, nor ABCC submitted any post-hearing documents or proposals, and the matter is considered mature for decision based on the record developed at hearing.

Ms. Zambito stated that on April 3, 1989, grievant remained on sick leave so she took grievant's final time-sheet for March, due in Charleston, to grievant at home. She said she could not submit the document until she provided grievant the opportunity to check it for accuracy. Grievant verified the contents of the time sheet by initialization and did not amend an entry which indicated that she worked from 8:00 a.m. until 2:30 p.m. on March 16.

According to the testimony, two ABCC officials investigated the matter shortly after receipt of the time sheet in Charleston. Grievant was notified that investigative personnel would be meeting with her because of a discrepancy on her time sheet. According to one investigator, at that meeting grievant denied wrongdoing but said she would have to check her daily work slips to be certain about her March absences. The official stated that grievant was not cooperative and instead challenged ABCC to fire her if it could.

ABCC submitted several documents, purportedly copies of warning notices previously filed about grievant's failure to report off properly for several days in February and April 1988. Another warning notice documented a November 28, 1988 incident. On that date, grievant was to report to work for the afternoon shift because of an audit. She called and said she would be late and later called to say a wheel fell off her car. When she did not report for the afternoon shift, an employee who had worked the day shift had to be called back out for the audit. Her supervisor noted that he had repeatedly told grievant,

"[D]ue to the nature of job, getting to work is primary concern." This third warning notice was stamped in at ABCC's Charleston headquarters on December 1, 1988.

West Virginia Civil Service Rules and Regulations in effect at the time of ABCC's disciplinary actions are, in pertinent part, as follows:

12.04. Demotions-A permanent employee may be demoted for cause after the person who is to be demoted has been presented with the reasons for such reduction stated in writing, and has been allowed a reasonable time to reply thereto in writing, or upon request to appear personally and reply to the appointing authority or his deputy. The statement of reasons for the demotion and the reply shall be filed with the Director of Personnel.

. . .

13.03. Suspension-The appointing authority may, upon oral notice confirmed in writing or by written notice, suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a job related adverse impact. The suspension must be for a specific period of time, except where an employee is the subject of an indictment or other criminal proceeding.

ABCC relied on and submitted its Policies and Procedures Handbook for Personnel which sets forth its disciplinary policy. The policy provides, in part:

Causes for verbal reprimand, written reprimand, suspension, demotion, or dismissal include but are not limited to the following reasons:

1. Repeated tardiness.
2. Leaving duty prior to end of shift without permission.
3. Failure to complete duties as assigned.
4. Abuse of leave.
5. Failure to obtain advance approval of leave.
6. Failure to report absences in a proper manner.
7. Safety violations.
8. Failure to follow directives of supervisor.

. . .

Disciplinary actions may include:

(1) Verbal Reprimand - The supervisor verbally warns an employee that job performance or actions are unsatisfactory and offers methods of corrections. Notice of the oral reprimand shall be included in employee's personnel file.

(2) Written Reprimand - In cases where the employee's supervisor feels that the employee had not responded to a verbal warning or the employee's conduct is such to warrant a written reprimand, the supervisor will issue such in writing. This written notice shall also be included in the employee's personnel file.

(3) Suspension - An employee may be suspended without pay for just cause. The written letter for such suspension shall be transmitted to the employee . . . Such notice shall include the specific reasons for the suspension and inclusive dates.

(4) If corrective action is not satisfactory after the reprimands and/or suspension(s) have been given to the employee, except in the case of gross misconduct, the employee will be dismissed without further warning.

(5) Demotion - An employee may be demoted for just cause. Demotion may include reduction in duties, salary, and/or title. The employee shall be notified by letter

(6) Dismissal - An employee may be dismissed for just cause [and] . . . notice shall not be required when, at the discretion of the Commissioner, the public interests are best served by immediate dismissal, as in the case of gross misconduct.

In response to ABCC's charges, grievant stated that she forgot she had not worked on March 16. She said she did not realize her error until after she met with ABCC investigative officials and subsequently checked her daily work records for March. She further denied knowledge of verbal or written prior warnings for unreported or unauthorized absences. She stated that she had never seen or been given copies of the warning documents. As noted by grievant, the warning notice form contains designated areas for the signatures of supervisory

personnel and witnesses,⁴ but not for the recipient of the notice.⁵

Grievant appeared sincere when she stated that she simply forgot she had been absent March 16. Her overall credibility and reliability was affected, though, by persistent inconsistencies in her testimony. For example, she related that on March 16, 1989, a wheel fell off her car approximately eight minutes after she left her home for work for the afternoon shift which began at 2:00 p.m. She testified that the incident was really frightening because it had never happened to her before. Several moments later, on cross-examination, she recanted the account that it was the first time a wheel came off her car. She remembered that it also happened November 28, 1988, but for a different mechanical reason. Her memory appeared to be refreshed when ABCC's counsel asked her about a protest she had submitted on December 5, 1988, about being charged an absence for November 28. Her handwritten statement detailed that on that date she was unable to report for work when an audit was scheduled because a wheel had fallen off her car. Her written

⁴A designated area for a witness signature was apparently included on the form to denote the individual who observed the employee infraction, when appropriate.

⁵Grievant's observation is correct. However, the form states at the bottom that the original copy of the triplicate form is to be transmitted to ABCC, one copy held by the issuer and a second copy given to the worker. When asked how she, as assistant manager, would correctly file the forms, grievant stated that she had not formally disciplined an employee since 1986, and she did not discuss what procedures she followed.

account, in fact, appeared to be a response to the written warning filed December 1 about her non-appearance the day of the audit, the very warning she claimed she never received.⁶

Other parts of grievant's level four testimony raised serious doubts about her overall credibility. Questioning by ABCC's counsel led to her revelation that she had forgotten the traumatic March 16, 1989, incident with her wheel only four or five days after it happened. On March 21 she completed a preliminary March attendance report that was due. Not only did she forget on March 21 the incident and absence of March 16, but the March 16 entry indicated that she worked 8:00 a.m. to 2:30 p.m. ABCC's counsel reminded her that she had just testified that she departed for work on March 16 at 1:30 p.m., for the afternoon shift. She explained that discrepancy by stating that it was her custom to fill out her monthly time-sheet several weeks in advance and she had filled out the page once, "messed it up" and redid it once more on March 21. She said that, as assistant manager, she had the prerogative of working morning or afternoon shift. She said she forgot on March 21 that she had changed her mind about working the day shift on March 16 and instead opted for the afternoon shift because she was in a hurry to get the preliminary report filed on time.

⁶Grievant also stated numerous times that prior to ABCC's disciplinary actions she did not know why she was asked to meet with investigators and was therefore unprepared for the meeting. On another occasion, she finally remembered that she had indeed been forewarned that there was a discrepancy on her March time sheet.

Moreover, grievant's testimony that her frequent absences did not affect store operations was not convincing. According to her, the cashiers were well-trained and knew what to do when she did not appear for work and one was designated acting assistant manager in her stead. If her statement could be accepted as true, that cashiers could constantly assume managerial responsibilities, then assistant managers and managers would not be necessary. The evidence revealed otherwise, e.g., that the record-keeping function of management was of prime importance. Furthermore, it appeared that grievant's absences affected her ability to recall accurate information for later record-keeping. Grievant's testimony that she did not know she was supposed to notify her superiors when she was not at work was refuted by Ms. Zambito and the manager who signed the warning notices. Ms. Zambito testified that she had counseled grievant to notify her when she did not report for work. Ms. Zambito related that grievant had been off sick in early 1989 for over a week and she had not been so advised by grievant. She testified that store employees, not grievant, notified her that grievant did not appear for work March 16.

The record supports a determination that grievant had been counseled and warned about proper reporting in her capacity as assistant manager. The evidence further indicates that grievant displayed indifference with respect to the authority of her superiors. Moreover, record-keeping and reporting are important components of ABCC's manager-assistant manager positions and grievant's negligence and carelessness in that area are

supported by her own admissions of forgetfulness and other credible evidence of record.

In short, ABCC's demotion of grievant for cause was authorized by its policy, supported by a preponderance of the evidence and applied appropriately in this case. The policy appears to embrace the concept of progressive discipline to encourage employee remediation for on-the-job infractions and deficiencies. When remediation does not occur, a more severe discipline is imposed. Grievant was counseled about appropriate and accurate reporting, but the counseling was not successful. However, ABCC's disciplinary policy does not appear to endorse both suspension and demotion as appropriate action for any offense. The policy does not set forth any criteria or justification for the simultaneous imposition of more than one disciplinary action. Grievant was docked a vacation day for the day's wages she received for March 16, 1989. That "restitution" appears adequate for her error, and an additional ten-day suspension is clearly excessive and unwarranted. See Schmidt v. W.Va. Dept. of Highways, Docket No. DOH-88-063 (March 31, 1989).

In addition to the foregoing, the following specific findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. In April 1989, grievant submitted a monthly report for the previous month which credited her for work on a day she did not work, March 16, 1989.

2. Grievant's testimony that she had forgotten the day's absence was credible; however, her failure to remember the incident was indicative of her ongoing and overall lack of responsibility to her assistant manager's position as documented by previous incidents and warnings.

3. ABCC, in essence, recovered wages it paid to grievant for March 16, 1989, and also imposed other discipline.

CONCLUSIONS OF LAW

1. Pursuant to the provisions of W.Va. Code §29-6A-6, 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. Schmidt v. W.Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

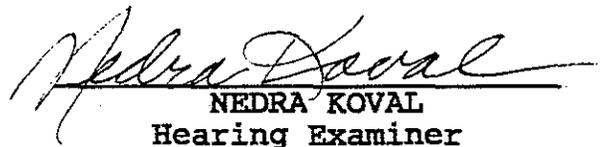
2. ABCC carried its burden of proof and established by a preponderance of the evidence that grievant's on-going negligence and carelessness in her reporting duties were just cause for demoting her from assistant manager to cashier.

3. Disciplinary action of both a ten-day suspension without pay and demotion was not authorized by ABCC's progressive discipline policy and was clearly excessive under the circumstances in this case. See Schmidt.

Accordingly, the grievance is **GRANTED IN PART**. Respondent is ordered to pay grievant all lost cashier wages resulting from the ten-day suspension, restore any and all other lost benefits due her in that regard and remove all records of the suspension from her personnel files. In all other respects, the grievance is **DENIED**.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Marshall 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.

DATED: December 8, 1989


NEDRA KOVAL
Hearing Examiner