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JAMES MCCRACKEN

v.

DOCKET NO. 89-H-720

W.VA. DEPARTMENT OF HEALTH/WESTON

DECISION

Grievant, James McCracken, was employed by the W.Va. Department of Health (Department) as a Health Service Worker at Weston Hospital. Mr. McCracken filed a grievance directly to level four on December 26, 1989, in which he alleged "On 13 December 1989 I was informed that I will be dismissed on 28 December 1989. This dismissal is unwarranted. I seek to be reinstated with back pay and in any other way be made whole." An evidentiary hearing was conducted on January 16, 1990 and proposed findings of fact and conclusions of law were submitted by February 5, 1990.

By letter dated December 13, 1989, Rein Valdov, Hospital Administrator, notified the grievant of his termination, effective December 28, 1989, in accordance with Section 13.02 of the Rules and Regulations of the West Virginia Division of Personnel and Department of Health Personnel Procedure 2750. The dismissal was based upon a continued

disregard of established policies and procedures, specifically set forth as follows:

1. Abuse of Leave/Absenteeism (Habitual tardiness or absenteeism from assigned duty station, particularly days preceding and following days off and holidays.)

a. By letter dated August 19, 1988 (copy attached), you were notified of the requirement to substantiate your absences due to illness through submission of a physician statement as the result of your established pattern of reporting off work on days adjoining regular scheduled days off. This requirement was in effect through February 19, 1989.

b. On December 5, 1988, your immediate supervisor, Dianne Douglas, sent you a memo addressing the problem of you punching out and leaving your work area before the end of the shift.

c. On February 22, 1989, Ms. Douglas gave you a written warning (attached) again informing you that you were expected to work the required 8 1/4 hour shift and participate in the shift overlap. She stated she was hopeful you would correct this problem before further disciplinary action was necessary.

d. On March 29, 1989, Ms. Douglas gave you an additional written warning (copy attached) addressing the problem of you leaving your worksite before the end of your assigned shift. She noted that between March 18 and March 25, 1989, you left your worksite early seven (7) out of nine (9) days of work. At this time, you were given a one-day suspension effective April 25, 1989 (copy attached), in the hopes that you would consider the fact that leaving your worksite early creates a hardship on your fellow employees, and that in the future, you would adhere to the procedure of participating in the established shift overlap.

e. On May 19, 1989, Chip Garrison, Assistant Administrator for Clinical Services, and Dianne Douglas, gave you a verbal counseling regarding your pattern of using sick leave. You told Ms. Douglas and Mr. Garrison that if they would just give you a verbal warning at that time, you would improve your attendance.

f. On August 30, 1989, Ms. Douglas again sent you a written warning (copy attached) stating that since your six-month physician statement requirement had elapsed, your attendance and pattern of reporting off work on days adjoining your regular scheduled days off had not improved. Ms. Douglas noted that you had reported off in connection with scheduled days off on five (5) occasions since May 8, 1989. Inasmuch as your attendance continued to be a problem and your pattern of absences continued, I issued a three-day suspension (copy Attached) to you effective September 16 through 19, 1989.

g. On November 11, 1989, you came to work and punched your time card. When you found that it would be necessary for you to be pulled to assist in providing coverage for Ward 5, you then punched out stating that you had a vacation day. This vacation day was not approved in advance according to procedures, and you were given an unauthorized absence for that date.

h. On November 23, 1989, you called the hospital requesting an emergency vacation day. Ms. Douglas disapproved this request due to the scheduling conflict of reporting off on a major holiday. You were again given an unauthorized absence for that date.

i. On November 24, 1989, you were asked to work overtime. You refused stating that you had lifted a laundry bag and injured your back. There was no documentation of an accident for this injury.

j. On the evening of November 25, 1989, you called in stating that you had worked in a double shift on November 25, 1989, and that you would not be out to work as scheduled on November 26, 1989. You did not receive an approved schedule adjustment for this date and were given an additional unauthorized absence for November 26, 1989.

k. You were scheduled off on November 27 and 28, 1989, and then called in on the evening of November 28, 1989, requesting sick leave for a family member on November 29, 1989, continuing your pattern of reporting off in connection with days off.

l. On December 8 and 9, 1989, following days off on December 6 and 7, 1989, you called requesting two days of emergency vacation. Due to your continuous pattern of reporting off in connection with scheduled days off, these two days are documented as unauthorized absences.

2. Physical and Verbal Abuse of Patients

a. On September 22, 1989, I gave you a thirty (30) day suspension for alleged physical and verbal abuse of Patient #53762 on the morning of August 26, 1989. Following the receipt of this letter, you came to my office and admitted the verbal and physical abuse. Due to your admitting the infraction and in the hopes that you would improve your attitude in the future, I sent you an amended letter dated October 4, 1989, reducing the suspension to twenty (20) days.

At the level four hearing Dianne Douglas, Unit Director and the grievant's immediate supervisor, testified extensively regarding the numerous disciplinary measures taken in an effort to correct the grievant's unacceptable practices. Ms. Douglas reviewed the grievant's work record through 1988-89 which revealed that he had been required to provide

a physician's statement for each use of sick leave for a period of six months. This action was taken in accordance with Weston Hospital Policy 2.009 and West Virginia Civil Service Rules and Regulations after the grievant had developed a pattern of reporting off sick on days adjoining regularly scheduled days off. This pattern monitored from mid-May through July 1988, consisted of six occurrences which had exhausted the grievant's sick leave and had required approval for annual leave and compensation time to cover his later absences. By memo dated August 30, 1989 Ms. Douglas advised the grievant that after the six-month period had expired in February his pattern of using sick leave adjoining regular days off had redeveloped with five specific occasions cited. At this time a three-day suspension was imposed.

Another area in which the grievant experienced difficulty was leaving his work area before the end of his shift. Ms. Douglas stated that she first addressed this problem by memo to the grievant dated December 5, 1988. A warning letter was issued on February 22, 1989 again informing the grievant that he was expected to work the required eight and one-fourth hour shift.¹ The grievant was advised that failure to correct this action would result in further disciplinary action. By memo of March 29, 1989 Ms. Douglas

¹The additional fifteen minutes provides a shift overlap assuring continuous coverage.

noted that the grievant's time cards indicated that he had left work early seven of nine days worked between March 18 through 25. A one day suspension was imposed for this continued infraction. The grievant was again counseled on May 19, 1989, at which time he promised to improve his attendance if he would not receive another suspension.

Personnel action forms submitted by the Department show the grievant with unauthorized absences on November 11, 23, 26 and December 8 and 9, 1989. The reasons for these absences were denials of emergency vacation (November 23, December 8, 9), the grievant taking unapproved vacation time after reporting for work (November 11) and failure to report for work as scheduled (November 26).

In addition to his difficulty in complying with attendance regulations the grievant was suspended for twenty days in October 1989 for the admitted verbal and physical abuse of a patient.² Ms. Douglas testified that due to the ongoing failure of the grievant to correct his absenteeism, the continued abuse of leave and the patient abuse, she recommended that he be terminated from employment.

²The suspension letter issued by Mr. Valdov recounted the incident as follows:

Client #53762 alleges that just after getting up on the morning of August 26, 1989, you called him a "Bottlenose Queerbait" to which he responded, "your mother sucks dicks." You then allegedly struck Client #53762 in the mouth causing a laceration of the lower left lip.

The grievant did not deny any of the incidents constituting the charges for dismissal but alleges that the Department has failed to show just cause for the extreme action. He asserts that the Department failed to follow its own guidelines for progressive discipline and neglected to provide him any warning, verbal or written, that his employment was in jeopardy. While concurring that his employment record for 1989 was not good, the grievant asserts that he did comply with the requirement that he provide a physician's statement for each occasion of sick leave usage (Charge 1-a) and that he had corrected his failure to work the fifteen minute shift overlap (Charge 1-b, c, d, e). The grievant asserts that the hospital failed to follow its own policies when no counseling or warnings followed his unauthorized absences of November 11 and 23 (Charges 1-g, h) and the last discipline imposed for abusive use of sick leave was a three-day suspension (Charge 1-f).³ He also notes that refusal to work overtime (Charge 1-i) does not constitute a dismissible offense and that he had followed the guidelines for reporting off work on November 26, 1989 (Charge 1-j). In reference to the second charge of patient abuse, the grievant asserts that this was the only such incident cited by the hospital in his five years of

³As will be noted later, the grievant's position is that the next level of discipline should have been a lengthier suspension, not dismissal.

employment and that he had been appropriately disciplined for that occurrence. The grievant proposes that he has already paid a penalty for the listed offenses and that if any further discipline is required, hospital policy would next provide for a three and/or ten day suspension prior to dismissal.

Applicable hospital policies regarding tardiness and absence each provide for progressive discipline. Guidelines for dealing with tardiness, defined as arriving late or as in the grievant's case leaving early, is contained in Policy No. 2.009.3

First Occasion - verbal counseling + authorized schedule adjustment or approved annual leave, compensatory time or unscheduled holiday for the period of tardiness (Minimum charge for annual leave and unscheduled holiday is 1/2 hour minimum charge for comp time is 1/4 hour).

Next Occasion - written warning + same as above.

Next Occasion - three day suspension + unauthorized absence (docked pay) for period of tardiness (Minimum charge for unauthorized absence is 1/4 hour).

Next Occasion - ten-day suspension + same as above.

Next Occasion - dismissal + same as above.

A variety of situations which would cause an employee to be absent are addressed in Policy No. 2.009.1,

Adjoining Time Days, Holidays, Vacation Days with Sick Days

3 occasions in a 3-month period establishes a pattern - verbal counseling

First occasion after pattern is established - written warning

Next occasion - 3 day suspension.

Next Occasion - 10 day suspension.

Next occasion - Dismissal.

Calling in Sick the Same Day of a Week, Partial Days of Unscheduled Sick Leave, Other Established Patterns of Sick Leave Usage, or Any Combinations of Sick Leave Usage Patterns

3 occasions in a 3-month period establishes a pattern - verbal counseling

First occasion after pattern is established - written warning

Next occasion - 3-day suspension.

Next occasion - 10-day suspension.

Next occasion - Dismissal.

Holiday Call-Ins

1. A physician's statement will be required for reporting off on more than one of the four (4) major holidays (New Years Day, Independence Day, Thanksgiving Day, Christmas Day) in the same calendar year. Failure to provide a physician statement for the second occasion of reporting off on one of the four (4) major holidays will result in an unauthorized absence (docked pay) unless the previous holiday call-in was verified by a physician statement.
2. A physician statement will be required for reporting off the same major holiday two (2) consecutive calendar years. Failure to provide a physician statement for the second occasion of reporting off on the same major holiday in consecutive years will result in an unauthorized absence (docked pay) unless the previous holiday call-in was verified by a physician statement.

Emergency Leave

Vacation Days, Compensatory Time or Unscheduled Holidays may be approved only when the employee requests the leave 72 hours in advance of taking off the time. Emergency Leave (for which vacation, comp time or unscheduled holidays may be utilized) will only be granted by approval of immediate and department supervisors. Disapproval of Emergency Leave (vacation, comp time or unscheduled holidays) will be handled as unauthorized absences as listed in Procedure F below.

Unauthorized Absence - If an employee has not reported off in accordance with acceptable

procedure (REF. WH Policy 2.009.2), the absence will be documented according to the following:

First occasion - verbal counseling.

Next occasion - written warning + 1-day unauthorized absence (pay docked)

Next occasion - 3-day suspension + 1-day unauthorized absence (pay docked)

Next occasion - 10 day suspension + 1-day unauthorized absence (pay docked).

Next occasion - Dismissal 1-day unauthorized absence (pay docked).

Both policies provide that exceptions to this general guideline may be appropriate due to various extenuating circumstances.⁴

Also controlling is Section 13.02, Rules and Regulations of West Virginia Division of Personnel addressing dismissals:

The appointing authority, fifteen (15) calendar days after notice in writing to a permanent employee stating specific reasons therefor, may dismiss any employee for cause. The employee shall be 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 reasons for dismissal and the reply shall be filed with the Director of Personnel. Fifteen days notice shall not be required for employees in certain classes when the public interest are best served by withholding such notice, and shall be at the discretion of the appointing authority for employees in any class when the cause of dismissal is gross misconduct.

The evidence provided by the Department sets forth a clearly-established case of an employee exhibiting numerous

⁴The policies do not define "extenuating circumstances"; however, the multitudinous number of infractions involving various policies would reasonably fall within that categorization.

work-related problems over a period of approximately twenty months. Warnings and suspensions were imposed upon the grievant as disciplinary measures for the individual unacceptable incidents of misconduct but they should have also encouraged the correction of his actions so that the offenses did not continue to accumulate. If the dismissal was based upon for a single charge of tardiness or absenteeism the Department would have been required to complete the progressive disciplinary procedure. However, because the dismissal was based upon a continued disregard of established policies and procedures, indicating a lack of desire on the part of the grievant to satisfactorily perform the duties for which he was hired, it is unnecessary for the employer to exhaust the numerous steps of progressive discipline set forth in all applicable policies. Failure to maintain a satisfactory attendance record or to work as scheduled in addition to the abusive treatment of hospital patients unquestionably constitute cause for dismissal as contemplated by the West Virginia Division of Personnel Rules and Regulations, Section 13.02.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. Grievant was employed for approximately five years by the Department of Health as a Health Service Worker at Weston State Hospital.

2. Throughout 1988 and 1989 the grievant engaged in numerous instances of abusive use of leave time/absenteeism resulting in a multitude of counseling sessions, warnings and suspensions. A twenty day suspension was also imposed in September 1989 for the physical and verbal abuse of a patient.

3. The grievant does not deny the occurrence of any of the thirteen incidents cited by the Department as the basis for the dismissal.

Conclusions of Law

1. Under the provisions of W.Va. Code §29-6A-6 (1988), the burden of proof in disciplinary matters rests on the employer. The standard of proof is by a preponderance of the evidence. The employer must prove the acts relied upon for the imposition of a penalty by the preponderance of the evidence. Davis v. W.Va. Department of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990).

2. By grievant's own admission the thirteen incidents cited by the Department had occurred thereby establishing cause for the dismissal as provided by Section 13.02 of the Rules and Regulations of the W.Va. Division of Personnel.

3. The grievant's continued practice of violating numerous personnel policies constitutes an extenuating circumstance permitting circumvention of the progressive discipline policies and establishes cause for dismissal as contemplated by the West Virginia Division of Personnel Rules and Regulation, Section 13.02.

Accordingly the grievance is **DENIED**.

Either party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Lewis 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 March 28, 1990

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER