THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBBIE SPARKS,
Grievant,

v. **Docket No. 2017-2089-DHHR**

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

DECISION

Grievant, Debbie Sparks, was employed by Respondent, Department of Health and Human Resources at Mildred Mitchell-Bateman Hospital ("Bateman"). On April 20, 2017, Grievant filed this grievance against Respondent alleging she had been dismissed from employment without good cause. For relief, Grievant seeks "[t]o be made whole in every way including back pay with interest and benefits restored."

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on July 24, 2017, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Harry C. Bruner, Jr., Assistant Attorney General. This matter became mature for decision on August 23, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent at Mildred Mitchell-Bateman Hospital as a Health Service Worker. Grievant was dismissed from employment following progressive discipline for attendance issues. Respondent failed to provide Grievant with notice and opportunity to be heard on part of the charges upon which her termination was based.

Respondent failed to prove it had good cause to dismiss Grievant from employment. Grievant's tardiness of a few minutes during "shift overlap" appears to be more a "technical [violation] of statute or official duty without wrongful intention" rather than "misconduct of a substantial nature directly affecting the rights and interest of the public." 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 was employed by Respondent at Mildred Mitchell-Bateman Hospital as a Health Service Worker ("HSW"). Grievant had been employed since 2013.

2. Grievant lives in Kentucky and is a caretaker for her father and brother. She cannot leave for work until her relief caretaker arrives.

3. Grievant met expectations overall in her employee performance appraisal in 2014, but was marked "Needs Improvement" in the category "Employee is a dependable team member" due to clocking in late.

4. On June 1, 2015, Grievant was placed on an attendance improvement plan after accruing twelve absences and numerous tardies in a six-month period. The plan notes, "Some of the absences have been related to personal illness and supported with physician's excuses" but does not specify how many of the listed absences were actually excused. The plan does not state the duration of the plan.

5. By letter dated September 9, 2015 and signed October 6, 2015, Grievant was given a written reprimand for numerous call ins, tardies, and failure to clock in/out.

Grievant stated that these issues were due to personal stress and a misunderstanding about clocking procedures and that she would improve.

6. In 2015, Grievant was marked "Fair, But Needs Improvement" on her interim employee performance appraisal for attendance. Grievant met expectations overall in her annual employee performance appraisal, but was marked "Needs Improvement" for all three subcategories in "Availability for Work" for "late arrivals and frequent call ins."

7. By letter dated January 29, 2016, Mildred Mitchell-Bateman Hospital Chief Executive Officer Craig Richards suspended Grievant for three days for violation of Respondent's attendance policies over a four-month period in which she reported late for work eleven times and had called in two days linked with a day off, following the failure of previous corrective action.

8. On March 1, 2016, Grievant was placed on an attendance improvement plan for arriving late three times. The plan does not state the amount of time Grievant was late. The plan does not state the duration of the plan.

9. On July 27, 2016, Grievant was placed on an attendance improvement plan until November 2016, stating that she had incurred six late arrivals, an instance of failure to clock in or out, and a call in. Notes attached to the plan state that Grievant called in due to flooding. The plan does not state the amount of time Grievant was late.

10. By letter dated August 1, 2016, Mr. Richards suspended Grievant for five days for continued violation of Respondent's attendance policies over a four-month period in which she reported late for work five times, called off work one time, and failed to clock in one time. The letter states that Grievant was late by four minutes, two minutes, three minutes, four minutes, and eighteen minutes. Grievant explained she had a virus when

she called in, that the timeclock was not working properly when she did not clock in, and that she was late mostly due to traffic, except that she was eighteen minutes late because she had been interrupted by a patient's family member on the way to the time clock.

11. By letter dated October 18, 2016, Richards suspended Grievant for ten days for continued violation of Respondent's attendance policies for an unspecified number of occurrences.

12. In 2016, Grievant was marked "Fair, But Needs Improvement" on her interim employee performance appraisal for attendance. Again, Grievant met expectations overall in her annual employee performance appraisal, but was marked "Needs Improvement" for all three subcategories in "Availability for Work" for attendance.

13. Grievant did not grieve any of her employee performance appraisals or corrective actions.

14. A predetermination conference was held on January 13, 2017, with Grievant, Mr. Richards, and Cheryl Williams, Nurse Manager to discuss five late arrivals of "15 minutes" each. Grievant explained she had ongoing medical issues and was caring for her brother and that she had traffic and transportation issues. Grievant was offered to apply for Family Medical Leave Act ("FMLA") leave and "Employee Assistance" and declined. Grievant stated that she loved her job and she had tried to leave earlier to not be late.

15. On February 9, 2017, Grievant signed a document titled "Attendance Improvement Plan." It is unclear if this was a new attendance improvement plan, or a review of the previous plan. In the previous plans, Grievant received a letter explaining

her attendance issues and the plan. One letter also attached to it the same form "Attendance Improvement Plan" as the February 9, 2017 document.

16. In 2017, Grievant was again marked "Fair, But Needs Improvement" on her interim employee performance appraisal for attendance.

17. Almost three months after the predetermination conference, and without additional notice or predetermination conference, by letter dated April 5, 2017, Mr. Richards dismissed Grievant from employment for her failure to adhere to Respondent's attendance policies. The dismissal was made upon the recommendation of Human Resources Director Tamara Kuhn, who drafted the letter for Mr. Richards' signature. The letter notes that the previous Attendance Improvement Plans and progressive discipline had failed to correct Grievant's behavior, and notes additional attendance occurrences following the January predetermination conference.

18. Although Grievant's evening shift was from 3 – 11 p.m., she was considered late if she clocked in later than 2:45 p.m.

19. Bateman policy NURc18 discusses "shift overlap" and states that the "Tour of Duty" is from 2:45 p.m. to 11:15 p.m. The only mention of HSWs in the policy states, "The off-going HSWs will monitor the hall while the on-coming HSWs listen to the report of the off-going nurse." This policy was not listed in the dismissal letter and, although Grievant signed Employee Acknowledgment Forms dated December 10, 2014 and March 4, 2015, certifying she had received, read, and agreed to comply with a list of policies, the lists did not include NURc18.

20. DHHR's Policy Memorandum 2102 defines the workday as "8 hours including a 30 minute paid meal period. . . ." The "shift overlap" "tour of duty" is an eight

and one half hour workday. None of the submitted policies discusses this “shift overlap” or “tour of duty.”

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "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*.

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

Grievant asserts that Respondent failed to properly conduct a predetermination conference, as the dismissal included occurrences after the predetermination conference, and that Respondent failed to prove it had good cause to dismiss Grievant from employment. Respondent asserts it properly dismissed Grievant based on progressive discipline and that its decision to dismiss Grievant was not disproportionate, excessive, or arbitrary and capricious.

Respondent offered no explanation why there was a delay of almost three months between the predetermination conference and the dismissal. Although a predetermination conference was held in January, this conference only addressed five occurrences that had followed Grievant's ten-day suspension. In his dismissal letter, Mr. Richards clearly considers additional occurrences following the predetermination hearing.

"The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977). "A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment." *Id*. at Syl. Pt. 4. "The constitutional guarantee of procedural due process requires "'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). "The pretermination hearing does not need to be elaborate or constitute a full evidentiary hearing. The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" prior to termination." *Id. at 732,* 356 S.E.2d at 486. Grievant was clearly not given notice and an opportunity to respond to the alleged occurrences after the predetermination conference. Therefore, Respondent improperly considered those occurrences in the decision to dismiss Grievant from employment.

Of the five occurrences that were the subject of the predetermination conference, Respondent did not provide an official record of Grievant's time, instead introducing a "timeline" prepared by Ms. Williams, which she described as a tool she uses to ensure that the steps of progressive discipline are followed. Ms. Williams' testimony regarding her recording of time in this document was unclear. At one point she testified that Grievant was counted fifteen minutes late if she clocked in past 2:53 p.m., but at another time she testified that Grievant was counted fifteen minutes late if she clocked in "ten seconds" late. Although Ms. Williams listed what she alleges to be the actual clock in time to the second of the occurrences following the predetermination, the occurrences that were at issue in the predetermination are all simply noted as fifteen minutes. Grievant asserts she was only late by seconds at times, and that several of the incidents should have been excused. Mr. Richards did not testify, so it is unclear if he understood that Grievant was less than fifteen minutes late, however, Ms. Kuhn specifically testified that she had made her recommendation for termination based on Grievant being actually fifteen minutes late.

Further, Respondent's authority to require Grievant to report fifteen minutes prior to her shift is unclear. Grievant and Ms. Williams all referred to Grievant's shift as the 3 – 11 shift, however, Grievant was considered late based on a start time of 2:45 p.m. This appears to be based on Bateman policy NURc18, which discusses "shift overlap" and states that the "Tour of Duty" is from 2:45 p.m. to 11:15 p.m. The only mention of HSWs in the policy states, "The off-going HSWs will monitor the hall while the on-coming HSWs listen to the report of the off-going nurse." DHHR's Policy Memorandum 2102 defines the workday as "8 hours including a 30 minute paid meal period. . . ." The "shift overlap"

"tour of duty" is an eight and one half hour workday. None of the other submitted policies discusses this "shift overlap" or "tour of duty."

Ms. Williams testified that tardiness is a concern because it affects the employee's colleagues who would have to stay at work until Grievant arrived to provide continuity of care for the patients. This is also the concern expressed by Bateman's Leave Authorization and Absence Control policy, which sets out the penalties for attendance deficiencies, which states, it "results in a delay of services, additional expense of replacements, personal inconvenience to replacements, and additional work for the entire staff. . . ." In Grievant's case, Grievant arrived before her actual shift began at 3:00 p.m. As the health service workers overlap from the previous shift, there was no need for colleagues to stay later to cover any work for Grievant for the occasional minimal amount of time Grievant was late.

Finally, Grievant's repeated pattern of being tardy for a few minutes appears to be in part because of her role as caretaker of her father and brother. Although Respondent did offer for Grievant to apply for FMLA leave in the predetermination conference, it appears that Grievant does not actually understand FMLA leave and that she could request an adjusted work schedule as an FMLA accommodation. While it is true that Grievant appeared to have a significant attendance problem in the beginning of her employment, she had improved greatly and her most recent issues were only being tardy for a few minutes for the "shift overlap" while being present for the beginning of her actual shift. This is a problem that may well be addressable by FMLA.

Considering all the above, Respondent has failed to prove it had good cause to dismiss Grievant from employment. Grievant's tardiness of a few minutes during "shift

overlap" appears to be more a "technical [violation] of statute or official duty without wrongful intention" rather than "misconduct of a substantial nature directly affecting the rights and interest of the public."

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "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. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

3. "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977). "A State civil service classified employee has a property interest arising out

of the statutory entitlement to continued uninterrupted employment." *Id*. at Syl. Pt. 4. "The constitutional guarantee of procedural due process requires "'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). "The pretermination hearing does not need to be elaborate or constitute a full evidentiary hearing. The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" prior to termination." *Id. at 732,* 356 S.E.2d at 486.

4. Respondent failed to provide Grievant with notice and opportunity to be heard on part of the charges upon which her termination was based.

5. Respondent failed to prove it had good cause to dismiss Grievant from employment. Grievant's tardiness of a few minutes during "shift overlap" appears to be more a "technical [violation] of statute or official duty without wrongful intention" rather than "misconduct of a substantial nature directly affecting the rights and interest of the public."

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to her position as a Health Service Worker at Mildred Mitchell-Bateman Hospital effective April 21, 2017, to pay her back pay to that date, with statutory pre-judgment interest on the back pay, and to reinstate all other benefits to which she would have otherwise been entitled, effective that date.

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: October 5, 2017

_____

Billie Thacker Catlett
Chief Administrative Law Judge