

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CRYSTAL STAMPER,

Grievant,

v.

Docket No. 2017-1515-DHHR

**DEPARTMENT OF HEALTH AND HUMAN
RESOURCES/LAKIN HOSPITAL,**

Respondent.

DECISION

Grievant, Crystal Stamper, filed this expedited level three grievance dated January 16, 2017, against her employer, Department of Health and Human Resources, Lakin Hospital, stating as follows: “[d]ismissal without good cause.” As relief sought, Grievant seeks, “[t]o be made whole in every way including back pay and interest & all benefits restored.”

A level three hearing was held on April 12, 2017, before the undersigned administrative law judge at the Grievance Board’s Charleston, West Virginia, office. Grievant appeared in person, and by her Representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, James “Jake” Wegman, Assistant Attorney General. This matter became mature for decision on June 1, 2017, upon receipt of the last of the parties’ proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent at Lakin Hospital. Grievant’s medical practitioner released her to return to work, but did not complete the correct form. While initially there may have been a misunderstanding between Grievant and the hospital

assistant administrator about the date she was to return to work, the evidence demonstrated that Grievant was eventually given a clear directive to return to work, she failed to do so, and ceased communications with that administrator and her employer. Thereafter, Grievant was dismissed for job abandonment. Grievant denies abandoning her job, and asserts that the assistant administrator told her that she could not return to work without the correct form completed by her medical practitioner. Respondent proved by a preponderance of the evidence that Grievant abandoned her position, which constitutes good cause for her dismissal. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. At the times relevant herein, Grievant was employed by Respondent at Lakin Hospital as housekeeper. Grievant had been so employed since April 2, 2012.
2. Lakin Hospital is a state-operated long-term care facility that provides 24-hour care to its residents.
3. Mary Darst is employed at Lakin Hospital as the housekeeping and laundry supervisor. Ms. Darst was Grievant's immediate supervisor. She had been employed in that capacity since November 2015. Prior to working in this position, Ms. Darst worked in Lakin's business office and patient accounting for fifty years.
4. Danelle Wandling is the Human Resources Director for Lakin Hospital. She has been so employed since November 1, 2016.

5. Matthew Keefer is employed as the Administrator at Lakin Hospital. He has been so employed since August 2015. Rose Holicker is the Assistant Administrator at Lakin Hospital. She has been so employed since November 2014.

6. Upon information and belief, Grievant had been off work receiving workers' compensation since in or about September 2016. The specific dates of such are unknown, and no other evidence regarding Grievant's workers' compensation claim was presented at the level three hearing. By letter dated December 16, 2016, Tammy Ball, FNP, at Grievant's medical practitioner's office had a letter faxed to Mary Darst stating that Grievant was able to return to work on Monday, December 19, 2016. However, the letter stated that Grievant was restricted to light duties including no lifting over ten pounds, and no pulling or lifting mattresses or trash.¹

7. Because Director of Human Resources Wandling was new to her position at the time of the events leading up to this grievance, Assistant Administrator Holicker was working with Grievant on her leave and return to work issues. HR Director Wandling had no contact with Grievant until after Grievant was dismissed from employment.²

8. Upon receipt of FNP Ball's letter, Lakin Administration determined that this return-to-work (RTW) was not on the correct form. Assistant Administrator Holicker had a telephone conversation with Grievant on December 16, 2016. During this conversation, Assistant Administrator Holicker informed Grievant that the RTW from FNP Ball was on the wrong form, and the correct form needed completed by Grievant's medical practitioner.

¹ See, Respondent's Exhibit 1, December 16, 2016, letter.

² See, testimony of Danelle Wandling.

9. Mary Darst was informed that Grievant was to return to work on December 19, 2016. It is unknown how Ms. Darst was so informed. Thereafter, Ms. Darst placed Grievant on the schedule to work on December 19, 2016, her return-to-work date.

10. Grievant did not return to work on December 19, 2016. Instead, Grievant texted Assistant Administrator Holicker the following message that morning at 6:03 a.m.: “Rose, I wont b coming to get that paper today. Im throwing up and running a low fever. I’ll let you know later in the day about Tuesday. Thanks, Crystal.”³ However, Grievant did not contact Assistant Administrator Holicker anymore that day. Assistant Administrator Holicker replied “Ok” to Grievant’s text message.⁴

11. On December 21, 2016, Grievant sent the following text message to Assistant Administrator Holicker: “Rose, I’m sorry i haven’t let u know anything about getting that paper, I’ve just been sick and honestly haven’t thought much of it. I called the Dr.s office that day and she was already gone for her Christmas vacation and wont be back until the 27th. So Ill pick it up and take it out to her then. Have a Merry Christmas, Crystal.”⁵ To this, Assistant Administrator Holicker replied as follows: “[y]ou need to report back to work since she has released you.”⁶ Grievant did not reply to Assistant Administrator Holicker’s text message.

12. Upon information and belief, Grievant had no further communication with Assistant Administrator Holicker after her December 21, 2016, text messages. Further, Grievant did not return to Lakin Hospital on December 27, 2016, as she had stated in her

³ This is a direct quote from the text message exhibit, and includes typographical errors.

⁴ See, Respondent’s Exhibit 2, screen shot of December 19, 2016, text messages.

⁵ This is a direct quote from the text message exhibit, and includes typographical errors.

⁶ See, Respondent’s Exhibit 2, screen shot of December 19, 2016, text messages.

December 21, 2016, text message. Grievant did not contact anyone at Lakin Hospital until after January 6, 2017.

13. By letter dated January 6, 2017, signed by Matthew Keefer, Grievant was informed that she was being dismissed from her employment for job abandonment effective that same date. This letter was mailed to Grievant by certified mail, return receipt requested.⁷ This letter was drafted by Danelle Wandling for Administrator Keefer's signature at the request of attorney Julie Thomas, who is believed to work in DHHR's Office of Human Resource Management.⁸

14. The January 6, 2017, dismissal letter stated, in part, as follows:

"[y]our dismissal is the result of absences without approval or contact on December 19, 2016 through January 6, 2017. Specifically, you did not report to work nor did you notify your supervisor regarding the reasons for your absence or request annual or sick leave. Therefore, in compliance with W. Va. Code R. § 143-1-14.6, the period of absence from December 19th, 2016 up until today's date, shall be charged to unauthorized leave. Your pay will be docked for your scheduled work hours during this period. You will be paid for all annual leave accrued and unused as of your last working day in accordance with the Wage Payment and Collection Act. Whereas you are being dismissed due to job abandonment, you are ineligible for severance pay. . . You may respond to the matters of this letter in writing or in person, provided you do so within fifteen days of this date of this letter. . . ."⁹

15. It is unclear who made the decision to dismiss Grievant for job abandonment. Human Resources Director Wandling testified that Attorney Julie Thomas asked her to draft the dismissal letter from a template. Administrator Keefer testified that HR Director Wandling, Ginny Fitzwater at OHRM, and he made the decision to dismiss

⁷ See, Respondent's Exhibit 5, January 6, 2017, dismissal letter.

⁸ See, testimony of Danelle Wandling.

⁹ See, Respondent's Exhibit 5, January 6, 2017, dismissal letter.

Grievant. Administrator Keefer testified that he based his decision on information provided to him by Assistant Administrator Holicker and HR Director Wandling. Assistant Administrator Holicker testified that she was not involved in the decision to dismiss Grievant from employment.

16. After receiving her dismissal letter, Grievant went to Lakin Hospital and met with Administrator Keefer regarding her dismissal. Human Resources Director Wandling was present during at least part of this meeting. During this meeting, Administrator Keefer reviewed the January 6, 2017, dismissal letter, and told Grievant that she could file a grievance. It is unknown when this meeting occurred. However, it appears that Grievant signed for the January 6, 2017, letter on January 14, 2017.¹⁰

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 ST. R. § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). “A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). “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

¹⁰ See, Respondent's Exhibit 5, January 6, 2017, dismissal letter.

17, 1993), *aff'd*, Pleasants Co. Cir. Ct., Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent asserts that it properly terminated Grievant's employment for job abandonment because she failed to return to work after being released by her medical practitioner. Grievant denies Respondent's claims, asserting that Assistant Administrator Holicker told her that she could not return to work until her medical practitioner completed the correct RTW form. Therefore, Grievant argues that she did not abandon her job.

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 *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (*per curiam*).

The West Virginia Division of Personnel Administrative Rule provides, in part, that

[a]n appointing authority may dismiss an employee for job abandonment who is absent from work for more than three (3) consecutive workdays or scheduled shifts without notice to the appointing authority of the reason for the absence or approval for the absence as required by established agency policy. . . The dismissal is effective fifteen (15) days after the appointing authority notifies the employee of the dismissal. Whereas job abandonment is synonymous with the term resignation, a predetermination conference is not required and an employee dismissed for job abandonment is not eligible for severance pay.

W.VA. CODE ST. R. § 143-1-12.2.c. (2016).¹¹

Many facts are disputed in this matter. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge should consider the following: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and, 4) the plausibility of the witness's information. See *Id.*; *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant claims that Assistant Administrator Holicker told her that she could not return to work without the correct RTW form completed by her medical practitioner, and that the letter sent on December 16, 2016, was not sufficient. Grievant, therefore, argues

¹¹ See, Respondent's Exhibit 3.

that she did not abandon her job, and she was trying to get the correct form completed. Assistant Administrator Holicker claims that she told Grievant to return to work on December 19, 2016, as her medical practitioner's letter stated, and that she could get the correct form to them later on.

Grievant testified at the level three hearing. Grievant displayed the appropriate attitude toward the proceedings, and answered the questions asked of her. Grievant was not evasive. However, as Grievant is seeking reinstatement into her position, she is an interested party and has motive to be untruthful. It was obvious from Grievant's testimony that she and Assistant Administrator Holicker do not get along well. Grievant even testified that Assistant Administrator Holicker had been trying to get rid of her for years. However, from the text messages presented at the level three hearing, Grievant did not contact Assistant Administrator Holicker on December 20, 2016, and failed to show up at the hospital even to get the correct form. Further, on December 21, 2016, Grievant texted that she could not get the form completed until her medical practitioner's office reopened on December 27, 2016, and that she would come and get the form from the hospital on that date. To this, Assistant Administrator Holicker clearly informed Grievant that she needed to return to work as she had been released to do so. This is undisputed. Grievant did not respond in any way to that text message, did not contact Lakin, and did not do or say anything to suggest that there was confusion or a misunderstanding concerning that text message. Grievant simply stopped communicating with her employer. Also, Grievant did not go to Lakin on December 27, 2016, as she had stated in her last text to Ms. Holicker. It does not appear from the evidence presented that Grievant contacted anyone at Lakin until after she received her dismissal letter. It seems implausible that Grievant

could have misunderstood Assistant Administrator Holicker's text on December 21, 2016, about returning to work, and that she would have taken no action in response to the same, even if it were to call someone else.

Assistant Administrator Holicker testified at the level three hearing. She displayed the appropriate demeanor, and answered the questions asked of her. She did not appear evasive. However, as Assistant Administrator Holicker's instructions are an issue in this matter, and that such formed, at least, part of the basis for Grievant's dismissal, she has an interest in the matter which could give her motive to be untruthful. Assistant Administrator Holicker testified that she told Grievant on December 16, 2016, during their phone call that the letter from the doctor was not on the correct RTW form, and that the completed correct form was needed. This is consistent with a portion of Grievant's testimony. However, Assistant Administrator Holicker further testified that she told Grievant to return to work on December 19, 2016, despite lacking the incorrect form, and that she could work while trying to get the correct form completed. This is at odds with what Grievant claims. In response to Grievant's December 19, 2016, text message that begins with "Rose, I wont b coming to get that paper today. . . ," Assistant Administrator Holicker simply said "Ok." She made no attempt to say anything about Grievant coming into work despite not having the correct RTW form. However, the rest of Grievant's message stated that she was ill and could not come in that day; therefore, it may not have made any difference.

Given the testimony of Grievant and Assistant Administrator Holicker, it is plausible that there could have been a simple misunderstanding about Grievant returning to work on December 19, 2016, without the correct form having been completed by the medical

practitioner. However, any misunderstanding could have been rectified on December 21, 2016, when Assistant Administrator Holicker clearly stated that Grievant was to return to work because she had been released by her medical practitioner. Grievant did not respond to this text message, did not return to Lakin, and did not make any effort to contact anyone else to question this directive, such as Administrator Keefer or Human Resources Director Wandling. Grievant testified that she asked Mary Darst what to do, but Ms. Darst denied this, saying that Grievant did not contact her until after she had received the dismissal letter in January.

Additionally, Grievant said in her text message to Assistant Administrator Holicker on December 21, 2016, that she would be in on December 27, 2016, to get the correct form, but she did not show. While there were issues with both witnesses' testimony, Grievant was less credible than Assistant Administrator Holicker. The undisputed evidence clearly shows that no matter what Assistant Administrator Holicker said to Grievant on December 16, 2016, Grievant failed to respond to Assistant Administrator Holicker, failed to appear at Lakin when she said she would, failed to attempt to remedy any misunderstanding about returning to work on December 19, 2016, and failed to follow Assistant Administrator Holicker's clear directive to return to work which was sent on December 21, 2016. The undisputed evidence demonstrates that Grievant stopped communicating with her employer and/or management until she received her dismissal letter. Grievant was absent from work for more than three consecutive workdays without notice to management or approval for her absences.

Accordingly, Respondent has proved by a preponderance of the evidence that Grievant abandoned her job at Lakin Hospital, which constitutes good cause for her

dismissal from employment by letter dated January 6, 2017. Therefore, this grievance is denied.

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 ST. R. § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). “A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). “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), *aff'd*, Pleasants Co. Cir. Ct., Civil Action No. 93-APC-1 (Dec. 2, 1994). 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 *Sloan v.*

Dep't of Health & Human Res., 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam).

3. Pursuant to the West Virginia Division of Personnel Administrative Rule, “[a]n appointing authority may dismiss an employee for job abandonment who is absent from work for more than three consecutive workdays or scheduled shifts without notice to the appointing authority of the reason for the absence as required by established agency policy. . . .” W.VA. CODE ST. R. § 143-1-12.2.c. (2016).

4. Respondent proved by a preponderance of the evidence that Grievant abandoned her position at Lakin Hospital which constitutes good cause for her dismissal.

Accordingly, this grievance is **DENIED**.

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* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: August 29, 2017.

Carrie H. LeFevre
Administrative Law Judge