**THE WEST VIRGINIA PUBLIC EMPLOYEES**
**GRIEVANCE BOARD**

**SAMANTHA RAE DUNLAVY,**
**Grievant,**

**v.** **Docket No. 2019-1213-DHHR**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/**
**WILLIAM R. SHARPE, JR. HOSPITAL,**
**Respondent.**

## DECISION

Grievant, Samantha Dunlavy, filed this action against her employer, William R. Sharpe, Jr. Hospital, directly to Level Three alleging a suspension without good cause. For relief, Grievant seeks to be made whole in every way with back pay with interest and benefits restored. A Level Three evidentiary hearing was conducted before the undersigned on July 8, 2019, at the Grievance Board's Westover office. Grievant did not appear in person, but by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Mindy M. Parsley, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on August 12, 2019.

## Synopsis

Grievant is employed as a Health Service Worker at the William R. Sharpe, Jr. Hospital. Grievant challenges her suspension due to attendance, absenteeism and tardiness issues. The record established that Respondent met its burden of proof and established by a preponderance of the evidence that Grievant had a long history of

absenteeism which warranted a three-day suspension after past progressive discipline measures were ineffective.

The following Findings of Fact are based upon the record of this case.

**Findings of Fact**

1. Grievant was employed by Respondent as a Health Service Worker at the William R. Sharpe, Jr. Hospital. Grievant's normal shift was 7 a.m. to 7 p.m.

2. On May 9, 2018, Grievant received a verbal reprimand regarding her no call/no show on May 9, 2018, as well as frequent absenteeism. The E2 Nurse Manager and the E2 Lead Nurse attempted to call Grievant more than 10 times the morning of May 9, 2018, when she failed to show up for her scheduled shift. Grievant did not grieve this reprimand.

3. On May 19, 2018, Grievant received a written reprimand due to her no call/ no show for a scheduled 12-hour shift from 7 a.m. to 7 p.m. She arrived at work on that day at 11:16 a.m. Grievant did not grieve this reprimand.

4. On May 31, 2018, Grievant was placed on an Attendance Improvement Plan. Grievant was placed on the AIP due to previous issues with attendance.

5. On August 14, 2018, Grievant received a letter notifying her that she was scheduled to attend a Predetermination Conference on August 20, 2018, regarding concerns about her continued tardiness and absenteeism.

6. On August 20, 2018, Grievant received a written reprimand for a no call/no show for scheduled 7 a.m. to 11 p.m. shift on July 19, 2018. Grievant clocked in tardy for her scheduled shift at 9:19 a.m. Grievant did not grieve the reprimand.

7. On August 23, 2018, Grievant's Employee Performance Appraisal 2 was completed by Mindy Hall, E2 Nurse Manager. Grievant received a rating of "does not meet expectations" based on her failure to adhere to policy. Grievant did not grieve this EPA 2.

8. On January 23, 2019, Grievant received a letter notifying her that she was scheduled to attend a Predetermination Conference on January 31, 2019, regarding allegations of her continued violations of attendance policy. The record established that Grievant called off fourteen times between November 2018 and January 2019. In addition, Grievant reported late to work on two occasions between November 2018 and January 2019. As noted previously, there were also occasions of no call/no shows which caused staffing problems for the hospital.

9. Grievant was suspended for three working days by letter dated March 1, 2019.

10. Grievant acknowledged that she was tardy or absent on the dates that were cited by Respondent.

11. Grievant's absenteeism and tardiness caused disruption at the hospital resulting in other Health Service Workers being required to be held over, work double shifts, or to be called to work.

## Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v.*

*Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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*.

Grievant was suspended for three working days after previous attempts at progressive discipline had failed to correct her problems with attendance, absenteeism, and tardiness. It is undisputed that Respondent afforded Grievant progressive disciplinary action. The record is replete with evidence including Employee Performance Appraisals, Attendance Improvement Plans and other forms of documentation addressing the need for attendance during scheduled shifts. This evidence documented Grievant's continued issues with excessive absenteeism and tardiness.

Respondent has met its burden of proof and demonstrated by a preponderance of the evidence the charge that Grievant was in violation of the hospital's policy concerning excessive absenteeism. In addition, Respondent established that Grievant had a pattern

of being a no call/no show for scheduled shifts during the relevant period of this grievance. Notwithstanding Grievant's argument that a technical math error of the absenteeism policy occurred, it appears from the record that Grievant was aware that her actions as an employee of the hospital were unacceptable. As counsel for Respondent aptly points out, employers have the right to expect that their employees will come to work on time and to follow instructions that do not impinge on their health and safety. *Page v. W. Va. Dep't of Health & Human Res.*, Docket No. 02-HHR-049 (July 5, 2002). It is also undisputed in this case that Grievant's absenteeism and tardiness caused disruption at the hospital resulting in other Health Service Workers being required to be held over, work double shifts, or to be called to work. The undersigned cannot view a three-day suspension in this case as unwarranted.

The following Conclusions of Law support the decision reached.

**Conclusions of Law**

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

2. Employers have the right to expect that their employees will come to work on time and to follow instructions that do not impinge on their health and safety. *Page v. W. Va. Dep't of Health & Human Res.*, Docket No. 02-HHR-049 (July 5, 2002).

3. Respondent has met its burden of proof and established by a preponderance of the evidence that Grievant had a long history of absenteeism which

supported a three-day suspension after progressive disciplinary measures were ineffective.

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, 2018).

**Date: August 28, 2019**

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**Ronald L. Reece**
**Administrative Law Judge**