THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CHRISTY WATTON,
Grievant,

v. **Docket No. 2018-0661-DHHR**

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

DECISION

Grievant, Christy Watton, filed this action directly to Level Three on or about November 6, 2017. Grievant's Statement of Grievance is "[F]unctional discharge: Grievant is not allowed to return to work and was forcibly placed on 'personal leave' along with threat of 'permanent' dismissal." The relief sought is "to be made whole in every way including back pay with interest and all benefits restored."

A Level Three evidentiary hearing was held on February 28, 2019, before the undersigned at the Grievance Board's Westover office. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, James "Jake" Wegman, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on April 24, 2019.

Synopsis

Grievant was employed by Sharpe Hospital as a Licensed Practical Nurse. Grievant's duties consisted of providing direct care to patients and mandatory overtime

was an essential function of the position. Grievant suffers from Lyme Disease. Record established that Grievant missed substantial periods of work, not only during extended periods of leave, but also unscheduled absences, which were particularly difficult in a setting which requires around the clock patient care. Grievant is unfortunately physically unable to perform the duties of her position. The facts of this case demonstrate that Respondent established the existence of good cause for Grievant's dismissal.

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

Findings of Fact

1. Grievant was employed by Sharpe Hospital as a Licensed Practical Nurse ("LPN"). LPN's provide direct care to patients and mandatory overtime is an essential function of the position.

2. Grievant suffers from Lyme Disease and missed a great amount of work. Attendance records from January 2016 through October 2017 show she regularly missed entire weeks of work. Grievant never worked all required hours during a month. She was regularly placed on Unauthorized Leave because she lacked annual and sick leave.

3. Carlotta Gee, EEO Officer for Respondent, reviewed Grievant's time sheets and indicated that Grievant regularly missed work. Grievant often worked less than 50% of her scheduled work time.

4. Grievant received an Attendance Improvement Plan dated December 9, 2016, which noted she had missed approximately 53% of scheduled work between June 1, 2016 through November 30, 2016. During this 183 working day period, Grievant as absent from work without prior authorization 126 times and also late 53 times.

5. On July 18, 2017, Grievant was issued a written reprimand. It noted that she was late for work 65 times in the previous six months and also had 55 call-ins.

6. A reasonable accommodation is an action that an employer undertakes to the work environment to assist the employee to perform the essential functions of his or her position. Employers do not have to grant accommodations that create an undue hardship.

7. Dawn Adkins, Director of Employee Management with the Office of Human Resource Management, determines if an employee cannot perform the essential functions of their position, the Office of Human Resource Management then starts an interactive process to try to assist them to find another position. The employee is sent an application to determine which positions they are qualified to occupy. Human Resource directors are then emailed regarding available positions to see if any can accommodate the employee with restrictions.

8. On September 20, 2016, Grievant contacted Ms. Adkins to discuss taking leave under a medical leave of absence or Family Medical Leave Act. Ms. Adkins indicated that the September 20 email was her first communication with Grievant in an attempt to help accommodate her condition.

9. Ms. Adkins responded by asking if there was any possibility of some way for Grievant to perform her job instead of being off work. Grievant indicated that she suffered from Lyme Disease, which resulted in her missing work. Grievant indicated that she needed an accommodation under the Americans with Disability Act.

10. Ms. Adkins provided Grievant with ADA forms for her physician to complete. On October 21, 2016, Grievant's physician submitted the required documentation for an

accommodation during flair up of the Lyme Disease. The physician opined that Grievant's condition was not permanent and would be resolved by February 2018. The physician opined that Grievant would not be able to work during flair ups.

11. On May 8, 2017, Grievant's physician submitted additional documentation. The physician opined that he was uncertain on Grievant's period of incapacity. The physician stated that Grievant should not work more than four days in a row nor more than twelve hours per day.

12. By letter dated June 21, 2017, Ms. Gee communicated to Grievant that to continue to allow her to not work during flare ups was an unreasonable accommodation. In addition, Grievant would be required to submit a job application to search for another position for the Grievant.

13. Ms. Gee's letter stated that she would continue to work with Grievant for sixty days, in order to help find another job position. If Grievant is unable to be placed in an alternative position, she would be placed on a Personal Leave of Absence. Grievant was notified that she would be dismissed from employment if she is unable to return to work after a sixty-day PLOA.

14. Ms. Gee reviewed Grievant's attendance records which demonstrated that she was having a difficult time with attendance. This proved to be an undue hardship on the employer.

15. ADA helps employees with disabilities continue to work. Ms. Gee indicated that Respondent's position was that even with an accommodation, a hospital employee must be able to work, be mandated, and work overtime.

16. Grievant submitted a job application to Ms. Gee. By letter dated August 10, 2017, Ms. Gee submitted to Grievant a list of job classifications for which she was qualified.

17. Ms. Gee worked with other human resources officials in an attempt to locate an alternative job position for Grievant. Ms. Gee explained that the position needed to be part time and flexible because Grievant was not able to work during flair ups. Ms. Gee was not able to locate such a position for Grievant.

18. Grievant continued to miss a substantial amount of work. On October 17, 2017, Grievant was placed on PLOA through December 16, 2017. Ms. Gee indicated that offering a PLOA is not required, but it was offered to help individuals in an attempt to bring them back to work.

19. Grievant was unable to secure an alternative job position. Grievant was also unable to regularly attend work at Sharpe Hospital. Grievant was unable to return from the PLOA. Grievant exhausted her FMLA and MLOA, pursuant to the relevant acts, in December 2016.

20. Mandatory overtime is an essential function of the Licensed Practical Nurse position in order to maintain staffing levels in case of employee call-offs. If an oncoming shift member fails to report, Sharpe Hospital will mandate staff from the current shift to remain at work, until a replacement worker can be brought in to cover the shift.

21. An essential function of the LPN job is to be able to work overtime if another nurse calls-off and to be able to work your scheduled shift.

22. Grievant was dismissed by letter dated December 1, 2017. The dismissal was due to Grievant's "inability to perform the essential functions of your position with or

without accommodation and subsequent inability to return to work from a leave of absence without pay." Respondent's Exhibit No. 11.

23. Grievant acknowledged that she is still unable to regularly work at Sharpe Hospital due to her medical conditions.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018); *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). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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).

It is well established that "an employer may expect its employees to arrive at work, and be ready to work, on time at the beginning of their shifts." *Holland v. Dep't of Health*

& Human Res./Mitchell-Bateman Hosp., Docket No. 06-HHR-126 (May 31, 2006). Continual, repeated absenteeism rises to the level of a substantial issue, for which termination has been found to be a reasonable outcome. An essential element of employment is to be on the job when your services are required. *Barnes v. W. Va. Dep't of Trans./Div. of Highways*, Docket No. 99-DOH-305 (Jan 31, 2000). Whatever an employer's workload, an extended absence by an employee will tend to disrupt its operations. *Barnes, Id*.

Although the Grievance Board has no authority to determine liability under the ADA, consideration of the act is still relevant to this case in determining whether Respondent had good cause to terminate Grievant. *See Martin v. W. Va. Dep't of Health &Human Res./Jackie Withrow Hosp.*, Docket No. 2011-1590-DHHR (May 18, 2012), *aff'd*, Kanawha County Circuit Court, Civil Action No. 12-AA-79 (December 7, 2012); *Ruckle v. W. Va. Dep't of Health & Human Res./Office of Maternal and Child Health*, Docket No. 04-HHR-367 (December 22, 2005); *Cf. Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

In the instant case, Grievant missed substantial periods of work, not only during extended periods of leave, but also unscheduled absences, which were particularly difficult in a setting which requires around the clock patient care. Grievant's numerous absences beginning in 2016 caused her to be unreliable as an LPN at Sharpe Hospital. Respondent's determination that Grievant's absenteeism was excessive is accepted since Grievant offered no evidence that any other employee at Sharpe Hospital was absent to the same extent.

The record established that Respondent attempted to find Grievant an alternative position as a reasonable accommodation since she was not able to meet the essential functions of her position. For reasons set out above, no position was found. Grievant is unfortunately physically unable to perform the essential duties of her position. Grievant's health did not improve, and she remained unable to attend work regularly. The record supports a finding that dismissal was a necessary action so that the position may be filled by an individual who is capable of fulfilling the duties. An employee may be dismissed when his/her absences due to health conditions render him/her unable to fulfill the duties of the position. *Hayward v. Dep't of Health & Human Res.*, Docket No. 07-HHR-086 (July 23, 2007); *Fullen v. Bd. of Trustees/W. Va. Univ.*, Docket No. 97-BOT-460 (June 18, 1998). Unfortunately, the facts of this case demonstrate that Respondent established the existence of good cause for Grievant's dismissal.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

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).

3. It is well established that "an employer may expect its employees to arrive at work, and be ready to work, on time at the beginning of their shifts." *Holland v. Dep't of Health & Human Res./Mitchell-Bateman Hosp.*, Docket No. 06-HHR-126 (May 31, 2006).

4. An employee may be dismissed when his/her absences due to health conditions render him/her unable to fulfill the duties of the position. *Hayward v. Dep't of Health & Human Res.*, Docket No. 07-HHR-086 (July 23, 2007); *Fullen v. Bd. of Trustees/W. Va. Univ.*, Docket No. 97-BOT-460 (June 18, 1998).

5. Respondent established by a preponderance of the evidence that Grievant was unable to fulfill the essential duties of her position due to health conditions. Respondent attempted to provide reasonable accommodations, however; this was to no avail. The facts of this case establish that Respondent established the existence of good cause for Grievant's 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 (2018).

Date: May 16, 2019

_____

Ronald L. Reece
Administrative Law Judge