BARBARA LEWIS, .

Grievant, .

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v. . Docket Number: 94-HHR-1146

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WEST VIRGINIA DEPARTMENT OF HEALTH .

AND HUMAN RESOURCES at LAKIN .

STATE HOSPITAL, .

Respondent. .

D E C I S I O N

Barbara Lewis (hereinafter Grievant) filed this grievance directly at level four pursuant to the provisions of the Grievance Procedure for State Employees, West Virginia Code §§29-6A-1, et seq., on December 29, 1994. Grievant initiated this complaint against her employer, the West Virginia Department of Health and Human Resources (hereinafter Health), protesting her dismissal from employment effective December 14, 1994. An evidentiary hearing was held at the Grievance Board's office in Charleston, West Virginia on March 13, 1995, and the case became mature for decision. (See footnote 1) Neither party submitted post-hearing briefs. The majority of material facts are not in dispute and shall be set forth below as appropriate Findings of Fact.

Findings of Fact

1. Grievant was employed by Health at its Lakin State Hospital (LSH) as a Food Service

Worker until her dismissal on December 14, 1995.

2. On November 2, 1993, Grievant injured her right hand while at work. This injury caused her to seek medical attention, and thereafter, to be off work until February 14, 1994. Grievant continued to suffer both pain and swelling which resulted in her inability to use her hand effectively.

3. During this initial period Grievant was off work, she received temporary total disability benefits from the State's Workers' Compensation system (hereinafter WCF).

4. After Grievant returned to work on February 14, 1994, she again experienced pain and swelling in her right hand. Grievant sought medical attention for her injury, and was thereafter awarded a permanent partial disability determination from the WCF.

5. Grievant was awarded a six-month medical leave of absence by her employer on June 14, 1994.

6. By letter dated November 10, 1994, James W. Burke, Administrator of the LSH, informed Grievant that her medical leave of absence was scheduled to end on December 13, 1994. Grievant was requested to return to work on December 14, 1994. She was also notified that her "failure to return as scheduled, without approval of further leave, would result in your [her] dismissal from employment."

7. Grievant neither responded to this letter nor returned to work on the scheduled date. Consistent with the statement in the letter, Grievant was dismissed from employment.

8. Prior to the issuance of this letter, Grievant informally asked her employer what options she had at the end of her leave of absence and was told that her only option was to request a personal leave of absence.

Discussion

Grievant's legal challenge to her dismissal is hard to ascertain. It is clear from Grievant's testimony that she does not consider herself capable of working due to the injury to her hand, even though she has only received a permanent partial disability determination from the WCF. (See footnote 2) Grievant appears to argue that she should not have been dismissed from employment, but instead, she should have been placed on some form of leave without pay until she was capable of returning. Grievant does not contend that she was discriminated against because she had filed a workers' compensation claim.

Finally, Grievant stated that she did tell Mr. Burke, prior to November 10, 1994, she would not be able to return to work at the end of her medical leave of absence. She testified that she asked if she could be placed on another leave of absence and Mr. Burke responded that the only leave available would be a personal leave which he was reluctant to grant because he would have to offer the same option to all other employees who would request such. She also stated that she spoke with someone in the personnel office at LSH concerning this issue. No evidence supporting or contradicting this testimony was offered by Respondent.

Health simply contends that it had just cause to terminate Grievant's employment pursuant to the Division of Personnel's applicable administrative regulations dealing with leave of absences after Grievant failed to return to work on December 14, 1994. It maintains that it has never received any formal notification other than that Grievant's injury has resulted in a determination that she has 2% permanent and partial disability; therefore, it contends that Grievant should have been able to return to work. Keith Stouffer, LSH's Assistant Administrator testified that it was not feasible to keep Grievant's position open or any other similar budgetary position open, given that Grievant's return date to work was deemed undeterminable. Given the evidence of record, it is determined that Grievant's claim must be denied.

143 CSR 1, Section 15.08(d) states, in pertinent part,

> End of leave: At the expiration of a leave of absence without pay, the employee shall be reinstated to his or her former position, or to one of comparable pay and duties, without loss of rights, unless the position is nolonger available due to a reduction-in-force. . . . Failure of the employee to report promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to the appointing authority, is cause for dismissal. (Emphasis added).

Sections 15.08(d) and 15.09 of these regulations are intended to closely mirror the reinstatement and anti-discrimination provisions under the State's laws dealing with workers' compensation in W. Va. Code §23-5A-3.

As our Supreme Court recognized long ago,

> In order to support a dismissal of a covered employee, the evidence must show good cause thereof. Such cause must be substantial. 'The cause must be one which specifically relates to and effects the administration of the office, and must be restricted to something of a substantial nature directly effecting the rights and interests of the public. An officer should not be removed from office on trivial or inconsequential matters, or for mere technical violations of statute or official duty without wrongful intention.'

Guine v. Civil Service Commission, 149 W.Va. 461, 468, 141 S.E.2d 364, 369 (1965), citing, 67 C.J.S., Officers, Section 60b. Basically, Section 15.08(d) establishes that the abandonment of a position by an employee is just cause for his/her dismissal. The question herein is whether Grievant abandoned her position, therefore, giving Health the ability and authority to terminate her employment.

Under 143 CSR 1, Section 5.08(d), an appointing authority has just cause to terminate an employee from employment for that employee's failure to return to work at the end of his/her leave of absence, unless the employee submits evidence to the appointing authority in advance of the end of the leave, which would justifythe appointing authority's decision to keep that employee's position open. Here, the only evidence that was presented to establish that Grievant submitted satisfactory reasons in advance as to why she should not be terminated on December 14, 1994, was Grievant's own very general testimony that she spoke with Mr. Burke and the LSH's personnel office sometime prior to November 1994 and opined that she was not able to return to work in December. No physicians' statements were presented to the employer nor was there any other evidence from which it could reasonably be determined that Grievant was, at that time, injured more severely than her original WCF determination would indicate.

Health did not violate either Code §23-5A-3 or the Division of Personnel's companion regulation, 143 CSR 1, Section 15.09, because it did keep a position open for Grievant to assume at the end of her leave of absence. Grievant simply refused to show up and attempt to work in her former position or, if that were not possible, another position which required different duties.

The only violation which could be supported would be of 143 CSR 1, Section 15.08(d), and this is not supported by the evidence. Grievant was not eligible for a second medical leave of absence because only one six-month leave may be granted within each twelve-month period. The only leave Grievant would have been eligible for would have been a personal leave pursuant to 143 CSR 1, Section 15.08(A). This leave of absence is discretionary and must be requested in writing. Grievant did not make such a request. Therefore, given the evidence of record, it is determined that Health did not violate 143 CSR 1. Section 15.08(d).

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. In this case, Health has the burden of proving its case by a preponderance of the evidence. W. Va. Code §29-6A-6.

2. Health has proven by a preponderance of the evidence that Grievant was properly dismissed from employment pursuant to the Division of Personnel's administrative regulation, 143 CSR 1, Section 15.08(d), for having failed to return to duty at the end of a medical leave of absence.

Therefore, this grievance is hereby **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

April 25, 1995

Footnote: 1At the hearing in this matter, Grievant's counsel requested that he be permitted to supplement the record with a copy ofGrievant's workers' compensation file. Ten days were given for the submission of said information but no documents have been presented. In any event, based upon a thorough review of the evidence herein, it is determined that such material would neither have been relevant nor material to the legal issues in this case.

Footnote: 2Grievant states that this determination has been appealed.