VIRGINIA A. MILLER

v. Docket No. 96-HHR-116

DEPARTMENT OF HEALTH AND HUMAN RESOURCES

D E C I S I O N

Grievant, Virginia A. Miller, employed by the Department of Health and Human Resources (Respondent) as an Economic Service Supervisor, filed a grievance directly to level four on March 15, 1996, following the termination of her employment. The reason given by Respondent for the dismissal was Grievant's continued and extended absence from work, without a physician's statement. After multiple continuances an evidentiary hearing was conducted on September 17, 1996. The matter became mature for decision on October 22, 1996, the last day on which Grievant could file fact/law proposals.

Respondent bears the burden of proof in this, as in all, disciplinary matters. W.Va. Code §29-6A-6. Schmidt v. W.Va. Dept. of Highways, DOH-88-086-3 (March 31, 1989). In support of the decision to dismiss Grievant from employment, Respondent offered the following evidence, set forth in narrative form herein, without objection from Grievant.

In 1993 Grievant used 113 hours (14 days) of sick leave. Usage continued to escalate in 1994 when she used 230.5 hours (28 days), and 1995 at 383 hours (47 days). In January 1996, Grievant used 88 hours (11 days) of sick leave. By memorandum dated January 30, 1996, Kathryn A. Bradley, Community Service Manager of Berkeley, Morgan, and Jefferson Counties, memorialized a discussion she had conducted with Grievant on January 16, 1996, regarding her "excessive use of sick leave." Ms. Bradley advised that she had directed Grievant at that time that, effectiveimmediately, she would be required to present a doctor's excuse within two days after returning from sick leave. Failure to comply would result in the absence being charged as unauthorized leave.

In the memorandum, Ms. Bradley continued to recount that when Grievant called the office on January 22, 1996, to report that she was ill and would not be at work, Grievant was

reminded that she would be required to present a doctor's excuse to substantiate sick leave usage. Grievant called in on January 23, 1996, and advised the Switchboard Operator of her continued illness. This action was contrary to office procedure which states that she is to report to Ms. Bradley, or her back-up. When Grievant attempted to call in sick to the Switchboard Operator on January 24, the Operator advised her that she could not accept the message and would transfer the call to Ms. Bradley. Ms. Bradley stated that when she picked up the telephone, no one was there. She made several attempts to call Grievant throughout the day but was unable to make a connection since the line was busy.

Ms. Bradley could not verify any report that Grievant had called to report that she would not be at work on January 25; however, she did call on January 26 and advised the Operator that she had a doctor's appointment that day. The call was transferred to Ms. Bradley's office, but she was not available to receive it. Having reviewed the foregoing events, Ms. Bradley advised Grievant that January 23, 24, 25, and 26, would be considered unauthorized absences for which her pay would be docked. Ms. Bradley further stated that she was in need of a full-time supervisor and that it wasunfair to continually shift Grievant's work load to other employees. She recommended that Grievant review Respondent's sick leave policy on pages 25 and 26 of the Employee Handbook. The letter was sent by certified mail and received by Grievant on January 30, 1996.

The following month, Grievant reported off work due to illness on February 1, 2, 5, 6, 7, 8, 9, 13, 14, 15, 16, and 20. By letter dated February 21, 1996, John Hammer, Director of Region III, notified Grievant she must submit a physician's statement “on the enclosed form” by February 27, substantiating the necessity for her absence since January 22, and the continued need for leave. Grievant was also directed to submit attendance sheets (PO-1As) for December, January and February, by February 27, or, return to work with a physician's statement substantiating the need for her absence since January 22, 1996. Mr. Hammer warned Grievant that in the event she failed to comply with the directives, the letter would serve as a 15 day notice of her dismissal. Mr. Hammer further offered Grievant the opportunity to discuss with him, in person or in writing, if she believed the facts and grounds recited were in error or why the action would be inappropriate. Grievant received the letter by certified mail on March 5, 1996, and because she took no action, the dismissal became effective March 8,

1996.

Respondent argues that the request for a physician's statement was in compliance with DHHR Policy Memorandum 2107 (February 28, 1992), which provides that "[w]hen a pattern of abuse of sick leave has been recognized, the employer may require substantiation of claims of illness through a physician's verification for each use of sick leave, including periods of less than 3 consecutive work days . . . . If an employee fails to produce verification as requested, the employee shall be subject to discipline, the absence shall be considered unauthorized leave, and the employee's pay will be docked accordingly." In addition to its own policy, Respondent asserts that the request for verification was consistent with Division of Personnel (Personnel) Rule 15.04(g)(2) which requires that employees absent due to illness shall provide a physician's statement from the attending physician "for all consecutive days of sick leave granted beyond three working days. The physician's statement shall specify the period of incapacity and state that the employee was unable to perform his or her job . . . ."

Respondent further relies upon Personnel Rule 15.05 which states in pertinent part: [w]hen an employee appears to have a pattern of leave abuse including such frequent use of sick leave as to render the employee's services undependable, the appointing authority may request appropriate substantiation of the employee's claim for leave. For example, verification of an illness of less than three days. The appointing authority must give the employee prior written notice of the requirement for appropriate substantiation.

When Grievant's use of sick leave became prolonged, without a physician's statement, Respondent argues that dismissal was appropriate under Personnel Rule 15.04(g)(4), which provides:

[f]or extended periods of sick leave, a prescribed physician's statement form confirming the necessity for continued leave must be submitted every thirty (30) calendar days. Failure to produce the required statement is grounds to terminate further sick leave benefits and the appointing authority shall place the employee on unauthorized leave. The appointing authority shall give the employee fifteen days written notice of such action. Failure of the employee to promptly submit the required statement at the expiration of the fifteen day notice period, except for satisfactory reasons submitted in advance to the appointing authority, is cause for dismissal . . . .

Because it followed all applicable policies, and Grievant failed to provide the physician's statement, Respondent argues that the termination of her employment was properly processed.

Representing herself, Grievant explained that she has experienced many health problems, including but not necessarily limited to, suffering a heart attack in 1990, hardening of the arteries,asthma, and bronchial problems which nearly led to pneumonia. It is not entirely clear, but appears that the bronchial distress was the cause of Grievant's 1996 absences. She stated that instead of being admitted to the hospital she chose bed rest at home. Her condition was so depleted that she had other people drive her, and was simply too ill to obtain the physician's statement. Grievant asserted that the procedures for sick leave which were presented by Respondent during the level four hearing were "not what she was used to when [she suffered a] broken ankle in 1989. She claims to have mailed the requested PO-1A's and a doctor's slip prior to the February letter, but concedes that she did nothing after receiving the letter on March 5, 1996, because she was "at the point of giving up." Grievant offered her annual evaluations for the years 1992-1994, which rated her as satisfactory or better, and opined that she was simply being used as an example because some employees seemed to believe that once employed by the state, they could not be terminated.

Grievant's testimony that she was unfamiliar with sick leave procedures is simply incredible. As a supervisor, Grievant needed to be aware of these policies to work with her subordinates. In fact, Grievant was familiar with the policy as evidenced by a memorandum dated September 21, 1992, in which she reprimanded an Economic Service Worker regarding sick/annual leave. (Respondent Exhibit 11). On November 1, 1994, Grievant signed a memorandum attesting that she had read numerous DHHR policies and was familiar with their contents. (Respondent Exhibit 10). Included on this list was Policy 2107, "Leave Abuse." Grievant was specifically notified what was required of her in the January 30, 1996, memorandum from Ms. Bradley and the February 21, 1996, letter from Mr. Hammer.

Neither did Grievant submit any documentation to support her claim that she had mailed in a physician's statement prior to receiving the February 21 letter. Considering that her job was injeopardy at that point, it is difficult to understand why she did not keep copies for her own records, or at least send the documents by certified mail.

Considering the number of times Grievant apparently sought medical assistance, it is particularly striking that she was unable to secure a written statement to verify her condition. Even if she was seriously ill at home, other measures could have been taken to insure her continued employment. At hearing, she stated that she "did not think about sending a form to the doctor." Presumably, she could have called her doctor's office, explained the situation, and had a form forwarded to her supervisor. By her own admission, Grievant did nothing after receiving the February 21 letter on her own behalf.

Early evaluations and the testimony of previous and present supervisors indicate that Grievant was generally considered to be a good employee; however, she was absent an increasing amount of time and, as Ms. Bradley stated, a supervisor was needed by DHHR because Grievant's absence was affecting the work force and the services rendered. The record also indicates that Ms. Bradley had extended offers to assist Grievant during this time. Ms. Bradley's undisputed testimony was that she would have granted a medical leave of absence, had one been requested. Kristin Willard, a previous supervisor of Grievant, testified that she had held several discussions with Grievant regarding stress, and encouraged her to seek other positions if she so desired. She specifically recalled offering her a Hospital Worker position which would have incurred no change in salary. Robert Cochran, Regional Administrator during the relevant period, testified that in August or September of 1994 he advised Grievant that if she believed her job was detrimental to her health, he would work with her to find another assignment more compatible to her needs. Grievant did not take advantage of any offer of assistance. Upon review of the record in its entirety, it must be determined that Respondent has proven that it acted in compliance with its internal policy and the policies of the Division of Personnel in terminating Grievant's employment. Grievant has not shown that the termination was in violation of any rule, policy or procedure, was arbitrary and capricious, or was in any other manner improper.

In addition to the foregoing discussion it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant was employed by the Department of Health and Human Resources as an

Economic Service Supervisor at all times pertinent to this matter.

2. In 1995 Grievant used 383 hours, or 47 days of sick leave, primarily during the second half of the year.

3. In 1996, Grievant used 88 hours of sick leave in January, 152 hours in February, and 40 hours during the period of March 1-7.

4. By letter dated January 30, 1996, Grievant was reprimanded regarding her excessive use of sick leave and directed to provide physician's statements for all absences.

5. Grievant failed to produce the physician's statement and apparently did not report to work at all during the month of February.

6. By letter dated February 21, 1996, Regional Director John Hammer advised Grievant that she must submit a physician's statement addressing her absence since January 22, 1996, and future need for sick leave, or return to work with a physician's statement. Mr. Hammer stated that failure to comply would result in her dismissal. 7. Grievant accepted the letter, sent by certified mail, on March 5, 1996, but took no action whatsoever.

8. Grievant was dismissed from her employment effective March 8, 1996.

Conclusions of Law

___1. In disciplinary matters the employer has the burden of proving by a preponderance of the evidence the charges upon which the action was taken. W.Va.Code §29-6A-6; Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-086-3 (March 31, 1989).

2. Respondent has proven by a preponderance of the evidence that Grievant used extensive amounts of sick leave, and that she failed to provide a physician's statement to account for her absences.

3. Grievant's dismissal was processed in compliance with Division of Personnel Rule 15.04 which provides for such action when an employee fails to produce a required physician's statement.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred, 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.

DATE: December 16, 1996 _____

SUE KELLER

Senior Administrative Law Judge