SCOTT HAYDEN,

Grievant,

v. **DOCKET NO. 98-HHR-133**

DEPARTMENT OF HEALTH AND HUMAN
RESOURCES/BUREAU FOR
CHILDREN AND FAMILIES,

Respondent.

DECISION

Scott Hayden (Grievant) challenges his termination from employment as a Child Protective Services Worker by the Division of Health and Human Resources (DHHR). This grievance was filed directly at level four on April 5, 1999. After several continuances granted for good cause shown, a level four hearing was conducted in the Grievance Board's office in Wheeling, West Virginia, on August 11, 1999. Grievant was represented by counsel, Gerald Jacovetty, Jr., and DHHR was represented by counsel, Dennise Smith Kastick. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on September 20, 1999. (See footnote 1) In order to expedite the level four decision, and pursuant to agreement of the parties, this grievance was reassigned to the undersigned administrative law judge on November 4, 1999.

The following findings of fact are made from a preponderance of the evidence introduced at the level four hearing.

Findings of Fact

1. Grievant was employed by DHHR as a Child Protective Services (CPS) Worker from July 19, 1991, until his termination.

2. Grievant has suffered several back injuries, one of which occurred at work in 1997.

3. Grievant has never received temporary total disability benefits from the Workers' Compensation Division for any occupational injury, although he has filed claims.

4. Grievant took multiple, short-term leaves of absence during 1998 for various medical problems, including back pain, a dislocated shoulder, arthritis, insomnia, and high blood pressure. Approximately 30 days of this leave was unpaid.

5. Beginning on September 15, 1998, Grievant was granted a six-month medical leave of absence without pay, due to surgery for a dislocated shoulder and continuing back pain.

6. On March 17, 1999, Louis Palma, Regional Director, notified Grievant by letter that his six-month leave of absence had ended, and that he had been absent without leave for a total of seven months of the preceding twelve-month period. This letter further stated, in pertinent part:

> No element of employment is more basic than an employer's expectation that an employee will report for work as scheduled. Accordingly, you are expected to return to work immediately with a release from your attending physician. Unless you comply with the directives of this letter, then I have no recourse but to dismiss you from your employment[.] . . .
>
> Additionally, you may be reinstated to your former or comparable position upon submission of a written statement from your medical professional certifying your physical ability to return to work and perform the essential functions of your position. . . .

7. Grievant did not respond to Mr. Palma's March 17 letter, and he provided no explanation for his failure to respond. His termination was effective April 2, 1999.

8. The most recent physician's statement provided by Grievant to his employer, dated January 11, 1999, stated that it was “unknown” whether Grievant was permanently disabled from performing his job duties.

9. Grievant believes he continues to be unable to perform the duties of his position as a CPS worker.

Discussion

In disciplinary matters, the burden of proof rests with the employer. W. Va. Code §29-6A-6. State employees who are in the classified service can only be dismissed for “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. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); W. Va. Code § 29-

6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Section 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993). This Grievance Board has recently determined that dismissal of an employee for failure to return to his position following a medical leave of absence is a dismissal for cause as set forth in Oakes and Guine, supra. Clark v. W. Va. Dep't of Military Affairs & Public Safety, Docket No. 99-DJS- 428 (Nov. 30, 1999). Employees of DHHR are granted medical leaves of absence pursuant to § 15.08(c) of the Administrative Rule for the Division of Personnel (DOP), which states in pertinent part, as follows:

Medical Leave; Notice to Employee

1. An injured or ill permanent employee upon written application . . . shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve month period provided:

a. The employee . . . has elected not to use sick leave for a work related injury . . . ;

b. The employee's absence is . . . verified by a physician . . . stating the employee is unable to perform his/her duties and giving a tentative date for the employee's return to work;

c. A prescribed physician's statement form is submitted every thirty (30) calendar days to confirm the necessity for continued leave; and

d. The disability . . is not of such nature as to render the employee permanently unable to perform his/her duties.

The Administrative Rule further provides, in §15.08(d), that “[f]ailure 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.” DHHR contends that

Grievant's dismissal was proper pursuant to the provisions cited above, due to his failure to provide the required medical documentation, along with his obvious inability to perform the essential duties of his position.

Grievant does not dispute that he is unable to work. He merely contends that he should not have been terminated, when his disability had been caused by an occupational injury. Although Grievant has not cited any particular law or policy which has beenviolated by his termination, W. Va. Code § 23-5A-3 prohibits termination of an employee who is "receiving or is eligible to receive temporary total disability benefits" due to a covered workers' compensation injury. However, the evidence presented in this grievance does not establish that Grievant has ever received temporary total disability benefits, nor is there any evidence of ongoing appeals to attempt to procure such benefits. Moreover, it has previously been held that employers are not required to maintain disabled workers on their payrolls while endless appeals for workers' compensation benefits are pursued, when it is obvious that the employee is physically unable to perform his job duties and the period of disability cannot be determined. Powell v. Wyoming Cablevision, Inc., 403 S.E.2d 717 at 723 (W. Va. 1991); Baire v. W. Va. Div. of Corrections, 97-CORR-129 (March 11, 1998).

The instant case is distinguishable from the situation presented in Clark, supra, wherein the administrative law judge found that the grievant had at all times acted in good faith and had made every attempt to comply with the applicable procedures for obtaining and extending medical leave. The situation presented in the instant case is quite similar to the one presented in Cook v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-298 (Nov. 30, 1999). In that case the grievant, also a CPS worker, failed to provide medical evidence regarding if or when she could return to her previous job duties following an extended medical leave of absence. Under these circumstances, termination was deemed proper.

Respondent has met its burden of proving that Grievant's termination was proper. It has complied with the pertinent provisions of DOP's Administrative Rule regardingmedical leaves of absence. Grievant's leave exceeded the permitted six months of medical leave, he failed to provide medical evidence to justify continued leave, and he did not return to work. Further, there is no evidence that Grievant is receiving Workers' Compensation benefits for his condition, so his termination did not violate any provision related to the receipt of such benefits.

Consistent with the foregoing findings and discussion, the following conclusions of law are

appropriate in this case.

Conclusions of Law

1. In disciplinary grievances, the burden of proof rests with the employer, and dismissal for failure to return to work after a medical leave of absence is a disciplinary dismissal. W. Va. Code § 29-6A-6. See Clark v. W. Va. Dep't of Military Affairs & Public Safety, Docket No. 99-DJS-428 (Nov. 30, 1999).

2. § 15.08(c) of the Administrative Rule for the Division of Personnel allows an injured employee to be placed on an unpaid medical leave of absence, so long as a physician's statement justifying continued leave is submitted every thirty days and the estimated period of disability is defined. Failure of an employee to report to work at the end of such a leave of absence or to provide proper justification for continued leave is grounds for dismissal.

3. State employees who are in the classified service can only be dismissed for “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.Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); W. Va. Code § 29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Section 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993).

4. W. Va. Code § 23-5A-3 prohibits termination of an employee who is "receiving or is eligible to receive temporary total disability benefits" under the workers' compensation law.

5. Grievant did not provide justification for a continued medical leave of absence and did not return to work after approximately seven months of medical leave, justifying his termination under the provisions of § 15.08(c) of the Administrative Rule. See Cook v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-298 (Nov. 30, 1999)

6. Grievant provided no evidence that he has ever received temporary total disability benefits, so his termination did not violate W. Va. Code § 23-5A-3.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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 (1998). 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: November 30, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant declined to submit a post-hearing proposal.