

BRENDA LYNGE,

Grievant,

v.

Docket No. 00-HHR-258

**WEST VIRGINIA DEPARTMENT
OF HEALTH & HUMAN RESOURCES/
HOPEMONT STATE HOSPITAL,**

Respondent.

DECISION

Brenda Lynge ("Grievant") initiated this proceeding on April 28, 2000, challenging a three-day suspension without pay. She requests rescission of the suspension, along with reimbursement for lost wages and benefits. After denials at levels one and two, a level three hearing was held on July 19, 2000. The grievance was denied in a written level three decision dated July 25, 2000. Grievant appealed to level four on August 2, 2000. A level four hearing was held on October 18, 2000. Grievant was represented by Michael McCall, union representative, and Respondent was represented by counsel, B. Allen Campbell. This matter became mature for consideration upon receipt of the parties' fact/law proposals on November 29, 2000.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent Hopemont State Hospital ("Hopemont") as a Licensed Practical Nurse for approximately four years.
2. Beginning in December of 1998, Grievant's attendance at work, which had

previously been excellent, began to decline.

3. On August 7, 1999, Grievant received a verbal warning from her supervisor, Pat Bobo, for leave abuse. The unscheduled absences which were the subject of this warning were as follows:

On December 2, 1998, Grievant missed one full day of work, in conjunction with her scheduled days off, stating she had car trouble.

On January 6, 1999, she called off work for an emergency vacation day, due to frozen water pipes.

On January 21, 1999, she arrived two hours late for work, stating she "had run into problems."

On February 5, 1999, she missed work in conjunction with two days off, citing illness.

On February 7, 1999, she left work two hours early, due to illness.

On February 8, 1999, and on April 8, 1999, she called in sick, in conjunction with two scheduled days off.

On June 8, 1999, July 13, 1999, and July 14, 1999, she called in sick.

On July 15, 1999, she left work 1¼ hours early, stating an emergency occurred. The following two days were scheduled days off.

On July 25, 1999, she left work 2¼ hours early, citing illness.

On July 26, 1999, she left work 2½ hours early, due to illness, and the following two days were scheduled days off.

On July 30, 1999, she was absent due to a family emergency.

On August 2, 1999, she missed work, stating her car broke down, and this was in conjunction with two scheduled days off.

4. Grievant provided a physician's excuse for her absence in June of 1999.

5. In the verbal reprimand of August 7, 1999, Ms. Bobo informed Grievant that a dependable support staff is imperative to the care of Hopemont's residents. She stated

that continued use of unscheduled time “in excess of norms” would likely cause a written reprimand to be issued.

6. In response to the verbal reprimand, Grievant gave the following written response:

Due to extenuating circumstances of being a single parent with a daughter with several medical disorders, one vehicle and no family to aid in support, I do not feel I have abused time off. Unfortunately circumstances could not have been foreseen or altered.

7. After the verbal reprimand, Grievant’s unscheduled absences continued, as follows:

On August 19, 1999, she called in sick in conjunction with two scheduled days off.

On August 20, 1999, she left work six hours early, due to a family emergency.

On September 4, 1999, she missed work due to car trouble, and the following day was a scheduled day off (Sunday).

On September 29, 1999, and September 30, 1999, she called in sick.

On October 1, 1999, she left work 1½ hours early, and the following day was a scheduled day off (Saturday).

On October 3, 1999, she called in sick, after having been off on Saturday for her scheduled day off.

On October 12, 1999, she called in sick.

8. On October 14, 1999, Sherri Snyder, Hopemont’s Director of Nursing, issued a written reprimand to Grievant for violating Hopemont’s and the Division of Personnel’s (“DOP”) policies regarding leave abuse. In accordance with DOP’s Administrative Rule §15.05, Grievant was told she would be required to provide a written doctor’s excuse for any future absences. She was also notified that future excessive absences, even if

substantiated by a physician, could lead to more severe discipline, including dismissal.

9. Grievant did not contest nor respond to the written reprimand dated October 14, 1999.

10. At Grievant's request, she was placed on day shift from October, 1999, through January 2000. Grievant believed this would help improve her attendance, because it would allow her to be more available to her daughter, whose difficulties apparently caused many of Grievant's absences.¹

11. After the written reprimand, Grievant's absences continued, as follows:

On November 18, 1999, she called in sick in conjunction with a scheduled day off.

On November 20, 1999, she called in sick on a Saturday, with the day before and the day after being regular days off.

On December 20, 1999, she called in sick on a Monday, with the day before and the day after being regular days off.

On January 2, 2000, she called in sick in conjunction with a scheduled day off.

She called in sick on January 4 and 5, 2000, in conjunction with days off before and after, and also in conjunction with an annual leave day.

On January 10, 2000, she missed work due to car trouble.

On February 28, 2000, she called in sick in conjunction with a day off before and after.

On March 2 and 3, 2000, she called in sick in conjunction with a scheduled day off.

12. Grievant provided physician's excuses for all of her illness-related absences

¹Grievant testified that her daughter has a mental illness, and she would have to leave work because "she didn't know where [her daughter] was."

after October 14, 1999.

13. On April 5, 2000, Grievant was issued a three-day suspension without pay for excessive absenteeism, effective April 19, 2000, through April 21, 2000. She was also notified that, for a six-month period, her attendance would be monitored, and a physician's excuse would be required for any illness due to sickness or injury.

14. Grievant testified at level four that she suffers from chronic fatigue and depression, but she has never provided a written physician's explanation of her illnesses to her employer.²

15. The Department of Health & Human Resources ("DHHR") issued a Policy Memorandum dated February 19, 1999, stating that the following factors may indicate leave abuse:

1. Unplanned absences of relative short duration which may be in conjunction with days off, holidays, or paydays, or any other discernable pattern of leave.
2. Excessive leave usage, whether planned or unplanned, and;
3. Repeated utilization of sick leave within a short time of its accrual.

Level III, Employer's Ex. 7.

16. The Policy Memorandum goes on to state that "[t]hese three examples of sick leave utilization shall apply whether or not the employee's leave is supported by a physician's statement."

17. Hopemont has adopted its own leave abuse policy, which defines a "pattern"

²Grievant did provide a letter from a psychiatrist dated July 18, 2000, which stated that Grievant should be given reduced work hours. However, this letter still did not explain the nature of Grievant's illness or illnesses.

of leave abuse as follows:

1. "Hooking" or calling in before or after established (weekends, holidays, vacation) days off.
2. Calling in every week/month.
3. Random excessive usage. Example: Frequent call ins.
4. Reporting late for work.
5. Leaving work early.

Level III, Employer's Ex. 4.

18. Hopemont's Leave Abuse Policy also provides that progressive discipline shall be used once a pattern is determined, as follows:

1st incident--verbal warning
2nd incident--written warning
3rd incident--3-day suspension
4th incident--10-day suspension
Next incident--termination

19. When new policies are adopted, Hopemont conducts in-service training on such policies for all employees. Grievant signed a statement dated September 1, 1998, that she had received in-service and understood the leave abuse policy.

20. Grievant testified that she did not recall attending in-service training regarding the leave abuse policy, and that many nurses miss these sessions, because they cannot leave patients unattended. However, these nurses are provided notice that the training has been conducted when they sign a statement, and they are advised that the policy is available for review.

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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The 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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Respondent contends that it has proven its case by a preponderance of the evidence. Grievant's repeated absences are well-documented, and Hopemont's progressive discipline process was followed. Grievant has been absent without prior notice on thirty-three occasions between January of 1999 and April of 2000. Twenty-nine of these absences occurred in conjunction with a scheduled day off. Although Grievant has provided physician's statements for thirteen of her absences, pursuant to DHHR and Hopemont's policies, Respondent argues that she still has a clear pattern of leave abuse, for which discipline was appropriate.

Grievant argues that she should not have been subject to discipline, when all but one of her absences after the written reprimand were substantiated by a physician's excuse. She contends that an absence supported by a physician's statement should not be considered as leave abuse. However, Grievant has not specifically argued that DHHR's or Hopemont's leave abuse policies are inconsistent with DOP's Administrative Rule. Nevertheless, this Grievance Board has previously held that a similar policy adopted by Sharpe Hospital, defining leave abuse and prescribing progressive discipline for violations, was not inconsistent with DOP's regulations. Sisley v. W. Va. Dep't of Health and Human

Resources, Docket No. 96-HHR-237 (Jan. 16, 1997). The only provision in the Administrative Rule which addresses leave abuse states that an employer may require an employee suspected of leave abuse to provide substantiation of illnesses of less than three days. 143 C.S.R. 1, §15.5. Otherwise, the Rule is silent as to how agencies are to deal with potential leave abuse by their employees.

Additionally, this Grievance Board has also previously held that a physician's statement does not necessarily remove an absence from consideration for determining leave abuse, and that "whether Grievant abused sick leave must be based on all the facts in evidence." Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). While it is true that Grievant provided excuses for her most recent absences, the evidence does not indicate that these excuses explained the nature of her illness. When initially warned about her excessive absences, Grievant told her supervisor that her daughter's difficulties were causing the problem. With the next warning, Grievant told her supervisor she was having joint pain and that her physician's assistant thought she "may" have fibromyalgia, which was apparently never substantiated by a doctor's report. Then, for the first time at the level four hearing, Grievant claimed she was suffering from depression, which was only referred to generally in a July, 2000, letter from her psychiatrist, which did not address her absenteeism. While Grievant may, indeed, be suffering from all of these problems, she failed to provide her employer with any specific medical substantiation of them, even after being warned that her excessive absences were a problem. Also, it is very clear that Grievant had a continuous pattern of "hooking" absences with scheduled days off, which she explained only by stating that her days off are different every week, so it is hard to avoid such a pattern. Unfortunately, this fails to

explain why Grievant's frequent absences almost always occurred in conjunction with days off.

Accordingly, the undersigned finds that, in consideration of all of the evidence of record, Grievant was properly disciplined for leave abuse, pursuant to Respondent's policies. Grievant was frequently absent without prior notice, most often in conjunction with days off, and provided little substantiation--along with varying reasons--for her absences. This clearly constitutes leave abuse under the applicable policies.

Consistent with the foregoing, the following conclusions of law are made.

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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. DHHR has adopted a policy defining leave abuse as:

Unplanned absences of relative short duration which may be in conjunction with days off, holidays, or paydays, or any other discernable pattern of leave.

Excessive leave usage, whether planned or unplanned, and;

Repeated utilization of sick leave within a short time of its accrual.

DHHR Policy Memorandum, February 19, 1999.

3. A physician's statement does not remove an absence from consideration for determining leave abuse, if all of the facts and circumstances support the conclusion that an employee has abused sick leave. Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997).

4. Respondent has proven by a preponderance of the evidence that Grievant was excessively absent without notice, and that most of her absences occurred in conjunction with scheduled days off, in violation of Respondent's leave abuse policies. Therefore, Grievant was properly disciplined under Respondent's progressive discipline provisions for leave abuse.

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: December 15, 2000

DENISE M. SPATAFORE
Administrative Law Judge