**KATHY STARKEY,**

**Grievant,**

**v.**

**DOCKET NO. 01-HHR-002**

**WEST VIRGINIA DEPARTMENT OF HEALTH**

**AND HUMAN RESOURCES/MILDRED**

**MITCHELL-BATEMAN HOSPITAL,**

**Respondent.**

**D E C I S I O N**

Grievant, Kathy Starkey, filed this grievance against her employer, the West Virginia Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital ("DHHR"), directly at level four on January 8, 2001:

> I am filing a grievance as a result of the letter I received December 30th, 2000 from Carol Wellman in which she states I must return from my medical leave of absence without pay by January 8th or effective January 9th I will be dismissed and all benefits will be terminated.
>
> Eight days notice is not sufficient time to make an appointment and obtain a statement from my physician in Arizona and return to work. I am requesting a 60-90 time frame to secure a physician statement with an additional 30 days to relocate.
>
> And if my doctor does not release me, Carol Wellman states my benefits will be terminated; benefits that I have been paying for and receiving for the past 4 years during my extended medical leave of absence.
>
> She also states my absence has created a burden within the Nursing Department and that she needs to terminate me in order to effectively manage the current work load and maintain an adequate level of productivity. I know for a fact my position was filled quite some time ago, therefore my absence should not be a factor in managing work loads or maintaining productivity.
>
> The relief sought is to be made whole but not limited to the continuation of insurance benefits I have paid for and received during the past four years as was promised by the department of Human Resources at Mildred Mitchell-Bateman Hospital per Kieth Anne Worden.

A level four hearing was held in the Grievance Board's Charleston, West Virginia, on February 1, 2001, and this matter became mature for decision on March 10, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant appeared via telephone, and was represented by her Legal Guardian/Conservator, Theodora (Teddy) Lange. DHHR was represented by B. Allen Campbell, Esq., Assistant Attorney General.

## SUMMARY OF EVIDENCE

### Grievant's Exhibits

Ex. 1 -

March 6, 1997 memorandum from Denise Runnels, Payroll Assistant, to Teddy Lange re: Insurance Premium (Kathy Starkey).

Ex. 2 -

Undated transcript of phone message left for Kathy Starkey by Kieth Anne Worden.

Ex. 3 -

December 21, 2000 letter from Carol Wellman, Administrator, to Kathy Starkey.

### DHHR Exhibits

None.

### Testimony

Grievant presented the testimony of Teddy Lange. DHHR presented the testimony of Kieth Anne Worden.

## FINDINGS OF FACT

After a careful review of all the evidence of record in this grievance, I find the following facts have

been proven by a preponderance of the evidence. 1. Grievant, at all times relevant, has been employed by DHHR at the Mildred Mitchell-Bateman Hospital in Huntington, West Virginia.

2. On March 17, 1996, Grievant was hospitalized in a coma.

3. On March 25, 1996, Grievant, through her representative, requested a medical leave of absence, which was approved by Desmond Byrne, then-Administrator of Mildred Mitchell-Bateman Hospital, on March 26, 1996.

4. Grievant remained in a coma for four months.

5. In September 1996, Grievant, through her Guardian, Teddy Lange, requested an extended medical leave of absence, which was granted by Desmond Byrne.

6. On March 6, 1997, Ms. Lange received a memorandum from Denise Runnels, Payroll Assistant, about the method of payment for Grievant's insurance premium. Following that memorandum, Grievant continued to submit premium payments, and every year she has received paperwork and a renewal card for her insurance. G. Ex. 1.

7. On September 19, 1997, Ms. Lange called the hospital because she believed Grievant's one-year medical leave of absence was coming to a close. Kieth Anne Worden, Human Resource Director, called Ms. Lange and left a message on her answering machine, which Ms. Lange retrieved and transcribed. The message stated:

> Teddy, this is Kieth Anne from Huntington Hospital, uh, was returning the call that you had, uh, the call you had given Ed earlier about the leave of absence, the continued leave of absence for Kathy, we will continue that, so you don't need to worry about that; so it will be continued for as long as she needs it. Thank you.

G. Ex. 2.

8. From that date until December 21, 2000, Grievant remained on medical leave without pay, and continued to receive insurance benefits.

9. On December 21, 2000, Carol Wellman, the new Administrator at Mildred Mitchell-Bateman Hospital, wrote Grievant informing her she either had to return to work or be terminated. G. Ex. 3.

## CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving her grievance by a preponderance of the evidence. 156 C.S.R. 1 § 4.21 (2000); Payne v. W.

Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. The West Virginia Division of Personnel Rule provides as follows:

15.8(c) *Medical Leave; Notice to Employee*

1. An injured or ill permanent employee upon written application to the appointing authority 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 (1) has exhausted all sick leave and makes application no later than fifteen (15) calendar days following the expiration of all sick leave or (2) has elected not to use sick leave for a personal injury received in the course of and resulting from covered employment with the State or its political subdivisions in accordance with W. Va. Code § 23-4-1 and makes application no later than fifteen (15) calendar days following the date on which the employee filed a claim for Worker's Compensation.

b. The employee's absence is due to an illness or injury which is verified by a physician/practitioner on the prescribed physician's statement form stating that the employee is unable to perform his or her duties and giving a date for the employee's return to work or the date the employee's medical condition will be re-evaluated.

c. A prescribed physician's statement form is submitted each time the employee's condition is re-evaluated to confirm the necessity for continued leave; and

d. The disability, as verified by a physician/practitioner on the prescribed physician's statement form, is not of such nature as to render the employee permanently unable to perform his or her duties.

2. The appointing authority shall, at least 15 days prior to, if possible, but no later than five (5) days following the expiration of the employee's sick leave, mail to the employee a written notice of the employee's right to a medical leave of absence without pay and informing him or her that the leave will not be granted if he or she fails to apply within the time limits specified in subparagraph 14.8(c)1.a of this rule.

15.8(d) *End of Leave*

1. At the expiration of a leave of absence without pay, the employee shall be

returned to duty to either his or her former position, or one of comparable pay and duties, without loss of rights, unless the position is no longer available due to a reduction-in-force.

2. If the leave of absence without pay was granted due to personal illness, the employee must furnish from the attending physician/practitioner a prescribed physician's statement form indicating the ability of the employee to return to work. The appointing authority may permit an employee to return to work at or before the expiration of the leave of absence at less than full duty, but the terms of return are subject to the same conditions specified in subdivision 14.4(h) of this rule.

3. 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.

15.8(a) *Personal Leave*

[A]n appointing authority *may* grant a permanent, probationary, or provisional employee a leave of absence without pay for a specific period of time which normally should not exceed one year. The employee shall apply for the leave of absence in writing to the appointing authority. If the appointing authority approves the request, the approval shall be in writing. A leave of absence without pay may exceed the normal one year limitation based on the agency's personnel needs. Time spent by provisional employees for leaves of absence does not extend the provisional period limitation. Written approval of the appointing authority is required in all cases. Approval of personal leave is *discretionary* with the appointing authority. (Emphasis added).

3. An employee may only be on a medical leave of absence for six (6) months within any twelve (12) month period. After that time, any leave becomes a personal leave of absence. At the end of Grievant's sick leave, Desmond Byrne approved a personal leave of absence for Grievant.

4. Pursuant to the Division of Personnel Rules, it is within the Hospital Administrator's discretion to grant or deny personal leave. As such, Carol Wellman, the current Hospital Administrator, has the discretion to end Grievant's personal leave of absence.

5. Ms. Worden's telephone call to Grievant did not make a promise of indefinite personal leave, but simply notified Grievant the Hospital Administrator would extend Grievant's leave of absence. Ms. Worden does not have the authority to grant or deny personal leaves of absence, let alone promise an employee lifetime medical insurance benefits.

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. Any 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.

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**MARY JO SWARTZ**

**Administrative Law Judge**

**Dated: March 28, 2001**