DORIS LYNCH ,

Grievant,

v v.

Docket No. 01-RS-096

WEST VIRGINIA DIVISION OF

REHABILITATION SERVICES,

Respondent.

D E C I S I O N

Grievant, Doris Lynch, is employed by the West Virginia Division of Rehabilitation Services ("RS") as a Health Service Worker ("HSW"). She filed this grievance on or about December 28, 2000. Her Statement of Grievance reads:

> Misrepresention (sic) of facts pertaining to leave time; i.e. memo from Steve Hill of 12/14/00, letter from Janice Holland of 12/15/00, and memo of 12/19/00 from Steve Hill ordering a physician[']s statement before I had knowledge I was to do so. I did not receive material until Saturday 12/16/00. One of the memo's was not typed until 12/19/00.

The relief sought is a complete written exoneration and apology, (See footnote 1) the return of any docked pay, and a copy of this decision to be placed in her personnel file. (See footnote 2)

The Level I Decision was issued on January 8, 2001, and granted the grievance on the issue of docked pay for December 6, 2000. (See footnote 3) Grievant appealed to Level II on January15, 2001, and her grievance was denied at that level. A Level III hearing was held on February 2, 2001. The recommended Decision of the Level III Hearing Examiner was not accepted, and this grievance was denied by decision of Janice Holland, Interim Director, dated March 12, 2001. This grievance was then appealed to Level IV on March 16, 2001. A Level IV hearing was held on April 30, 2001. This case became mature for decision on that date as the parties did not wish to submit proposed findings of fact and conclusions of law. (See footnote 4)

Issues and Arguments

Grievant asserts she has not abused her leave, and her pay should not have been docked. She maintains she was sick and had the right to take her sick leave as needed. Grievant also argues she was removed from her Improvement Plan by her performance evaluation. Additionally, she alleges she was treated differently from other workers on her unit as the Office Assistant who maintains the time did not notify her she needed a doctor's certificate, and she has counseled other employees in the past when there were problems.

Respondent reports Grievant's pay was docked because she failed to turn in doctor's excuses as was required by her Improvement Plan. Respondent contends the Improvement Plan was clear on its face as to its duration, and Grievant's belief that she was removed from the Improvement Plan by the evaluation is not supported by the evidence. Additionally, Respondent asserted Grievant has a long history of leave abuse and of calling-in sick in conjunction with scheduled days off, or "hooking."

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by RS for a number of years as a HSW.

2. When Grievant is at work she is considered a good worker, and there are no other problems with her performance other than the dependability issues created by her frequent absences.

3. Grievant has been orally counseled since 1997 about her pattern of leave usage.

4. On February 11, 1998, the then Director of Nursing, Betty Boso, cited three separate incidences in the preceding two months where Grievant had taken sick leave in conjunction with scheduled days off. Grievant was informed she must have a doctor's excuse for each day she was absent due to illness.

5. On December 4, 1998, and February 22, 1999, the next Director of Nursing, Kay McVey, sent a memo to all staff noting there had been too many call-ins and too many extended leaves of absence. She directed her employees to contact her personally for leaves of absence of three days or longer, and the staff would be required to bring a doctor's certificate for family illness. Grievant received these memos.

6. By Memo dated May 13, 1999, Grievant was informed she was being placed on an

Improvement Plan because of a continuing pattern of call-ins either before or after a scheduled day off. 7. This Improvement Plan required Grievant to obtain a doctor's excuse for each absence due to illness, to call-in personally a minimum of two hours prior to her scheduled shift, and to speak either to Director McVey or the charge nurse. This Improvement Plan noted the burden placed on all staff when one employee abused sick leave. Grievant refused to sign this Improvement Plan.

8. Grievant responded to this Improvement Plan with a lengthy letter dated May 21, 1999. Grievant had many complaints, believed she was being singled out for negative treatment, indicated she had done nothing wrong, her illnesses were caused by the work environment, believed RS was trying to terminate her employment, and informed Director McVey of various, negative statements the staff had made about Director McVey.

9. At a May 24, 1999 staff meeting, Director McVey again addressed the issue of staffing, call-ins and leave policies. Grievant attended this meeting.

10. Also on May 24, 1999, Director McVey responded to Grievant's letter of May 21, 1999. She informed Grievant there was no intention of terminating her employment, and the only issue was the need for Grievant to improve her attendance. Director McVey reiterated the terms of the Improvement Plan, and informed Grievant the Improvement Plan would be in effect for two months, until July 13, 1999, if Grievant's attendance improved and the pattern of abuse was not repeated. Director McVey also reviewed the numerous call-ins attached to scheduled days off, and noted Grievant had earned 130.50 hours of sick leave in 1997, and she had used 116.00 hours. 11. On June 1, 1999, Grievant wrote Director McVey thanking her for various documents, and stating she would comply with the Improvement Plan, but did not acknowledge any form of sick leave abuse. Resp. Ex. No. 10, at Level III.

12. On June 21, 1999, Grievant's Improvement Plan was extended for an additional month, to August 13, 1999, because of her failure to comply with the requirement of turning in doctor's excuses. This memo also informed Grievant it should be considered a written reprimand, and her attendance "must improve." Resp. Ex. No. 9, at Level III.

13. On August 2, 1999, Grievant received her performance evaluation for the past year. She received a "two" in dependability because of her continuing pattern of leave abuse, and it was noted Grievant would remain on an Improvement Plan until August 13, 1999. Resp. Ex. No. 11, at Level III.

14. On June 5, 2000, Grievant was placed on another Improvement Plan due to persistent

attendance problems. Grievant continued to call-in in conjunction with scheduled days off. This Improvement Plan was to last for six months. The first two months Grievant was required to provide a doctor's slip for every call-in, call Director McVey personally to get approval for call-ins, and furnish doctor's excuses and/or other documentation for all family illnesses and emergencies. Director McVey also noted if this Improvement Plan was not successfully completed, disciplinary action starting with suspension, would be taken. If after the first two months Grievant had complied with the above stated measures, Director McVey would continue to monitor Grievant's leave and doctor's slips would still be required, but she would no longer have to call Director McVeypersonally. This Improvement Plan listed a record of Grievant's numerous call-ins from January through June, 2000. Grievant refused to sign the Improvement Plan, but the Improvement Plan was discussed with her, and the expected consequences if she failed to comply were identified.

15. On August 8, 2000, Grievant received her yearly performance evaluation. She received a "one" in dependability, indicating a major weakness. Grievant also received a "two" in work quantity because she had missed so much work. Director McVey also noted on this performance evaluation that Grievant had been "100% compliant" with the Improvement Plan for the first two months. Grievant refused to sign her performance evaluation.

16. Grievant decided this statement by Director McVey meant she was no longer on an Improvement Plan. She did not ask anyone to confirm her belief, nor was she able to explain why she thought this assumption was true when the document on its face indicated the period of the Improvement Plan was six months.

17. In 1998, Grievant had 22 "call-in" sick days off. All but one of these were in conjunction with scheduled days off.

18. In 1999, Grievant had 17 "call-in" sick days off. All but four of these were in conjunction with scheduled days off.

19. In 2000, Grievant had 39 "call-in" sick days off. All but two of these were in conjunction with scheduled days off. 20. Several employees on Grievant's Unit now ask if they should plan to come in on the days surrounding Grievant's scheduled days off. They do this so they can plan their schedules.

21. On December 15, 2000, Grievant received a memo informing her that her pay check for December 31, 2000, had been docked for eight days because of unauthorized leaves of absence on

October 25, and 25; November 15, 23, 24, 25, and 27; and December 6, 2000. (See footnote 5)

22. When the Office Assistant in charge of recording Grievant's Unit time sheets, Karen Shuck, saw Grievant had submitted them without a doctor's excuse, she took them to the Hospital Administrator Steve Hill for guidance as to whether she should discuss this deficiency with Grievant. Administrator Hill told her he would handle the situation.

23. Administrator Hill did not sign the slips, but took them to Human Resources to seek guidance on how to handle the situation.

24. Contrary to Grievant's assertion, no doctor's slips were placed in the record for the days in question, and the testimony is clear no slips were submitted by Grievant to cover these days.

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.

Although Respondent characterized the docking of Grievant's pay as a disciplinary action, it did not identify in the December 15, 2000 memo why Grievant's leave was not approved. Initially, the undersigned Administrative Law Judge was unsure whether the disciplinary action was for a continuing pattern of leave abuse, hooking, or for failure to submit physician's excuses. However, from the discussions in the lower level grievance Decisions and the Level III testimony, it became clear the parties agreed; Grievant's leave was unauthorized because she did not submit the required doctor's excuses.

The only reason Grievant gave to explain her failure to submit the required documentation of illness was she thought she had been removed from the plan. (See footnote 6) This assumption was based on one positive statement indicating Grievant had followed theImprovement Plan for two months. Grievant did not clarify her assumption with anyone. It is unclear why Grievant would think this statement on her performance evaluation would remove a six month Improvement Plan that had

only been in place for two months. Additionally, Director McVey informed Grievant during her 1999 performance evaluation that she would no longer need to call her personally for the remaining portion of the Improvement Plan, but the rest of the factors identified in section 2, including the need for a doctor's excuse, would still be required. Director McVey's testimony at Level IV at 153 - 154.

Grievant's actions constitute insubordination. The offense of insubordination “encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988)(citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N. C. 1980)). In Sexton, the Administrative Law Judge noted insubordination has been shown through an employee's “blatant disregard for the authority” of his second-level supervisor. Id. at 10.

“Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990) (citing Meads v. Veterans' Admin., 36 M.S.P.R. 374 (1988)). Additionally, an employer has the right to expect subordinate personnel “to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .”. McKinney v. Wyoming County Bd. of Educ.,Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)). There are few defenses to the charge of insubordination. Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 27, 1997); See, e.g., Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996). Essentially, what an employer must demonstrate to substantiate insubordination, is the employee was given an order, directive, or rule, which did not entail unnecessary physical risk to himself or other employees, and the employee failed to comply. Hundley, supra. Employers have the right to expect employees to come to work on time and to follow orders that are do not impinge on their health and safety. Hatfield v. Dep't of Corrections, Docket 98-CORR-020 (Apr. 30, 1998). See Scarberry v. Bureau of Employment Programs, Docket No. 94-BEP- 625 (Jan. 31, 1995); Smith v. Dep't of Corrections, Docket No. 93-CORR-538 (May 17, 1994).

Grievant argued Respondent's failure to return her copy of the time slips in a timely manner prevented her from knowing there was a problem. It is noted Grievant never asked where her copies of the time slips were, and she was aware she had not received them. Although it may have been helpful to remind Grievant sooner that her pay would be docked if her leave was unauthorized,

Grievant had been repeatedly informed of the rules and regulations regarding leave, and that her behavior was unacceptable. Failure of the employer to remind Grievant about policies does not relieve Grievant of the duty to follow the reasonable orders of her supervisor. See Hundley, supra. Respondent has demonstrated Grievant was insubordinate when she failed to follow her supervisor's orders, and provide the required doctor's excuses. Respondent counseled Grievant on numerous occasions about the importance of coming to work and the pattern of hooking call-ins to her scheduled days off. Grievant received verbal counseling, evaluations which indicated her failure to come to work as scheduled was serious, and a Written Reprimand, which clearly explained these problems must be corrected. Additionally, her prior Improvement Plan was extended when she failed to follow the direction to submit doctor's excuses.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Pursuant to W. Va. Code § 29-6A-6, 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. 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).

2. The offense of insubordination “encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” Sexton v. Marshall Univ., Docket No. BOR2-88-029-4(May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N. C. 1980).

3. Insubordination includes “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

4. “Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

5. An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)).

6. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

7. Employers have the right to expect employees to come to work on time and to follow orders that are do not impinge on their health and safety. Hatfield v. Dep't of Corrections, Docket 98-CORR-020 (Apr. 30, 1998); See Scarberry v. Bureau ofEmployment Programs, Docket No. 94-BEP-625 (Jan. 31, 1995); Smith v. Dep't of Corrections, Docket No. 93-CORR-538 (May 17, 1994).

8. Respondent has proven Grievant was insubordinate in her failure to follow her supervisor's orders.

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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: June 29, 2001

Footnote: 1

An apology is not a form of relief granted by the Grievance Board.

Footnote: 2

At the Level IV hearing, Grievant also wanted to raise the issue of retaliation since she had filed this grievance. Respondent objected as it had no notice of this issue. Accordingly, this issue was not addressed in this grievance, but Grievant was directed to file another grievance if she so desired. The undersigned Administrative Law Judge informed the parties this grievance should be considered timely, if filed within the stated timelines from the hearing date.

Footnote: 3

As of the date of the Level IV hearing, Grievant had still not received this compensation. Mr. Steve Hill, the Hospital Administrator, stated he would look into the matter and see that Grievant received this money.

Footnote: 4

Grievant was represented by her husband Reggie Lynch, and Respondent was represented by Attorney Warren Morford.

Footnote: 5

The December 6, 2000 absence, was removed from the unauthorized absence list a Level I, as it was discovered Grievant's Improvement Plan had expired on December 5, and she was not placed on a new one until later that month.

Footnote: 6

Grievant's representative also appeared to argue that since Director McVey had left it was reasonable to assume the plan was no longer in effect. It is noted Director McVey's last day of work was October 13, 2000, and 14 of Grievant's 39 days of call-ins occurred from Director McVey's last day of work on October 13, 2000, to December 6, 2000.