THOMAS E. BROWN, JR.,

Grievant,

v. **Docket No. 01-HHR-631**

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

D E C I S I O N

Grievant, Thomas E. Brown, Jr., employed by the Department of Health & Human Resources (DHHR or Respondent) as a Program Manager, filed a grievance directly to level four seeking reinstatement following his dismissal effective December 3, 2001. A level four hearing was conducted in the Grievance Board's Elkins office on May 7, 2002, at which time Grievant was represented by Kevin Church of AFSCME, and DHHR was represented by Assistant Attorney General Jon Blevins. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties and received on or before June 18, 2002. (See footnote 1)

The following facts are derived from the record developed at level four.

Findings of Fact

1. Grievant was employed by DHHR in the Bureau for Children & Families forapproximately seven and one-half (7½) years. In early 2000, he was promoted to Health and Human Resources Specialist Senior, with a working title of Program Manager.

2. Beginning in May 2001, Grievant began using leave time at a rate which resulted in Regional Director Louis Palma sending him a letter dated September 26, 2001. Mr. Palma noted that Grievant had utilized fifty-two (52) hours of sick leave in May, forty (40) hours of annual leave and eight (8) hours of sick leave in June, seventy-two and one- half (72.5) hours of sick leave in July, sixteen hours (16) hours of annual leave and one hundred sixty-eight(168) hours of sick leave in August, and eighty-eight (88) hours of sick leave through September 25, 2001. He advised Grievant to contact him immediately to clarify his status, or his pay would be docked for the period of August 5 through September 7, 2001.

3. Grievant occasionally provided generic physician statements, which did not mention

substance abuse, when he claimed sick leave, but throughout 2001, he frequently failed to provide the required medical excuse for his absences beyond three consecutive days.

4. Grievant was known to suffer from asthma and other respiratory problems, for which he was treated by a specialist.

5. On September 18, 2001, Mr. Palma attempted to telephone Grievant to determine his leave status, and left a message on his answering machine.

6. On September 20, 2001, Grievant contacted Mr. Palma's secretary and requested that she have Mr. Palma telephone him. Grievant did not respond to a call from Mr. Palma on September 21, 2001. 7. On October 26, 2001, Mr. Palma issued Grievant a second letter regarding his failure to comply with attendance and leave policies. Mr. Palma noted that Grievant had failed to call in, or turn in an Attendance Sheet for the month of October. Additionally, Grievant was notified that he was being placed on Unauthorized Leave since he ran out of sick leave and did not request annual leave, or a medical leave of absence.

8. Mr. Palma issued Grievant a reprimand on November 5, 2001, for his unauthorized leave in October and November 1, and 2, 2001.

9. On November 16, 2001, Mr. Palma notified Grievant by certified letter that he had been absent without prior approval since 10:30 a.m. on November 9, 2001, and had worked only five and one-half (5 ½) hours since October 11, 2001. Further, Grievant had scheduled an appointment with Mr. Palma for 8:30 a.m. on Wednesday, November 14, 2001, but called that morning and advised that he could not be there until the afternoon. Grievant did not appear for that meeting, but called on Thursday, November 15, and scheduled an appointment for Friday, November 16, 2001, which he did not attend. Grievant was directed to contact Mr. Palma immediately to relay his intentions regarding continued employment with DHHR. Failure to reply would be construed as abandonment of his position, and the letter would serve as a fifteen (15) day notification of dismissal, effective December 3, 2001.

10. Grievant contacted Mr. Palma at 4:27 p.m. on December 3, 2001, and requested a conference on December 4. Grievant called Mr. Palma's office on December 4, at 3:50, to report that he was too ill to attend the meeting, and rescheduled it for December 6, 2001. Grievant did not keep that appointment, and did not call to rescheduleit. By letter dated December 6, 2001, Mr. Palma notified Grievant that he was left with no alternative but to process his dismissal.

11. Grievant sent Mr. Palma a letter by telefax on December 6, 2001, in which he apologized for his failure to keep his appointment that morning, and for the first time advised his supervisor that he was suffering from anxiety and depression compounded by alcohol and substance abuse. Grievant stated, “I agree that the Department has every right to dismiss me for this extreme behavior,” but asked that his entire employment history be considered. He requested that any leave time be applied to a medical leave of absence, but if that was not feasible, “I would ask you to allow me to resign as I planned to weeks ago in order to keep my health insurance.”

Discussion

In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

It is undisputed that beginning in May 2001, Grievant began using an excessive amount of leave time, that he frequently did not call in to report his absences, and failed to provide physician's statements for absences longer than three consecutive days.

Grievant initially asserted that his rights were violated under the Americans with Disabilities Act (ADA) and Respondent's progressive discipline policy. However, athearing, Grievant withdrew the ADA claim, and did not offer any evidence regarding progressive discipline. Instead, he argued that Respondent had failed to direct him to the Employee Assistance Program (EAP), as other employees had been.

Grievant testified that he began abusing alcohol when he was seventeen (17) years of age, and that over the intervening fourteen (14) years his addictions grew to include marijuana, LSD, cocaine, and finally crack cocaine. Grievant asserts that Mr. Palma and other supervisors should have been aware that he had a problem by observing various warning signs such as his coming to work with bloodshot eyes and hangovers, plus other nonverbal communication. Grievant notes that Mr. Palma has referred other employees to the EAP for assistance, and that his decision not to do so in this instance was arbitrary and capricious.

Certainly, Grievant was eligible to receive assistance under DHHR Policy Memorandum 2120,

"Employee Assistance Program" which provides employees assistance, including referral to the appropriate internal or external professional resources, when they are experiencing personal problems which could affect or impair their daily work performance. Behavioral problems which may affect the work performance include alcohol or drug abuse. Supervisors are trained to observe warning signs of employee difficulty, including chronic absenteeism, and advise the employee of the availability of the program. Mr. Palma is familiar with the EAP, and has referred employees for assistance in the past. However, contrary to Grievant's opinion that his condition should have been obvious, Mr. Palma testified that he had not referred Grievant to the EAP, because Grievant's work was satisfactory when he was present, and his demeanor did not indicate a problem. Because he was aware that Grievant suffered from ongoing respiratory conditions, Mr.Palma believed that to be the cause of the absenteeism. Additionally, he noted the generic physician slips that Grievant did provide made no reference to substance abuse, and he had no other reason to know of Grievant's drug and alcohol abuse.

Rhonda Colanero, Community Service Manager and Grievant's supervisor from 1998-2000, Mary Jo Anderson, Family Support Supervisor and Grievant's supervisor from 1994-1998, and Bill Wince, Community Manager and Grievant's friend, mentor, and former supervisor, all testified that they were unaware that Grievant had ever experienced substance abuse problems.

Grievant's request that his entire employment record be considered in reviewing the level of discipline imposed, is an affirmative defense that due to certain factors, the level of discipline imposed is disproportionate to the offense proven, or otherwise arbitrary and capricious, and should be mitigated. Grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dept. of Health & Human Serv., Docket No. 94-HHR-254 (Jan. 20, 1995).

By his own admission, Grievant had a long history of substance abuse, and had managed to keep it hidden from his co-workers and supervisors for many years. His ability to perform satisfactorily when at work, together with the acknowledged chronic respiratory ailments, reasonably distracted his co-workers from the actual problem. Sadly, Grievant did not disclose the truth of the matter until he had effectively abandoned his position. Division of Personnel Administrative Rule §3.51 defines job

abandonment as “the absence from work under such conditions as to be synonymous with resignation.” AlthoughGrievant had performed satisfactorily for much of his time at DHHR, his attendance for the eight months prior to his dismissal was so poor that it was considered a resignation. Under these circumstances, mitigation is not warranted.

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

Conclusions of Law

1. In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. Respondent has proven that Grievant abandoned his position, which is good cause for dismissal.

3. An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and Grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dept. of Health & Human Serv., Docket No. 94-HHR-254 (Jan. 20, 1995).

4. Grievant failed to prove that the measure of discipline must be mitigated because his supervisors should have known of his substance abuse, and secured assistance for him.

Accordingly, the 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 §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: July 1, 2002 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Approximately one week following the level four hearing, the Grievance Board was notified that Mr. Brown had passed away. Mr. Church requested that a decision be issued on behalf of the estate.

Mr. Church subsequently filed a complaint alleging that Respondent's proposals had been filed after the deadline of June 14, 2002. Mr. Blevins asserted that he wrote it, signed it, and gave to a secretary to copy and mail on June 14. If the document was placed in the mail later than Mr. Blevins intended, it does not appear that he had access to Grievant's proposals, or gained any other advantage in this matter.