JACQUELINE PAGE,

Grievant,

v. **Docket No. 02-HHR-049**

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/BUREAU OF CHILD

SUPPORT ENFORCEMENT,

Respondents.

DECISION

Grievant, Jacqueline Page, was employed as a Legal Assistant in the Bureau of Child Support Enforcement ("BCSE") in the Department of Health and Human Resources ("DHHR" or "Agency"). Her Statement of Grievance, filed April 24, 2002, reads, "[Wrongful] Termination as of Feb. 26, 2002. The relief sought was "[r]emoval of all disciplinary actions; re-instatement to be rehired as a State Gov. Employee; monetary values to be reimbursed." (See footnote 1)

As this grievance was a termination, it was filed directly to Level IV on February 21, 2002. A pre hearing conference was held on March 19, 2002, to clarify issues, and a Level IV hearing was held on April 25, 2002. (See footnote 2) This grievance became mature for decision on June 7, 2002, after receipt of Respondent's proposed findings of fact and conclusions of law. (See footnote 3)

Issues and Arguments

Respondent asserted Grievant had a continuous pattern of leave abuse, including late arrival time, failure to sign in/out properly, and extensions of lunch breaks. Additionally, after Grievant was placed on additional leave restrictions, she was slow to provide required doctor's statements and frequently failed to ask for her annual leave in advance.

Grievant asserted she was wrongly terminated, but did not present any evidence in this regard at the Level IV hearing. She did not testify, but at the end of the Level IV hearing, she indicated she had been constructively discharged in violation of whistle blower laws. Grievant was not constructively discharged; her employment was terminated. Additionally, Grievant did

not present any evidence pertaining to whistle blower laws during the hearing. Grievant also appeared to assert racial and/or gender discrimination, but as no evidence was presented on these issues, these possible allegations will not be addressed.

Findings of Fact

1. Grievant was employed by DHHR as a Legal Assistant.

2. During 1999, Grievant began having leave abuse problems, and she was verbally counseled by her supervisor, Robert Deitz, several times. During each of these discussions Grievant indicated she would improve, but she did not.

3. On May 25, 1999, Mr. Deitz sent Grievant a written reprimand for her failure to abide by the "established rules and regulations that related to start times, lunch breaks, regular breaks, sign in/out and other unit procedures." Resp. Ex. No. 1, at Level IV. In thisletter Grievant was informed that further progressive discipline would be forthcoming if there was not a change in her behavior. Grievant did not grieve this written reprimand.

4. On September 30, 1999, Mr. Deitz wrote Grievant confirming their meeting of September 22, 1999. In that meeting, numerous incidences of Grievant's leave abuse from June through August 1999, were documented and discussed. During the September 22, 1999 meeting, the prior written reprimand and the progressive discipline policy were discussed.

5. As a result of this meeting and Grievant's failure to improve, she was placed on a thirty-day Improvement Plan. Grievant signed the Improvement Plan, but indicated she had not read all of it, nor had she checked the time records she had been given a week before to see how they compared with her own. Grievant did not grieve placement on this Improvement Plan.

6. On October 12, 2001, Grievant received another written reprimand for leave abuse, and her pay was docked for these infractions. Grievant was informed her behavior was seen as insubordinate. Grievant was directed to seek assistance from the Employee Assistance Program if she so desired. Grievant was also informed she could no longer use the GroupWise sign in/out procedures, and must now sign in/out with her supervisor. Grievant did not grieve this written reprimand.

7. On November 20, 2001, Grievant received a three-day suspension for her continuing

pattern of leave abuse. This suspension was to run from November 29 to December 3, 2001. Additionally, Grievant was informed she must now submit a doctor's statement to document every request for sick leave. Further, she was required to request annual leave 48 hours in advance. She was warned that further failure to adhere to therules and regulations relating to leave abuse could result in termination. Grievant did file a grievance over this suspension, but did not pursue it past Level III, where it had been denied.

8. On December 4, 2001, Grievant received a ten-day suspension for her continuing pattern of leave abuse. This suspension was to run from December 12 to December 26, 2001. Grievant was warned that the next step in progressive discipline was termination, and that it was " imperative" that she comply with the guidelines set forth. Resp. Ex. No. 5 at Level IV Grievant did file a grievance over this suspension, but did not pursue it past Level III, where it had been denied.

9. On February 11, 2002, Grievant was terminated from her employment with DHHR for her continuing pattern of leave abuse. "The straw that broke the camel's back" occurred on February 4, 2002. Grievant asked for and received permission to meet with Tom Hamilton, Civil Rights Compliance Officer, in the Office of the Inspector General, DHHR. Her appointment was scheduled from 9:00 - 9:30 a.m. on February 4, 2002. Grievant reported to work at 11:00 a.m. on that day. When asked about her delay in returning, Grievant responded Mr. Hamilton had kept her until 10:00 a.m. On February 6, 2002, Ms. Sharon Skull-Daughtery, Grievant's immediate supervisor, called Mr. Hamilton. He reported Grievant had called around 9:30 a.m. to inform him she would not be coming to the meeting and was on her way to work. When faced with this set of facts, Grievant initially lied to her supervisors and stated she had met with Mr. Hamilton. When questioned again, Grievant admitted she did not keep the appointment. 10. Additionally, Grievant called in sick on February 5 and 6, 2002. When she returned to work on February 7, she presented a doctor's note indicating she was released to returned to work on February 6, 2002, the day before.

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.

State employees who are in the classified service can only be dismissed for "good 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. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).

The first issue to address is whether Respondent met its burden of proof and demonstrated by a preponderance of evidence that Grievant failed to report to work as scheduled. The evidence of record clearly demonstrates Grievant did not follow the established guidelines in requesting leave, was frequently late to work, frequently tookextensive lunch periods without permission, and failed to follow the requirements established in the written reprimands and suspension letters. Respondent demonstrated progressive discipline was instituted to no avail. Grievant received numerous verbal warnings, written warnings, and two suspensions, but she continued her pattern of leave abuse. Grievant was well aware her actions were unacceptable.

These actions were not trivial in nature. 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. English v. Div. of Corrections, Docket No. 98-CORR-087 (June 29, 1998); 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). Respondent has met its burden of proof and demonstrated Grievant abused her leave, and termination was warranted in this case. See Scarberry, supra.

These actions can also be seen as insubordination. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule,

regulation, or order issued . . . an administrative superior." Butts v. Higher Educ. Interim Governing Bd. No. 30120 (W. Va. June 17, 2002)(per curiam). See 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).

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 CountyBd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990) citing Meads v. Veteran Admin., 36 M.S.P.R. 574 (1988). See also Daniel v. U. S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983).

Grievant disobeyed her supervisor's directive to come to work on time, cease taking extended lunch breaks, and to request annual leave 48 hours before she wished to take it. The progressive discipline Grievant received placed her on notice that her actions were unacceptable, and she still did not follow the "reasonable and valid" orders of her supervisors. Butts, supra.

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. State employees who are in the classified service can only be dismissed for "good 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.Dep't of Finance and Admin., 164 W. Va. 461, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).

3. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . an administrative superior." Butts v. Higher Educ. Interim Governing Bd. No. 30120 (W. Va. June 17, 2002)(per curiam). See 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 Dep't, Docket No. 90-H-128 (Aug. 8, 1990).

5. 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).

6. 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. English v. Div. of Corrections, Docket No. 98-CORR-087 (June 29, 1998); 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). 7. Respondent has proven Grievant was insubordinate in her failure to come to work on time, failure to follow her supervisor's orders, failure to receive prior approval for annual leave, and her continuing practice of extending her lunch breaks.

8. Respondent has met its burden of proof and established by a preponderance of the evidence that Grievant had a long history of leave abuse, which warranted termination after progressive disciplinary measures were ineffective.

9. Grievant was terminated for misconduct of a substantial nature directly affecting

rights and interests of the public.

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. Theappealing 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: July 5, 2002

Footnote: 1

Grievant did not file a grievance form when she originally filed her grievance. After a request to complete the form during the pre-hearing conference without results, Grievant was asked to fill in a grievance form at the start of the Level IV hearing.

Footnote: 2

Originally Respondent thought Grievant was appealing her suspensions to Level IV. This assumption was in error.

Footnote: 3

Grievant was self-represented, and Respondent DHHR was represented by Assistant Attorney General B. Allen Campbell. Initially, Grievant asked for an extension until June 7, 2002, for her proposals, and this request was granted. This extended date passed without proposals or further word from Grievant.