CYNTHIA BROOKS,

Grievant,

v.

DOCKET NO. 03-HHR-182

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

BUREAU FOR CHILD SUPPORT ENFORCEMENT,

Respondent.

D E C I S I O N

Grievant, Cynthia Brooks, filed this grievance directly at level four against her employer, the West Virginia Department of Health and Human Resources/Bureau for Child Support Enforcement ("DHHR") on June 25, 2003:

> Termination due to absenteeism and poor work performance. Time periods covered by the State include Family Medical Leave Act and hospitalization time I was out. I was told to have all doctors notes signed by the doctor and no one else has been told to do this.
>
> Relief sought: Reinstatement & back pay.

This matter was heard in the Grievance Board's Charleston, West Virginia, office on September 22, 2003, and became mature for decision on October 22, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant represented herself, and DHHR was represented by B. Allen Campbell, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

LIV DHHR Exhibits

Ex. 1 -

October 8, 2002 memorandum from Jeffrey Johnson to Cindy Brooks.

Ex. 2 -

October 8, 2002 memorandum from Jeffrey Johnson to Cindy Brooks.

Ex. 3 -

October 10, 2002 memorandum from Jeffrey Johnson to Cindy Brooks.

Ex. 4 -

October 14, 2002 memorandum from Cindy Brooks to Henrietta Webb, Karen McComas, Larry Lefevre, and Jeffrey Johnson; October 8, 2002 email from Jeff Johnson to Cindy Brooks.

Ex. 5 -

October 22, 2002 Plan of Action to Clear Backlog.

Ex. 6 -

November 6, 2002 letter from Jeffrey Johnson to Cynthia Brooks.

Ex. 7 -

November 6, 2002 letter from Henrietta Webb, Jeffrey Johnson, and Karen McComas to Cynthia Brooks with attached Leave Usage Reports from April 2000 through September 2001.

Ex. 8 -

April 2, 2003 memorandum from Ruby Harrison and Jeffrey Johnson to Cynthia Brooks.

Ex. 9 -

January 29, 2003 letter from Jeffrey Johnson, Karen McComas and Henrietta Webb to Cynthia Brooks.

Ex. 10 -

March 19, 2003 Plan of Action to Clear Backlog.

Ex. 11 -

April 16, 2003 letter from Susan Shelton Perry to Cynthia Brooks.

Ex. 12 -

June 4, 2003 emails between Jeffrey Johnson and Cindy Brooks.

Ex. 13 -

June 11, 2003 letter from Garret Jacobs to Cynthia Brooks.

Ex. 14 -

DHHR Policy Memorandum 2107: Leave Abuse.

Ex. 15 -

December 17, 2002 memorandum from Henrietta Webb to Cindy Brooks.

Ex. 16 -

January 16, 2003 memorandum from Henrietta Webb to Cindy Brooks.

Ex. 17 -

April 29, 2003 memorandum from Ruby Harrison to Cindy Brooks.

Ex. 18 -

DHHR Policy Memorandum 2104 (Revised): Guide to Progressive Discipline.

LIV Grievant's Exhibits

Ex. 1 -

July 31, 2003 Decision from the Board of Review, Board of Employment Programs.

Testimony

The Board presented the testimony of Jeffrey Johnson, Henrietta Webb, and Ruby Harrison. Grievant testified in her own behalf.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed by BCSE in its Logan County office as a Legal Assistant.

2. Grievant was dismissed from her position as a Legal Assistant effective June 24, 2003, for continued absences, poor work performance, and failure to comply with directives outlined in a prior written reprimand. DHHR Ex. 13.

3. Jeff Johnson was assigned as the attorney for the Logan County office beginning in March, 2002. In October 2002, Mr. Johnson began noticing problems with Grievant's work performance. On October 8, 2002, Mr. Johnson found a stack of complaints on Grievant's desk which she was to have corrected and returned to him. Some of the cases were grossly past the time frame in which Grievant should have processed them. Grievant was notified of these errors in several emails. DHHR Exs. 1-4.

4. On October 22, 2002, Grievant was given a verbal reprimand for failing to prepare cases for court within the prescribed ten-day time limit. As a result of this verbal reprimand, Grievant was placed on a Corrective Action Plan to help her clear her backlog of cases. DHHR Ex. 5. Grievant was not able to complete all of her assigned duties on the Corrective Action Plan by the due date.

5. On November 6, 2002, Grievant was sent a follow-up letter emphasizing the importance of completing cases for hearing within the ten-day time period.

6. Additionally, on November 6, 2002, Grievant was sent a letter warning her of excessive absenteeism. From May 1, 2000 to September 6, 2002, Grievant had missed approximately 57% of her work time. This letter also required Grievant to have all annualleave approved 48 hours in advance, and required documentation from a physician for all sick leave instances. DHHR Ex. 7.

7. Grievant had previously utilized some Family Medical Leave time, but this predated Mr. Johnson's arrival in the Logan County office. Grievant had not taken any Family Medical Leave time since August, 2002.

8. By January 2003, Grievant still had not shown any improvement in her work performance or attendance. On January 29, 2003, Grievant received a written reprimand for continued poor work performance and poor attendance. In an attempt to alleviate some of her problems, Grievant had been reassigned to a Field Customer Representative position in the Logan County office in December, 2002. Almost all of Grievant's caseload was assigned to other workers to clear her

backlog. Caseloads are assigned alphabetically and Grievant was allowed to keep “Z.” DHHR Ex. 9.

9. In her capacity as Field Customer Representative, Grievant was responsible for taking customer calls, researching cases, addressing customer concerns, and taking proper actions based on the issues raised in the telephone calls.

10. Mr. Johnson received complaints about erroneous information Grievant was giving to customers. DHHR Ex. 16.

11. Shortly after receiving the January 29, 2003, written reprimand, Grievant returned to her former duties as Legal Assistant, because she did not feel the Field Customer Representative position was a good fit for her. Her entire case backlog had been cleared by other workers. DHHR Ex. 17.

12. By March 2003, Grievant had again accumulated a backlog, and she was again put on a Corrective Action Plan. DHHR Ex. 10. 13. On April 2, 2003, Grievant was late, and was issued a verbal reprimand for failing to contact the office within 45 minutes of her start time as per office policy. DHHR Ex. 8.

14. Despite the March 2003 Corrective Action Plan, Grievant's work performance and absenteeism did not improve. Consequently, on April 16, 2003, Grievant was suspended without pay for 3 working days. BCSE had again received several complaints from customers regarding Grievant's work, and, in a random sample of calls made to customers, BCSE found Grievant had an error rate of 50%. Grievant's absenteeism was approximately 29% of her work time. DHHR Ex. 11.

15. After the suspension, BCSE saw no improvement in Grievant's work performance or absenteeism. By letter dated June 11, 2003, BCSE terminated Grievant from her position as Legal Assistant for poor work performance and continued excessive absenteeism. From March 25, 2003 to May 22, 2003, Grievant was absent approximately 37% of her working time. DHHR Ex. 13.

DISCUSSION

The burden of proof in disciplinary maters 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; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested facts is more likely true than not. Hammer v. W. Va. Div. of Corrections,

Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-486 (May17, 1993). Where the evidence equally supports both sides, the employer has not met is burden of proof. Hammer, supra.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a “substantial nature directly affecting rights and interests of the public.” House v. Civil Serv. Comm'n, 181 W. Va. 49, 380 S.E.2d 226 (1989). “The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965).” Scragg v. Bd. of Directors W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

Grievant was dismissed for poor performance and excessive absenteeism. BCSE has met its burden of proving these charges against Grievant. Beginning as early as October 2002, Mr. Johnson alerted Grievant through verbal and written warnings that her work performance was deficient, and that she was missing too much work. Mr. Johnson testified he felt he needed to warn Grievant about her leave use because he saw a pattern of leave abuse. Moreover, her continued absences from work had a detrimental effect on the rest of the staff, who had to cover for Grievant.

Employers have the right to expect employees to come to work on time and to follow orders that do not impinge on their health and safety. Page v. W. Va. Dept. of Health and Human Resources, Docket No. 02-HHR-049 (July 5, 2002), *internal citations omitted*. However, despite written reprimands and a 3 day suspension, Grievant's performance did not improve, nor did her leave usage. BCSE followed a progressive discipline policy, and attempted to assist Grievant through two separate Corrective Action Plans, and finally terminated her employment. BCSE has demonstrated it had good cause to dismiss Grievant.

Grievant asserts that she was off work on Family Medical Leave during the majority of the time frame covered by the State's evidence. Grievant maintains that when she was at work, she completed her work in a satisfactory manner.

Mr. Johnson testified Grievant was off work on Family Medical Leave when he came to the Logan

office in March 2002. He recalled Grievant's mother died, and then her grandmother became ill, but after August, Grievant had no more Family Medical Leave. Moreover, he recalled that even when she was using Family Medical Leave, it was intermittent, and she was still expected to perform her job, and she did not.

Grievant testified she had surgery in August 2002, which would account for some of her leave usage around that time. However, the leave usage summaries introduced into evidence demonstrate her absences continued throughout her employment up until her dismissal.

The above findings of fact and discussion are supplemented by the following conclusions of law.

CONCLUSIONS OF LAW

1. The burden of proof in disciplinary maters rests with the employer and the employer must meet that burden by proving the charges against an employee by apreponderance of the evidence. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a “substantial nature directly affecting rights and interests of the public.” House v. Civil Service Comm'n, 181 W. Va. 49, 380 S.E.2d 226 (1989). “The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965).” Scragg v. Bd. of Directors W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. Employers have the right to expect employees to come to work on time and to follow orders that do not impinge on their health and safety. Page v. W. Va. Dept. of Health and Human Resources, Docket No. 02-HHR-049 (July 5, 2002), *internal citations omitted*.

4. BCSE proved Grievant's work performance was unsatisfactory, and that her leave usage was excessive, justifying her termination from employment.

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: November 4, 2003