PATRICIA WHITING,

Grievant,

v.

DOCKET NO. 02-HEPC-335

HIGHER EDUCATION POLICY COMMISSION/

FAIRMONT STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, Patricia Whiting, filed this grievance against her employer, the West Virginia Higher Education Policy Commission/Fairmont State College ("Fairmont"), on July 15, 2002:

> Harassment from my supervisor, Beth Slusser, while off sick from injuries I sustained while on the job.
>
> I received a letter of reprimand at my home on June 21, 2002 while I was off sick due to the injuries I sustained on the job on May 20, 2002 and May 21, 2002. When I returned to work on July 1, 2002, Mrs. Slusser gave me another letter of reprimand.
>
> I feel that I am being harassed on the job as well as off the job by Mrs. Slusser because of my injuries.
>
> Relief Sought: The letters be removed from my personnel file; that no other warnings of any sort be given me as a result of my being absent due to injuries that occurred or may occur while I am on the job, and that there be no retaliation from my superiors for grieving this matter. (See footnote 1)

Grievant received a level one response from her immediate supervisor, Beth Slusser, on August 30, 2002, following an informal conference on August 23, 2002. Grievant bypassed level two, and appealed directly to level three, where a hearing washeld on October 2, 2002, and a decision denying the grievance was issued by Daniel Bradley, President, on October 8, 2002. Grievant appealed to

level four on October 15, 2002, where the parties agreed to submit the grievance on the record developed below. This grievance became mature for decision on February 17, 2003, the deadline for filing proposed findings of fact and conclusions of law. (See footnote 2) Grievant was represented by Tim Tucker, LIUNA Local 814, and Fairmont was represented at level three by Steve Leach, and at level four by Kristi A. McWhirter, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Level Three Hearing Exhibits

Ex. 1 -

Payroll Record for Patricia Whiting, January 2-May 10, 2002.

Ex. 2 -

Fairmont State College Occupational Injury/Illness Report, June 11, 1997.

Ex. 3 -

February 15, 2001 letter from Beth Slusser and Steven Leach to Pat Whiting.

Ex. 4 -

April 2, 2002 letter from Beth Slusser and Steven Leach to Pat Whiting.

Ex. 5 -

June 5, 2002 letter from Beth Slusser and Steven Leach to Pat Whiting.

Ex. 6 -

July 29, 2002 letter from Workers' Compensation to Patricia Whiting re medication authorization.

Level Four Fairmont Exhibits

Ex. 1 -

March 6, 1998 letter from Workers' Compensation re claim closing.

Ex. 2 -

July 19, 2000 letter from Workers' Compensation re claim closing.

Ex. 3 -

Personnel Action Form for Patricia Whiting effective March 16, 2000.

Ex. 4 -

2000 Performance Evaluation of Patricia Whiting.

Ex. 5 -

2001 Performance Evaluation of Patricia Whiting.

Ex. 6 -

2002 Performance Evaluation of Patricia Whiting. (See footnote 3)

Testimony

Fairmont presented the testimony of Beth Slusser and Dr. Martin Bond. Grievant testified in her own behalf.

The following findings of fact have been derived from a review of all the evidence and testimony of record.

FINDINGS OF FACT

1. Grievant is employed by Fairmont in the Office of Student Publications, and has been so employed for nine years. Her immediate supervisor is Beth Slusser, Journalism Instructor and Student Publications Advisor.

2. Grievant has a history of excessive absences. Fairmont made Grievant an hourly employee in April of 2000 because she had exhausted all of her sick and annual leave days. LIV Fairmont Ex. 3.

3. As Grievant's immediate supervisor, Ms. Slusser evaluates Grievant's job performance on a yearly basis. On Grievant's 2000 Performance Evaluation, dated May 2, 2000, Ms. Slusser gave her a satisfactory rating in the area of Attendance, noting she had improved that spring. Grievant noted she did not agree with “Spring.” LIV Fairmont Ex. 4.

4. Following the May 2000 evaluation, Grievant's attendance did not improve, and on February 15, 2001, Ms. Slusser gave Grievant a verbal warning, which she memorialized in writing. Ms. Slusser warned Grievant if her attendance did not improve, she could be subject to further discipline. Ms. Slusser wrote the memorandum would remain in Grievant's personnel file for a period of one year. LIII Hrg. Ex. 3.

5. On Grievant's 2001 Performance Evaluation, dated May 15, 2001, Ms. Slusser rated Grievant as unsatisfactory in Attendance. Grievant noted, “I have somemedical problems which are being treated by physicians one of which is job related.” LIV Fairmont Ex. 5.

6. Grievant's attendance still did not improve. From January 1, 2002 to March 31, 2002, Grievant was absent a total of thirty-one (31) days and one and a half (1 ½) hours. Nine (9) days were properly taken sick and annual leave days; the remaining twenty-two (22) days and one and a half (1 ½) hours were not. Throughout this time and on several occasions, Ms. Slusser verbally advised Grievant that her attendance level was unacceptable.

7. On April 2, 2002, Ms. Slusser issued Grievant a first formal letter of warning, advising that her excessive absenteeism was “damaging to the Office of Student Publications,” and if she did not improve she could be subject to further disciplinary action. LIII Hrg. Ex. 4.

8. From April 1, 2002 to May 10, 2002, Grievant was absent a total of seven (7) days and three and a half (3 ½) hours, three (3) days of which were accepted sick and annual leave, four (4) days and three and a half (3 ½) hours of which were not.

9. On May 21, 2002, Grievant sustained chemical burns from a stripping agent used on the floors during the course of her employment. She left work May 21 and returned June 4, 2002. She worked one day, and was absent again from June 5 through July 1, 2002. Grievant filed a Workers' Compensation claim for this injury, which was not contested by Fairmont.

10. On June 5, 2002, Ms. Slusser issued Grievant a second letter of warning regarding her excessive absenteeism. This letter was essentially identical to the February2001 and April 2002 letters, again warning Grievant that further disciplinary action could result if she did not improve her attendance. LIII Hrg. Ex. 5.

11, On Grievant's 2002 Performance Evaluation, dated July 17, 2002, Ms. Slusser again rated Grievant unsatisfactory in the area of Attendance, noting the letters of warning, and clarifying that those letters covered absences which had occurred before the May 15, 2002, on-the-job injury.

Grievant disagreed with the evaluation, noting she was absent due to work related injuries. LIV Fairmont Ex. 6.

DISCUSSION

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Fairmont has presented sufficient evidence to demonstrate a pattern of excessive absenteeism from at least February 2001 onward. Ms. Slusser testified that Grievant's absences had been ongoing even before 2001, but they did not taken action until her absences just became too much of a problem to ignore. Ms. Slusser verbally counseled Grievant about her absences, which was memorialized in the February 15, 2001 letter. Ms. Slusser counseled and documented Grievant's continued absenteeism in her 2001 performance evaluation. In April 2002, and again in June 2002, Ms. Slusser again warnedGrievant in writing about her absenteeism, and documented those warnings as well as further counseling in Grievant's 2002 performance evaluation. Ms. Slusser kept her supervisor, Dr. Martin Bond, informed of the problems she was having with Grievant, and often, employees from Dr. Bond's office would have to cover for Grievant. In April 2000, Grievant had to be switched from a salaried employee to an hourly employee because she had used up all of her sick and annual leave. Fairmont has proven Grievant's absences were excessive, that she was verbally counseled, and then given letters of warning for those absences.

Grievant alleges Fairmont improperly reprimanded her for absences allegedly related to on-the-job injuries, that the letters of warning represent harassment because she filed a Workers' Compensation claim, and that Fairmont improperly issued a second letter of warning after failing to remove from her personnel file a stale-dated letter documenting a verbal counseling session about her excessive absences. “An allegation that a particular disciplinary measure is disproportionate to

the offense proven, or otherwise arbitrary and capricious, is an affirmative defense, and the 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.'" Connor v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995); Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

First, Grievant alleges her letters of warning were for absences incurred as a result of on-the-job injuries. Grievant established she had filed for Workers' Compensation once in 1997, once in 2000, and the last time in May 2002. The 1997 claim was closed by Workers' Compensation in March 1998, and the 2000 claim was closed on July 19, 2000,although Grievant's medications resulting from those claims are still covered. Moreover, both injuries required an absence of three days or less. Grievant claims all of her absences are due to back problems which resulted from those injuries. While Grievant may still be experiencing back pain due to on-the-job injuries, the fact remains that her claims for those injuries have been closed since 2000, and her absences are not compensable under Workers' Compensation.

As for the May 2002 chemical burn, Fairmont does not dispute that on-the-job injury, or her Workers' Compensation claim, and asserts the letters of warning do not include that absence, but relate to the excessive absenteeism that existed before that injury. It was mere coincidence of timing that the second letter of warning at the end of the school year was sent while Grievant was off work due to the chemical burn.

Considering all of the circumstances in totality, the undersigned does not find that the letters of warning relate to Grievant's May 2002 on-the-job injury, but rather, address the excessive absenteeism which had been ongoing before that injury, and since at least 2000.

Grievant also claims receipt of the letters of warning constitute harassment. “Harassment” means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession. W. Va. Code § 29-6A-2(l). Harassment has been found in cases in which a supervisor has constantly criticized an employee and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997). See also Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan.29, 1999)(disallowing such a claim because it was based on an isolated incident); Thacker v. Bd. of

Trustees/Marshall Univ., Docket No. 98-BOT-400 (June 24, 1999)(distinguishing a situation where the employer established legitimate reasons for all of its actions)." Earnest v. BOD/SWVCTC, Docket Nos. 98-BOD-273/00-HE-396 (Jan. 2003).

As discussed above, Fairmont's issuance of the letters of warning was justified, although Grievant no doubt found them annoying. Mere annoyance or disagreement with management's decision to discipline does not constitute harassment without more. Here, the letters were justified, and create no unreasonable expectations of performance from Grievant; Fairmont simply wants her to come to work.

Finally, Grievant alleges a flaw in the progressive discipline imposed, because the February 2001 memorandum documenting verbal counseling was not removed from her personnel file within one year as stated. Grievant contends that if that document had not been in her file, then the April letter would be changed to a verbal warning, and the June letter would be changed to a first warning, and not a letter of reprimand.

There is no argument the February 2001 memorandum remained in Grievant's file past one year from the date of its issuance. However, this memorandum is not a written warning; it is merely documentation of a verbal counseling session. Obviously, it is impossible to "erase" a verbal warning from an employee's personnel file. Moreover, an employer is not required to wipe the slate clean even if it is required to remove a letter from a personnel file after one year. Grievant presented no evidence of any disciplinary policy which would prohibit Fairmont from issuing her a letter of reprimand when it did, considering she had numerous verbal counseling sessions with Ms. Slusser, had been notified via performance evaluations that her attendance was unsatisfactory, and hadreceived a written warning over the matter. Grievant knew what was expected of her at all times, and the June 2002 letter of reprimand was justified, even it had been preceded by only one letter of warning.

The preceding discussion is supplemented by the following conclusions of law.

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-

325 (Dec. 31, 1992); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

2. Fairmont has proven by a preponderance of the evidence that Grievant engaged in excessive absenteeism over at least a two-year period, resulting in numerous verbal counseling sessions, a written warning, and a letter of reprimand.

3. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense, and the 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.'" Connor v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995); Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). 4. "Harassment" means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession. W. Va. Code § 29-6A-2(l).

5. Grievant failed to prove the penalty imposed by Fairmont was excessive or unwarranted given her excessive absenteeism.

6. Grievant failed to prove the issuance of verbal and written warnings for her excessive absenteeism constituted harassment.

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, 2003

Footnote: 1

W. Va. Code § 29-6A-3(h) prohibits reprisal of any kind "taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of the participation. A reprisal constitutes a grievance, and any person held responsible for reprisal action is subject to disciplinary action for insubordination.

Footnote: 2

This case was reassigned to the undersigned Administrative Law Judge on March 6, 2003, for administrative reasons.

Footnote: 3

LIV Exs. 1 through 6 were admitted by Fairmont post-hearing with Grievant's concurrence.