DIXIE LANDIS,

Grievant,

v. **Docket No. 01-HHR-365**

DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/

WILLIAM R. SHARPE, JR., HOSPITAL,

Respondent.

DECISION

Dixie Landis ("Grievant") initiated this grievance on May 31, 2001, challenging the termination of her employment as a health service worker at William R. Sharpe, Jr., Hospital ("Sharpe Hospital"). After numerous continuances granted for good cause shown, a level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on October 28, 2002. Grievant was represented by Rob Johnson, union representative, and Respondent was represented by counsel, Darlene Ratliff-Thomas, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on December 6, 2002.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant was employed by Sharpe Hospital as a health service worker, beginning April 16, 1998.

2. On January 15, 2001, Grievant's husband committed suicide. 3. Grievant was on approved leave from January 15, 2001, through January 18, 2001, due to her husband's death.

4. Although Grievant had told her supervisor, Janice Woofter, that she wanted to return to work as soon as possible and was scheduled for work on January 19, Grievant called Ms. Woofter that day and requested "a few days" of sick leave, because she had fallen after her husband's funeral.

5. Grievant was scheduled to return to work on January 24, but did not come in or call. Ms. Woofter contacted Grievant by telephone on January 26, and Grievant requested additional time off until January 31 due to “family issues.”

6. Grievant did not return to work as expected on February 1. Again, Ms. Woofter reached her by phone, and Grievant stated that her physician wanted her to remain off work a “couple more weeks.” Ms. Woofter requested that Grievant provide a doctor's excuse.

7. Grievant did not return to work on February 16, 2001, and did not contact Sharpe Hospital. Ms. Woofter reached her by telephone on February 19, and Grievant indicated she would provide a physician's statement to excuse her continued absence. Grievant did not provide the physician's excuse.

8. On February 22, after continued requests from Ms. Woofter, Grievant provided physician's excuses stating she was unable to work due to illness from January 30, 2001, through February 15, 2001. The nature of the illness was unspecified. 9. Grievant was again scheduled to return to work on February 25, but she did not come in and did not call. Ms. Woofter contacted her by telephone on February 26, and Grievant indicated she would return to work on March 1.

10. By letter dated February 28, 2001, Debbie Cook, Human Resources Director, advised Grievant that she had exhausted all her accrued leave as of February 9, 2001, and was being placed on a medical leave of absence. She also advised Grievant that she needed to provide medical documentation to justify her absence, and that the employee assistance program was available to help her cope with her personal difficulties.

11. During her conversations with Grievant in February, Ms. Woofter explained that physician's statements were crucial for allowing Grievant to remain on unpaid leave. Grievant was advised that, without the requested physician's excuses, she was on unauthorized leave. In addition, Ms. Cook provided Grievant with forms to be completed for continuing medical leave without pay, along with forms to request donated leave.

12. Grievant failed to return to work on March 1, 2001, and did not contact Sharpe Hospital.

13. On March 15, 2001, Ms. Cook received a physician's statement and a leave donation form from Dr. April Cotton, who had been treating Grievant. The forms contained “whited-out” portions regarding dates of disability, and pertinent portions had not been completed at all. Ms. Cook provided new forms to Dr. Cotton with a letter dated March 20, 2001, explaining how the forms needed to be

completed. Grievant received a copy of this letter. 14. Ms. Cook spoke with Grievant by telephone on March 19, 2001, explaining that new forms would be provided to Dr. Cotton.

15. When no further documentation was received from Grievant or her physician, on April 10, 2001, Ms. Cook notified Grievant that she had been in abandonment of her position since February 16, 2001, because medical verification had not been provided. She advised Grievant that she would have until April 18, 2001, to provide documentation regarding her diagnosis, prognosis, ability to work and anticipated return date. Ms. Cook also stated that "[f]ailure to provide this information by the above date will result in your dismissal from employment."

16. On April 17, 2001, Sharpe Hospital received a completed physician's statement from Dr. Cotton, stating that Grievant was released to return to work on March 6, 2001, and that Grievant had been scheduled to see a psychiatrist on that date, who had taken over her care.

17. On April 19, 2001, Dr. Cotton provided Grievant's most recent medical records to Ms. Cook. Grievant had last been seen on April 17, 2001, complaining of neck and shoulder pain, and requested that Dr. Cotton complete disability forms stating Grievant had presented with the same problems dating back to February. Dr. Cotton refused to do so, because Grievant had never complained of these problems previously, although a variety of complaints had been documented. Grievant refused to see a psychiatrist, although appointments had been scheduled for her, and would not submit to testing regarding her shoulder and neck pain. Dr. Cotton refused to continue treating Grievant, advising her of this by letter dated April 18, 2001. 18. By letter dated April 27, 2001, Sharpe Hospital Administrator Jack Clohan advised Grievant that her employment was terminated, due to job abandonment and her lengthy unexcused absence.

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.

The employer must also demonstrate that the 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, 380 S.E.2d 226 (W. Va. 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 Serv. Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dep't of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Serv. Comm'n, 141S.E.2d 364 (W. Va. 1965)." Scragg v. Bd. of Directors, W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

With regard to unpaid medical leave, the West Virginia Division of Personnel ("DOP") Administrative Rule (2000) provides as follows:

14.8(c) Medical Leave; Notice to Employee

> 1. An injured or ill permanent employee upon written application to the appointing authority shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve month period provided:
>
> a. The employee (1) has exhausted all sick leave and makes application no later than fifteen (15) calendar days following the expiration of all sick leave or (2) has elected not to use sick leave for a personal injury received in the course of and resulting from covered employment with the State or its political subdivisions in accordance with W. Va. Code § 23-4-1 and makes application no later than fifteen (15) calendar days following the date on which the employee filed a claim for Worker's Compensation;
>
> b. The employee's absence is due to an illness or injury which is verified by a physician/practitioner on the prescribed physician's statement form stating that the employee is unable to perform his or her duties and giving a date for the employee's return to work or the date the employee's medical condition will be re-evaluated;
>
> c. A prescribed physician's statement form is submitted each time the employee's condition is re-evaluated to confirm the necessity for continued leave; and,
>
> d. The disability, as verified by a physician/practitioner on the prescribed physician's statement form, is not of such nature as to render the employee permanently unable to perform his or her duties.

Respondent contends that, while Grievant's supervisors certainly sympathized with her tragic

situation, it simply could not continue to allow Grievant to remain on unsubstantiated leave after repeated attempts to get her to cooperate and providenecessary medical information, leaving it no choice but to dismiss her. Grievant contends that she was on authorized medical leave at the time of her dismissal. Because the DOP Rule allows up to six months of leave, she believes that her termination was improper.

The undersigned certainly sympathizes with Grievant's devastating personal situation, which obviously brought on her absences from work. However, it is quite clear that Grievant repeatedly failed to cooperate with Respondent's requests to provide information required to substantiate her leave of absence. In fact, she is very fortunate that her supervisors were kind enough to place her on medical leave without a request from her and without supporting documentation, which is clearly required under DOP's provisions. While Grievant contends that she did, in fact, provide the requested information just prior to her termination, those records unequivocally state that Grievant was released to return to work on March 6, 2001. Moreover, at no time prior to her termination did Grievant ever provide an explanation of her illness, prognosis or ability to work, as is clearly required in order to obtain and continue medical leave without pay.

Employers have the right to expect employees to attend work as required and to follow orders that 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). In Myers v. West Virginia Department of Transportation, Docket No. 96-DMV-304 (May 29, 1997), the administrative law judge noted that when an employer has established that an employee has continuously abused leave without doctor's excuses, after being asked to comply, the decision toterminate will be upheld. Morrison v. W. Va. Div of Health, Docket No. 90-H-013 (Apr. 30, 1990). Grievant's supervisors clearly tried to be patient with her situation and give her every benefit of the doubt. However, her continued failure to substantiate medical leave with the required documentation appropriately resulted in Respondent's decision to terminate her employment.

Conclusions of Law

1. 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).

___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. 2, Buskirk v. Civil Serv. Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dep't of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (W. Va. 1965).

___3. An employee may obtain a medical leave of absence without pay for up to six months, upon proper application and with supporting medical documentation of the need for medical leave. Division of Personnel Administrative Rule § 14.8(c) (2000). 4. When an employer has established that an employee has continuously abused leave without doctor's excuses, after being asked to comply, the decision to terminate will be upheld. Myers v. West Virginia Dep't of Transp., Docket No. 96-DMV-304 (May 29, 1997), citing Morrison v. W. Va. Div. of Health, Docket No. 90-H-013 (Apr. 30, 1990).

5. Grievant did not apply for medical leave without pay and, despite repeated requests, did not provide documentation of her medical condition; therefore, her termination was justified.

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, and 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.

Date: January 8, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge