DELLA FOX,

Grievant,

v v.

Docket No. 04-HHR-178

DEPARTMENT OF HEALTH and HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Della Fox, is employed as a cook by the Department of Health and Human Resources ("HHR") at Mildred Mitchell-Bateman Hospital ("MMBH"). She filed this grievance on January 22, 2004, asserting she had wrongly received a written reprimand for leave abuse. She requested the written reprimand be removed from her file.

This grievance was denied at all lower levels, and an appeal to Level IV was received on May 13, 2004. A Level IV hearing was held on June 15, 2004. (See footnote 1) The matter became mature for decision on that date, as the parties elected not to submit proposed findings of fact and conclusions of law.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed as a cook at MMBH since August 16, 2002. During her orientation, the leave policy at MMBH was explained to Grievant, and she was given a copy for her own use. 2. MMBH has a Leave Authorization and Absence Control Policy designed to ensure

there is adequate staff to care for the patients within their control and protection and to inform employees what is required to avoid leave abuse.

3. MMBH also has a Progressive Discipline Policy.

4. MMBH's Human Resources Office maintains attendance records for each employee. One of the things tracked is the leave occurrences of each employee. An occurrence is considered an unscheduled, unexcused absence. The Human Resources Office also tracks occurrences of "hooking" or combining absences with scheduled days off. While a doctor's slip is not required for one or two days of sick leave, bringing in a doctor's slip for that time off will prevent the absence from being counted as an occurrence.

5. If, within a six-month period, an employee has four occurrences she/he is to receive counseling. If occurrences continue, progressive discipline is imposed, starting with a verbal reprimand and ending with dismissal.

6. On October 3, 2002, Grievant was counseled about her excessive absences by her supervisor, Rhonda Fields, Director of Dietary Services.

7. On December 3, 2002, Grievant received a verbal reprimand for her absenteeism. She grieved that verbal reprimand, and her grievance was denied. (See footnote 2) Fox v. Dep't of Health and Human Res., Control No. 010303-1 (Feb. 7, 2003). 8. Approximately three and one half months later, on February 14, 2003, Grievant received a written reprimand for excessive absences and hooking. The written reprimand also stated Grievant's level of absenteeism had increased since her verbal reprimand. Grievant did not grieve this written reprimand, and it was to remain in her personnel file for one year if no further infractions occurred.

9. Grievant's supervisor noted improvement after this written reprimand until June 2003.

10. On January 14, 2004, Grievant received her second written reprimand for excessive absenteeism and hooking. Grievant had eight occurrences within a six-month period. According to the Progressive Discipline Policy, Grievant was to receive a suspension, but Ms. Fields decreased this discipline to a second written reprimand, as the first written reprimand had resulted in improvement in Grievant's absenteeism for a period of time, and this change was the desired goal.

Issues and Arguments

___Respondent asserts Grievant has had difficulty with absenteeism ever since she began

employment, progressive discipline has been followed except with this last disciplinary action. With this latest action, Grievant's supervisor decided to give Grievant "a break" and issued a second written reprimand instead of a suspension to try and get Grievant back on the right track. Grievant asserts she was unaware that she could turn in a doctor's slip for all sick leave to avoid receiving "an occurrence," believed her sick leave assessment should have started with a clean slate on August 7, 2003, and MMBH wentpast the six-month time frame to obtain a sufficient number of occurrences to result in disciplinary action. (See footnote 3)

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 Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Respondent placed into evidence Grievant's past disciplinary actions which reflected her leave usage and copies of the Progressive Discipline and Leave Authorization and Absence Control Policies. On page 4, the Leave Authorization and Absence Control Policies under "Exceptions" states, "All sick leave used and verified by a physician's statement is excused." Grievant received data about this policy in orientation and was given her own copy of this policy. Additionally, all the reprimands noted when sick leave was verified by a doctor's note, and these were not counted as an occurrence. Further, the Grievance Evaluator's Level III Decision on the verbal reprimand clearly stated this fact. Grievant's assertion she did not have this information is incorrect, and even if this were so, it would not prevent MMBH from following its policy.

As for Grievant's second assertion that she should start with a clean slate after August 7, 2003, the undersigned Administrative Law Judge finds no evidence to support this contention. (See footnote 4) Pursuant to the Progressive Discipline and Leave Authorization and Absence Control Policies a verbal reprimand remains in the supervisor's office for one year and is only removed if there are no further infractions. A written reprimand remains in an employee's personnel file for one year and is

only removed if there are no further infractions. This was not the case here. Grievant received her verbal reprimand on December 3, 2002, a written reprimand on February 14, 2003, and her second written reprimand on January 14, 2004. In the six months leading up to the second written reprimand, Grievant had eight occurrences. MMBH did not violate any polices by its actions.

The above-discussion will be supplemented by the following Conclusions of Law.

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). "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 Res., DocketNo. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. Respondent has met its burden of proof and demonstrated that it followed its Progressive Discipline and Leave Authorization and Absence Control Policies in giving Grievant her second written reprimand.

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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 30, 2004

Footnote: 1 *Grievant represented herself, and HHR was represented by Robert Miller, Esq., Assistant Attorney General.*

Footnote: 2 *Grievant asserted the Level III Grievance Evaluator decreased the length of time the verbal reprimand was to remain in her supervisor's office from one year to six months. The Progressive Discipline Policy indicates this verbal reprimand is to remain on file for one year. The undersigned Administrative Law Judge has read this Level III Decision and found no change in the length of time the verbal warning was to remain.*

Footnote: 3 *At the Level IV hearing, Grievant realized this belief was in error. Additionally, Grievant alleged a violation of the Family Medical Leave Act, but agreed she was not covered by this Act at the time of the occurrences, or at the time she received the second written reprimand.*

Footnote: 4 *It is unclear why Grievant selected this date.*