DIANE YERKOVICH,
Grievant,

v. **Docket No. 05-HHR-049**

DEPARTMENT OF HEALTH & HUMAN RESOURCES/
JOHN MANCHIN SR. HEALTH CARE CENTER,
Respondent.

D E C I S I O N

Diane Yerkovich ("Grievant"), employed by the Department of Health & Human Resources ("DHHR") as a Housekeeper at the John Manchin Sr. Health Care Center, filed a level one grievance on September 17, 2004, contesting a three-day suspension. For relief, Grievant requested that the three days be converted to sick leave. The grievance was denied at all lower levels, and appeal was made to level four on February 14, 2005. An evidentiary hearing was conducted in the Grievance Board's Westover office on April 14, 2005. Grievant was represented by Donna Sims, a relative, and DHHR was represented by Landon R. Brown, Senior Assistant Attorney General. The grievance became mature for decision at the conclusion of the hearing when both parties waived their right to file proposed findings of fact and conclusions of law.

The facts of this matter are undisputed and may be set forth as follows.

Findings of Fact

1. Grievant has been employed by DHHR in the Housekeeping Department at the John Manchin Sr. Health Care Center for approximately seven years.

2. By letter dated September 9, 2004, Carol Merrill, Administrator, notified Grievant that she was suspended without pay for a period of three working days, from September 28 through September 30, 2004. The reason for the suspension was abuse of leave time.

3. The incident cited by Ms. Merrill occurred when Grievant left a note for her supervisor, Shirley Church, on August 30, 2004, stating that she would be taking time off, and would not return until at least September 7, 2004. Housekeeping employees are to request time off by the fifteenth day of the month for the upcoming month. Grievant had not requested this leave. Grievant called the Center and spoke with Human Resources officer Lela Sinclair on September 3, 2004. After Ms. Sinclair advised her that disciplinary action was being considered, Grievant returned to work on September 4, 2004. In addition to the suspension, Grievant was not paid for the three days she failed to appear for work.

4. Grievant had been given a written warning on May 3, 2004, after she called in sick on May 2, 2004. Grievant had requested May 2, 10, 11, 12, 13, and 14, 2004, as annual leave, and all but Sunday, May 2, had been granted.

5. Ms. Church further noted in the May 3 warning that Grievant had been scheduled to work Easter Sunday, April 11, 2004, but left work early, purportedly because her daughter was ill. Because Grievant had previously told her coworkers that she wanted that day off to attend a party at a local park, they drove by after their shift ended at 3:00 p.m., and observed her car at the party.

6. Grievant presented a physician's report upon her return to work, even though it had not been requested. The document verifies that she had taken her eleven year old daughter to a clinic on Monday, April 12, 2004, reporting some vomiting on Saturday. The

physician noted the patient was asymptomatic, and that Grievant had brought her for evaluation "because she needed a work slip stating that she was taking care of her daughter over the weekend."

7. In Spring 2002, Grievant told her co-workers that she would be attending a field trip with one of her children. When Grievant was not granted leave for the day of the trip, she called in sick. Ms. Sinclair called the school and spoke with a teacher who confirmed that Grievant had attended the field trip. Upon her return to work, Grievant was verbally warned that this behavior was not acceptable.

8. Ms. Church noted on Grievant's performance appraisal dated March 2004, that she cannot rely on her to show up for work, and that improvement was needed in that area.

9. Grievant suffers from bipolar disorder, and is noncompliant with her medication at times. Grievant advised Ms. Merill that she had discontinued her medication in early September 2004, in order to binge drink with her boyfriend.

10. The Housekeeping Department at the Manchin Health Care Center consists of six employees who provide service seven days a week. Leave during holidays is rotated among the staff. When one employee fails to report to work as scheduled the remaining employees must complete that individual's assigned tasks.

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); 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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he 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).

Because Grievant does not deny any of the allegations upon which the suspension was based, the only issue for consideration is whether her request for mitigation should be granted. Grievant did not testify at level four; however, her representative stated that her family is now monitoring her medication, and there have been no additional incidents of this nature. DHHR asserts that mitigation is not appropriate in this case based in part on Grievant's apparent intentional decision to discontinue her medication.

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 the employer's discretion, or an inherent disproportion between the offense and

the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

With due consideration given to Grievant's affliction, DHHR has followed a progressive discipline plan, having previously given her verbal and written warnings for the same type of offenses. Grievant's actions were intentional, and without regard to the consequences. Under these circumstances, it cannot be determined that the discipline was inappropriate, or that mitigation is warranted.

In addition to the foregoing findings of fact and discussion, the following conclusions of law support the decision herein.

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); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

3. Because Grievant had been warned about abuse of leave on at least two previous occasions, but continued to act in willful disregard of her responsibilities to her employer, mitigation of the punishment in this case is not appropriate.

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.

DATE: MAY 5, 2005

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SUE KELLER
SENIOR ADMINISTRATIVE LAW JUDGE