THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

VIOLET BURNS,

Grievant,

v. **Docket No. 06-ADMIN-186**

DEPARTMENT OF ADMINISTRATION/
GENERAL SERVICES,

Respondent.

DECISION

On June 9, 2006, Grievant, Violet Burns, filed a grievance alleging she had been dismissed from her position as Custodian in the General Services Division for medical reasons. She seeks to have a position available when she is able to return to work. Grievant filed her grievance directly to Level IV pursuant to *W. Va. Code* § 29-6A-4(e)(2). A hearing was held at the Grievance Board's Charleston office on July 14, 2006. Grievant represented herself, and Respondent was represented by William Hicks, Assistant General Counsel for the Department of Administration. At the conclusion of the hearing, the parties informed the undersigned they did not wish to submit proposed findings of fact and conclusions of law. Therefore, this case became mature on July 14, 2006.

Issues and Arguments

Grievant was dismissed from employment after she failed to return to work after the expiration of her approved leave of absence without pay, and contends her dismissal was unjustified because she was still medically disabled. Respondent stands on its authority to dismiss an employee who is unable to perform the duties of her job and fails to return to work at the expiration of a leave of absence. Therefore, based on a preponderance of the evidence, I find the following material facts

have been proven:

Findings of Fact

1. Grievant was employed by Respondent as a Custodian in the General Services Division.

2. She has been off work since August 26, 2004, due to an injury.

3. After expiring all accrued paid leave, she was granted a medical leave of absence without pay commencing on August 31, 2004. Upon the expiration of the medical leave she was then granted personal leave without pay for medical reasons which expired on July 23, 2005.

4. At the expiration of Grievant's personal leave, Roger Paxton, her immediate supervisor contacted her and explained a request for extension of her personal leave was required.

5. Grievant supplied Respondent with the Application for Leave of Absence Without Pay and the Physician's Statement. It was lacking the dates for which the extension was to cover, as well as the date Grievant's condition would be reevaluated by her physician. This was essential information needed to process the request. Respondent requested the information by letter dated August 17, 2005. Grievant was given until August 25, 2005, to either return to work or request leave. Grievant subsequently requested leave through April 2, 2006.

6. On March 22, 2006, Mr. Oliverio again sent Grievant a letter informing her that he had received her request for a personal leave of absence and her physician statements predicting Grievant would be disabled at least through April 1, 2006. Mr.Oliverio also indicated Respondent could no longer hold open Grievant's position, as Grievant had been on leave for almost two years. Grievant was informed to return to work no later than Monday, April 3, 2006, with a release from her physician, or provide verification of an imminent return on that date. Otherwise, Respondent would have no choice but to terminate her.

7. Grievant subsequently requested an extension of personal leave without pay through April 21, 2006.

8. That extension was granted by Mr. Oliverio in a letter dated April 11, 2006. This extension was granted based on the information provided by Grievant's physician that Grievant was going to be referred to another physician or specialist, but the identity of the new physician and the appointment date had not been provided to Grievant.

9. Grievant was informed that if she were unable to see the new physician prior to April 21, 2006, she was to request another extension and provide the appropriate documentation.

10. On April 20, 2006, Grievant requested an extension of her personal leave of absence for medical reasons through May 20, 2006. This extension was requested because she did not yet have an appointment scheduled with her new physician.

11. By letter dated May 11, 2006, Mr. Oliverio approved Grievant's request for extension of personal leave through May 21, 2006. He instructed Grievant she was to report for duty on May 22, 2006, with the appropriate documentation releasing her to full, unrestricted duty. Mr. Oliverio also informed Grievant that failure to return on said date and provide appropriate documentation releasing her to full, unrestricted duty would result in her dismissal. 12. On May 22, 2006 at approximately 11:30 a.m., Grievant requested another extension of her leave of absence and presented a physician's statement that she would be incapacitated from May 24, 2006, until a date undetermined. The statement also indicated the disability could be life long.

13. By letter dated May 25, 2006, Robert Ferguson, Jr., Cabinet Secretary for the Department of Administration, informed Grievant that she was dismissed from her position as Custodian.

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 & 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.*

The Division of Personnel's *Administrative Rule* addresses this situation. Section 14.8(d) allows an injured (or otherwise disabled) employee to be placed on an unpaid medical leave of absence, so long as a physician's statement justifying continued leave is submitted every thirty days and the estimated period of disability is defined. Failure of an employee to report to work at the end of such a leave of absence or to provide proper justification for continued leave is grounds for dismissal. *Hayden v. Dep't of Health andHuman Res., Docket No. 98-HHR-133 (1999).* In addition, section 14.8(a), which discusses leaves of absence, states that a leave of absence should not exceed one year, and specifies that the employer may grant an extension to a leave of absence “at his or her discretion based on the agency's personnel needs.” It is significant that the Rule is written so that the

discretion depends on the needs of the agency and not of the employee. This section of the Rule even repeats that “Approval of personal leave is discretionary with the appointing authority.” *Harbert v. Dep't. of Revenue*, Docket No. 05-TD-027 (May 24, 2005).

Grievant was not released from her physician to return to work, and the documentation from her doctor indicated this disability could affect her permanently. Also, Respondent tried for almost two years to accommodate Grievant by continually extending her personal leave for medical reasons. Unfortunately for Grievant, Respondent could not grant any further extensions. Section 14.8(d)(3) of the Administrative Rule states, “Failure of the employee to report promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to the appointing authority, is cause for dismissal.”

While the undersigned realizes Grievant was in a difficult position because she could not return to work without being released by her physician, it is also difficult for Respondent to operate with a vacancy indefinitely, as Grievant's physician indicated the disability could be lifelong. This situation is unfortunate for the parties involved.

The following conclusions of law support this discussion:

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 apreponderance 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 & 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.*

2. Section 14.8(d)(3) of the Administrative Rule for the Division of Personnel allows an injured employee to be placed on an unpaid medical leave of absence, so long as a physician's statement justifying continued leave is submitted every thirty days and the estimated period of disability is defined. Failure of an employee to report to work at the end of such a leave of absence or to provide proper justification for continued leave is grounds for dismissal. *Hayden, supra*. (See footnote 1)

3. Personal leave is granted at the discretion of the employer, and extensions of leave given for a specific amount of time may be given, at the discretion of the employer based on the needs of

the agency. DOP Administrative Rule § 14.8(a).

4. Respondent met its burden of proving that Grievant failed to report to work at the expiration of her leave of absence without pay, and that it therefore had grounds to dismiss her from employment.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party 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 filedwithin 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: July 28, 2006

_____

Wendy A. Campbell

Administrative Law Judge

Footnote: 1

The Hayden decision references section 15.08 of the administrative rule; that section has since been replaced by section 14.8(d)(3), which is essentially identical.