HARRY R. DOTY,

Grievant,

v. Docket No. 06-DOH-015

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Harry R. Doty ("Grievant"), employed by the Division of Highways ("DOH") as a Mechanic in Ohio County, filed a grievance directly to level four, as is permitted by *W. Va. Code* § 19-6A-4(e), following his dismissal. For relief, Grievant requests that he be allowed to return to work after recovering from a back injury. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on March 21, 2006, at which time Grievant represented himself, and DOH was represented by Barbara Baxter, Esq. Both parties waived the opportunity to file post-hearing proposed findings of fact and conclusions of law, and the grievance became mature for decision at the close of the hearing.

The following facts essential to the case are undisputed, and may be set forth as formal findings of fact.

Findings of Fact

1. Grievant was first employed by DOH in November 2003, and was assigned as a Mechanic in Ohio County at all times pertinent to this grievance.

2. Beginning in March 2004 Grievant failed to arrive or to report off work in a timely manner. A written reprimand was issued when, on March 25, 2004, he did not report to work until 10:30 a.m. after being called at home at approximately 8:10 a.m. 3. A Record of Significant Occurrence documented that Grievant failed to report off work in a timely fashion on July 27, 2004. Grievant had left work early the previous day for a personal emergency, stating that he would return on July 27; however he did not call in to report off until after 1:00 p.m. Grievant responded that he had woke with a headache and dozed off. When he woke again much later his phone was out of order.

4. On October 6, 2004, Grievant failed to report for work. In a subsequent counseling session, Grievant indicated that he would "try to do better."

5. Grievant was cited for performing below expectations on October 20, 2004, when he called in to report that he would be late, but then did not show up or report off for the day.

6. Grievant reported off as sick on November 5 (Friday) and November 8 (Monday), 2004. At that point, Grievant held a balance of only 16. 73 hours of sick leave.

7. On November 8, 2004, County Administrator Milton Davis recommended that Grievant be suspended for three days, and that any further use of sick leave be approved only with a doctor's excuse.

8. On November 18, 2004, Mr. Davis documented a demonstrated decline in performance by Grievant after he reported off sick at 10:00 a.m. Mr. Davis also noted that Grievant had exhausted all his accrued sick leave.

9. On November 19, 2004, Grievant failed to report to work.

10. DOH District Six Engineer Bob Whipp notified Grievant by letter dated December 22, 2004, that he would be suspended for three days beginning January 4, 2005. 11. On December 29, 2004, Grievant was absent from work for the third straight day, and had exhausted his accrued annual leave time.

12. Grievant did not work on January 24 and 31, 2005, and failed to call his supervisor to report off.

13. On February 7, 2005, Mr. Davis documented that it was sixth day Grievant had been absent from work, and had called only on February 3, to report illness.

14. On February 8, 2005, Grievant was absent a second day that week without reporting off.

15. On February 9, 2005, Grievant failed to report to work, or to call off. Grievant had not reported to work since January 30, 2005.

16. On February 10, 2005, Grievant failed to report to work, or call off.

17. On February 11, 2005, Grievant called DOH at approximately 9:00 a.m. to report that he needed to discuss test results with his doctor. He did not report to work that day.

18. On February 14, 2005, Grievant reported to work with doctor's slips for 2/1 to 2/14. Grievant acknowledged that he must report to work or call off every day, but stated that he was again experiencing difficulties with his home phone.

19. On February 16, 2005, Grievant called at 8:50 to report he would be late for work because his electricity was out again.

20. On February 23, 2005, Mr. Davis recommended that Grievant be suspended for five days without pay due to his failure to report to work, or call off, on January 24 and 31, 2005. 21. On February 24, 2005, Mr. Davis recommended that Grievant be suspended for five working days after he failed to report to work on February 16, 2005, or to call in an update the status of his situation, resulting in unauthorized leave from January 31 through February 13, 2005.

22. On March 9, 2005, Grievant was called out for S.R.I.C. (snow removal ice control) at 10:00 p.m. His partner stated that Grievant was asleep and she could not guarantee she could wake him. Grievant did not report to work, but did call in at 7:00 a.m. on March 10, 2005. Mr. Davis advised him to report for his regular shift at 8:00 p.m., and annual leave could be used for four hours when he did not respond to call.

23. On March 21, 2005, Grievant requested a personal leave of absence to “clear up” his problem which he would not identify. Grievant requested a one month leave, but was advised that he could take only five days without receiving prior approval from the Charleston office. Grievant accepted the five-day leave, but did not return to work until five months later, on August 29, 2005.

24. Grievant was scheduled to serve the combined five-day suspensions for a ten day suspension beginning April 20, 2005; however, due to his absence, it was rescheduled for September 7 through 21, 2005.

25. On September 1, 2005, Grievant called after his shift began to report that he would be late for work due to a personal problem.

26. On September 2, 2005, Grievant failed to report to work or to call off. Documenting the eight hours of unauthorized leave, Mr. Davis recommended Grievant's dismissal. 27. On September 6, 2005, Grievant failed to report to work at his regularly scheduled time, and did not call until 9:00 a.m. to state he had vehicle problems. He did not report to work the remainder of the day, or update is transportation situation to verify his need to be absent. Mr. Davis again recommended Grievant's dismissal for unauthorized leave.

28. On September 26, 2005, Grievant called to report he over slept and would be arriving late. Grievant called again at 11:15 to state that he would not report to work due to a personal matter. Grievant reported to work on September 27, but left at 3:00 p.m. for a doctor's appointment.

29. On September 29, 2005, Grievant did not report to work or call off. Mr. Davis recommended Grievant's dismissal a third time. Grievant did not return to work any time thereafter.

30. By letter dated November 29, 2005, DOH Director of Human Resources Jeff Black notified Grievant that his employment would be terminated, effective December 14, 2005, due to his use of unauthorized leave and job abandonment.

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). 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*, 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Director. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

Grievant was dismissed for unauthorized leave and excessive absenteeism. DOH has met its burden of proving these charges against Grievant. Beginning as early as July 2004, Grievant was counseled on timely reporting off work and his frequent absences. Further, Grievant was advised multiple times that if he continued to be absent, or failed to call in, more severe discipline could be imposed. Grievant asserts that he has suffered with back pain since September 2004, and has been under a doctor's care until September 6, 2005. He also volunteered that he has reopened his Workers' Compensation claim to get a much needed MRI, which his regular insurance would not cover. Grievant argues that dismissal was unfair and discriminatory because other employees in Ohio County use excessive sick leave.

It is unfortunate if Grievant has a medical disability; however, he has not provided any medical verification to support such a finding. It also appears that his Workers'Compensation claim has been

closed. Notwithstanding any medical problems, during the nearly two-year period prior to his dismissal Grievant's excuses for not coming to work frequently involved a malfunctioning telephone, unreliable electrical service, or no excuse at all.

Employers have the right to expect employees to come to work on time. *See Page v. W. Va. Dep't of Health and Human Res.*, Docket No. 02-HHR-049 (July 5, 2002). However, despite an incredible number of counseling sessions, written reprimands, a three-day and two five-day suspensions, Grievant's attendance did not improve, nor did his failure to report off work. Division of Personnel Administrative Rule, Section 3.51, defines job abandonment as the absence from work under such conditions as to be synonymous with resignation. DOH has proven that Grievant repeatedly failed to follow procedure by not reporting off work prior to the beginning of his shift, or failing to report to work at all. Grievant's absence from September 28, 2005, through November 2005, clearly constitutes job abandonment. This action was neither unfair nor discriminatory inasmuch as the facts of this case independently support dismissal, and Grievant offered no evidence that any other employee in District Six was absent to the same extent.

In addition to the foregoing findings of fact and discussion, it is appropriate to make 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 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).

2. "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).

3. DOH has proven that after exhausting all of his accrued leave Grievant failed to report to work for a substantial period of time with no notice or explanation. This action constitutes job abandonment which is good cause for dismissal.

Accordingly, the 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 thegrievance 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: APRIL 28, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE