WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

VIVIAN EICHELBERGER,

Grievant,

v.

Docket No. 2008-1027-DOT

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant Vivian Eichelberger filed this grievance on January 7, 2008, following the termination of her employment with the Division of Highways ("DOH"). Grievant seeks a return to her job, "and a settlement of ten million dollars." On February 8, 2008, the parties filed an agreement wherein they requested to waive the lower levels and proceed directly to level three. A level three hearing was conducted before the undersigned Administrative Law Judge on June 19, 2008, at the Board's Beckley Office. Grievant represented herself. DOH appeared by Carrie A. Dysart, General Counsel. The parties were given until July 21, 2008, to submit proposed findings of fact and conclusions of law. No proposals were filed by either party. The parties were then given until August 22, 2008, to provide their proposals or inform the undersigned of the need for additional time. Again, no proposals were filed by either party. This grievance is mature for decision.

Synopsis

Grievant was terminated for a continuous pattern of leave abuse. Grievant had a long history of leave abuse, and had received a written reprimand and four suspensions. Despite numerous attempts at counseling sessions regarding reporting off work, Grievant continued a pattern of

absenteeism. Grievant asserted the agency's requirement to submitthe necessary leave forms amounted to harassment. This assertion was not supported by the evidence. DOH met its burden of proof and clearly demonstrated Grievant was terminated for good cause.

After a review of the entire record, the undersigned Administrative Law Judge makes the following findings of fact.

Findings of Fact

1. Grievant was hired as a Transportation Worker One on March 1, 2002, and was assigned to District Nine (Fayette, Greenbrier, Monroe, Nicholas and Summers Counties).

2.

In December of 2006, Grievant began a pattern of leave abuse.

3. On December 8, 2006, Grievant failed to report to work, and failed to obtain prior approval for leave.

4. During the week of December 18 through December 22, 2006, Grievant requested one day of medical leave without pay and four additional days of leave without pay.

5. In accordance with a “Physician's Certification for Parental Leave without Pay” dated December 16, 2006, DOH indicated they would honor Grievant's request for a family medical leave of absence without pay to care for her ill mother. This certificate indicated intermittent care of her mother was medically necessary from December 2006 to June 2007. DOH approved one day of family medical leave in accordance with the physician's certificate for the period of December 18 through December 22, 2006; however, Grievant was notified that any other leave for that period would be charged as unauthorized leave without pay. 6. Grievant worked on the 18th and 22nd of December 2006. Grievant used what small amount of annual/sick leave was available to her on December 19, 2006. Grievant was given family medical leave without pay for December 20, 2006. Grievant failed to report to work on December 21, 2006. This day was recorded as unauthorized leave without pay. As a result of this unauthorized leave, Grievant was given a written reprimand that further leave violations could lead to additional disciplinary action.

7. Grievant, without approval, left work early on December 27, 2006, and was charged with six hours of unauthorized leave without pay for that day.

8. Grievant failed to report to work, and failed to call in on December 29, 2006. Grievant was

charged with eight hours unauthorized leave without pay.

9. On January 9, 2007, Grievant advised her Crew Chief that she would be taking family medical leave without pay on January 10, 2007, for the care of her mother. Grievant also advised her Crew Chief on January 11, 2007, that she would be taking personal sick leave to attend a doctor's appointment.

10. Grievant was informed by James M. Lagos, District Manager, that she had insufficient sick leave to attend her doctor's appointment on January 11, 2007 (at that point, Grievant had no balance of sick leave available). Grievant was further informed that she would have fifteen calendar days from the date of absence to request a medical leave of absence. She was informed that proper medical documentation from a doctor must be provided.

11. On January 22, 2007, Mr. Lagos informed Grievant that, due to not having any accumulated sick leave, her request for medical leave without pay on January 17,2007, was denied pending receipt of proper medical documentation from a doctor within fifteen calendar days from the date of the absence.

12. Keith Hollinghead is the County Administrator for Greenbrier County, District Nine of the DOH.

13. A Snow Removal and Ice Control (“SRIC”) work schedule went into effect for the winter months of 2006 through 2007.

14. The policy requires the DOH employees to work from 6:00 a.m. to 6:00 p.m. during SRIC season. During days when it was not considered SRIC season, the employees' work schedule was 7:30 a.m. to 4:00 p.m.

15. The Greenbrier County SRIC procedure requires that if a snow storm is ongoing at 6:00 a.m., those employees scheduled for the first shift of SRIC duty begin their workday at that time. If there is no snowstorm, they begin their workday at 7:30 a.m. The employees are required to call their supervisor if they are unsure as to what time to start work.

16. Grievant was placed on the day shift working 6:00 a.m. to 6:00 p.m., as SRIC duties required. Other work days, Grievant's schedule, as well as all other employees, remained 7:30 a.m. to 4:00 p.m.

17. On January 22, 2007, a suspension letter was sent to Grievant advising her that Mr. Hollinghead had recommended that she be suspended for one day. Grievant was given notice on

January 16, 2007, of the opportunity to discuss the charges against her. Grievant failed to appear for her appointment with Mr. Lagos on January 22, 2007. This suspension resulted from Grievant not reporting to work on December 29, 2006. In addition, Grievant left work before the end of her shift on SRIC on January 9, 2007. 18. On February 13, 2007, Mr. Hollinghead recommended that Grievant be suspended for three working days after Grievant left work early on January 17, 2007, before performing SRIC activities. In addition, Grievant refused to report to work on January 18, 2007, for SRIC activities. Grievant's failure to report for SRIC activities, as noted above, is in violation of DOH policy.

19. Grievant continued a pattern of leave abuse throughout April and May of 2007. Grievant repeatedly requested medical leave without pay, which was disapproved. Grievant failed to provide any required documentation from a doctor within the required time frame, and was charged hours of unauthorized leave.

20. On March 22, 2007, Mr. Lagos recommended Grievant be suspended for twenty-one working days for the pattern of medical leave abuse and failure to report to work. Jeff Black, Human Resources Director, reviewed the recommendation and reduced the suspension to ten working days. The suspension resulted from Grievant's failure to report and/or call in for SRIC activities.

21. On June 12, 2007, Mr. Lagos recommended that Grievant be dismissed because of repeated acts of unauthorized leave, and failure to comply with agency policies. Once again, Mr. Black reviewed the recommendation and reduced the discipline to a twenty-one-day suspension in lieu of dismissal. The grounds for the suspension were the Grievant being absent from work without approved leave on April 5, 6, 17, 2007, as well as May 2, 9, 30, 31, 2007, and June 8, 2007.

22. Grievant was warned in the twenty-one-day suspension letter dated September 24, 2007, that any future incident of unauthorized leave would result in her termination from employment with DOH. 23. Grievant failed to report to work, and failed to call in to report off work from September 24 through October 3, 2007.

24. By letter dated December 13, 2007, Jeff Black notified Grievant that her employment would be terminated, effective December 28, 2007, due to her continued and habitual use of unauthorized leave.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *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.*

Permanent 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. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). “The 'term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard ofthe employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees.' *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).” *Jaggers-Green v. Bur. of Empl. Programs*, Docket No. 03-BEP-026 (July 30, 2004). Grievant was dismissed for unauthorized leave and excessive absenteeism. DOH has met its burden of proving these charges against Grievant. Beginning in the spring of 2006, Grievant was counseled on timely reporting off work and her frequent absences. During the winter months, SRIC scheduling is a very necessary part of roadway maintenance. Grievant had been given many documented disciplinary actions which were not to be punitive in nature, but were to afford her the opportunity to correct her work behavior. Further, Grievant was advised multiple times that if she continued to be absent, or failed to call in, more severe discipline could be imposed. Clearly, the written reprimands, numerous suspensions, and the repeated docking of Grievant's pay did not have the desired effect as Grievant's attendance problems continued throughout that period.

Grievant argues that the agency's treatment of her constitutes harassment. W. Va. Code § 6C-2-2(l) defines “harassment” as “repeated or continual disturbance, irritation or annoyance of an

employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ*., Docket No. 97-52-183 (Sept.30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ*., Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res*., Docket No. 98-HHR- 302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ*., Docket No. 97-54-463 (July 6, 1998).

Grievant's argument that she was the subject of harassment is not supported by the evidence. Requiring Grievant to complete the necessary paperwork in order to obtain approved leave is not harassment. Further, requiring Grievant to submit a physician's certification confirming the need for family medical leave without pay is not harassment. Grievant was repeatedly warned about the necessity to complete the leave forms in an effort to impress upon Grievant the importance of this documentation. It can reasonably be viewed that this effort was done to protect Grievant from continued docking of pay, not harassment. The Division of Personnel's Rule 14.6 states:

> When an employee is absent from work without authorization for sick or annual leave, the appointing authority shall dock the employee's pay in the next pay period for an equal amount of time paid during which no work was performed. The appointing authority shall notify the employee in writing that his or her pay is being docked and that the unauthorized leave is misconduct for which discipline is being imposed. The appointing authority shall use unauthorized leave only in cases when the employee fails to obtain the appropriate approval, according to agency policy, for the absence.

It is well documented Grievant failed to follow the leave policy established by DOH. While Grievant was approved for family medical leave without pay to allow her to providecare for her ill mother, this approved leave did not begin to account for the extent of time taken off work that was not approved. The undersigned does sympathize with the issues in Grievant's personal life, but it does not explain the excessive, unapproved absences. Grievant has failed to establish any conduct that would be considered harassment.

The evidence of record clearly demonstrates Grievant did not follow the established guidelines in requesting leave, was frequently absent from work, and failed to follow the requirements established

in the written reprimands and suspension letters. DOH demonstrated progressive discipline was instituted to no avail. Grievant received numerous verbal warnings, written warnings, and four suspensions, but she continued her pattern of leave abuse. Grievant was well aware her actions were unacceptable. Employers have the right to expect employees to come to work on time and to follow orders that are do not impinge on their health and safety. *Page v. W. Va. Dep't of Health and Human Res.*, Docket No. 02-HHR-049 (July 5, 2002); *English v. Div. of Corrections*, Docket No. 98-CORR-087 (June 29, 1998). DOH has met its burden of proof and demonstrated Grievant abused her leave, and termination was warranted in this case.

The following conclusions of law support the decision reached.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). 2. Permanent 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. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ*., Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res*., Docket No. 98-HHR- 302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ*., Docket No. 97-54-463 (July 6, 1998).

4. Employers have the right to expect employees to come to work on time and to follow orders that are do not impinge on their health and safety. *Page v. W. Va. Dep't of Health and Human Res.*, Docket No. 02-HHR-049 (July 5, 2002); *English v. Div. of Corrections*, Docket No. 98-CORR-087

(June 29, 1998).

5. Respondent has met its burden of proof and established by a preponderance of the evidence that Grievant had a long history of leave abuse, which warranted termination after progressive disciplinary measures were ineffective.

Accordingly, this grievance is **DENIED**. Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: October 7, 2008

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Ronald L. Reece

Administrative Law Judge