THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

REBECCA JILL WALLS,
Grievant,

v. **Docket No. 2011-0687-DHHR**

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES/
MILDRED MITCHELL-BATEMAN HOSPITAL,
Respondents,

DECISION

Rebecca Jill Walls, Grievant, was employed by the West Virginia Department of Health and Human Services ("DHHR"). She was assigned to Mildred Mitchell-Bateman Hospital and classified as Health Services Worker. Grievant Walls was dismissed from employment with the DHHR in a letter dated October 20, 2010. She filed a grievance form dated November 2, 2010,[1] stating that she was "[t]erminated without good cause on October 20, 2010." As relief, Grievant Walls requests "[t]o be made whole including restoration of all wages with interest, benefits & tenure."

A level three hearing was conducted at the West Virginia Public Employees Grievance Board office in Charleston, West Virginia, on February 28, 2011. Grievant personally appeared at the hearing and was represented by Gordon Simmons, UE Local 170, WVPWU.[2] Respondent DHHR was represented by Heather Laick, Assistant Attorney General. At the conclusion of the hearing, the parties agreed to submit proposed findings

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[1] Pursuant to W. VA. CODE § 6C-2-4(a)(4) this grievance was filed directly to level three.

[2] West Virginia Public Workers Union.

of fact and conclusions of law. The last of the fact/law proposals was received on April 1, 2011, and this grievance became mature for decision on that date.

Synopsis

Grievant was dismissed from employment for failure to meet the Respondent's attendance expectations. Grievant demonstrated that she had suffered from a back injury and that many of her absences were supported by a doctor's excuse. Respondent was able to prove that Grievant had a long history of absences and that reasonable efforts were made to accommodate Grievant's difficulties and assist her with her attendance issues. Respondent met the burden of proving that the disciplinary action was justified.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Walls was employed by the DHHR at the Mildred Mitchell-Bateman Hospital as a Health Service Worker. Her employment for Respondent began in April 2000.

2. Mildred Mitchell-Bateman Hospital ("Hospital") is an in-patient psychiatric facility located in Cabell County. Because the patients need around the clock care, the Hospital staff is required to work on weekends and holidays. When one staff member calls off work, a substitute must be found or another employee must work an additional overtime shift to provide coverage for patient care. Often employees are required to work an additional shift to cover for absent co-workers. As a result of these difficulties, employees are discouraged from calling off work on weekends and holidays.

3. Over the course of her employment, Grievant has received counseling and reprimands related to problems with attendance and tardiness including the following:

- November 2001 - Counseling for six incidents of absence for illness without a doctor's excuse;
- May 2002 - Counseling for excessive tardiness;
- June 2003 - Counseling for leaving work early and excessive tardiness;
- December 2003 - Written reprimand for attendance issues;
- April 2005 - Counseling for unscheduled absences and tardiness;
- July 2005 - Counseling for unscheduled absences;
- August 2005 - Counseling for unscheduled absences;
- January 2006 - Counseling for excessive tardiness;
- March 2006 - Verbal reprimand for unscheduled absences;
- June 2007 - Counseling for a "no call - no show" for a mandatory training;[3]
- January 2008 - Counseling for excessive tardiness and unscheduled absences;
- May 2008 - Counseling for excessive tardiness, unexcused absences and calling off work on a holiday;
- August 2008 - Verbal reprimand for attendance issues and other matters; and,
- January 2009 - Written reprimand for attendance issues and other matters.[4]

Respondent's Exhibits 8 & 9.[5]

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[3] The term "no call - no show" is defined as "[f]ailure of an employee to report for duty as scheduled and to notify the work location of an unscheduled absence." *Dept. of Health & Human Res. Bureau for Behavioral Health and Health Facilities' Absence Control Policy.* Respondent's Exhibit 13.

[4] The additional issues in the reprimands in August 2008, and January 2009, were not cited as reasons for terminating Grievant's employment and are not considered in this decision.

[5] Respondent's Exhibits also noted counseling and reprimands for Grievant refusing mandatory overtime. Since that issue was not included as a reason for Grievant's dismissal, those actions are not relevant to this grievance and are not considered herein.

4. Grievant's supervisor during this period, was the Hospital Nurse Supervisor, Erin Boggess. Supervisor Boggess noted that Grievant missed a total of 33 shifts in a six-month period, and that five of the absences were unexcused.

5. Grievant was placed on a Plan of Improvement on January 8, 2008. As part of the plan, Grievant was placed on day shift for thirty days. During that time Grievant was not required to work any weekends or holidays. These measures were taken to give Grievant time to work out transportation problems she was having. Additionally, the Hospital management agreed to attempt to keep Grievant on evening shift at the end of the thirty days to help Grievant with her tardiness problems.

6. At the end of the Performance Improvement Plan, Grievant's supervisor, Erin Boggess, rated Grievant's performance as "Does Not Meet Expectations." Nurse Manager Boggess noted that Grievant's "continued call-ins, tardiness and missing a mandatory training" were problems that occurred during the improvement period. Respondent's Exhibit 2.

7. By letter dated May 4, 2009, Grievant was suspended without pay for a period of five working days. As justification for the suspension, Mary Beth Carlisle, Hospital Chief Executive Officer,[6] noted that Grievant had missed eleven shifts in January 2009, and had failed to show up or call in for work on January 20, 2009. Additionally Grievant had missed seven more shifts between February 16, 2009 and April 20, 2009. Four of the seven shifts occurred in April 2009. Respondent's Exhibit 12.

8. By letter dated June 23, 2010, Grievant was suspended for ten working days

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[6] Ms. Carlisle has subsequently left employment at the Hospital.

without pay for continuing problems with attendance. Specifically, the letter noted that in the period since May 11, 2009, Grievant had missed twenty-five days of work and left work early on another. Of the twenty-five days missed, twelve were taken in conjunction with days off.[7] The remainder were call-ins.

9. Grievant was issued a letter dated October 20, 2010, dismissing her from employment. The letter was signed by Kieth Anne Worden, Director of Human Resources for the Hospital. Respondent's Exhibit 8.

10. The reason given for the termination of Grievant's employment was "failure to comply with attendance expectations." Director Worden reviewed Grievant's history of attendance problems and noted that since Grievant's return from her suspension on July 16, 2010, she had been absent on eleven separate occasions through October 10, 2010. Those days were listed as follows:

- July 16, 2010, Called in sick - linked to the ten day suspension - Grievant's mother had surgery;
- July 18, 2010, Called in sick - linked to the ten day suspension - physician statement received;
- August 15, 2010, Called in - linked with two days off;
- August 17, 2010, Call in - linked with two days off;
- August 30, 2010, Call in - no physician statement;
- September 5, 2010, Call in - linked with two days off - physician statement received;
- September 7, 2010, Call in - linked with two days off - physician statement received;
- October 4, 2010, Call in - no physician statement;
- October 6, 2010, Call in - no physician statement;
- October 7, 2010, Call in - physician statement received; and,
- October 10, 2010, Call in - physician statement received.

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[7] The practice of linking absences with days off is one indicator of leave abuse. *Dept. of Health & Human Res. Bureau for Behavioral Health and Health Facilities' Absence Control Policy.* Respondent's Exhibit 13.

Out of the eleven days that Grievant missed work after her ten-day suspension, Grievant did not have a physician statement for five days. Respondent's Exhibit 8.

11. At one point in her career with Respondent, Grievant suffered a work-related injury that required her to miss roughly a year and a half of work in 2006 and 2007. When the doctor authorized her to return to work, he placed Grievant under three restrictions: she could not sit for extended periods of time, she could not perform any heavy lifting, and she could only work eight hours without taking time off. The Hospital management accommodated Grievant on all of these issues. As part of the accommodations, Grievant was not required to work overtime after she returned to work. None of the leave related to Grievant's injury was considered as part of any disciplinary action taken against Grievant.

12. Grievant had to be taken off the payroll any time she was absent from work but did not have accumulated leave to cover the absence. Each time this occurred, Grievant received an "unauthorized leave notice." Grievant received twenty-five unauthorized leave notices between March 2007, and September 2009, because she was absent without accumulated 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. *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*.

The employer must also demonstrate that 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*, 181 W. Va. 49, 380 S.E.2d 226 (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 Service Comm'n*, 175 W. Va. 279, 281; 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

The Department of Health & Human Resources Bureau for Behavioral Health and Health Facilities Absence Control Policy ("Bureau's Policy") defines "leave abuse" as "[u]nauthorized or improper use of annual or sick leave, with or without pay, including excessive leave usage." The Bureau's Policy also states that "leave abuse may exist when unplanned sick leave averages 8 hours per month (for a full-time employee) in a period of three (3) consecutive months. Leave abuse shall be determined only after a full review of the circumstances involved." *Id.* In the three-month period of August 2010 through October 2010, Grievant was absent nine days, or eighty-two hours, pursuant to the

absences cited in the dismissal letter of October 20, 2010. Based upon these figures, in the three-month period immediately proceeding Grievant's dismissal she was averaging an absence rate of nearly twenty-three hours per month. This is more than twice the absence rate established by the Bureau's Policy. Such an absence rate in a three-month period may be understandable if unusual events or illnesses were taking place in an employee's life. However, Respondent demonstrated that this high absentee rate has been the norm for Grievant throughout her tenure with the agency.

Grievant objected to consideration of prior counseling and reprimands given to Grievant because many of them had taken place more than a year prior to the disciplinary action herein. The *Department of Health and Human Resources Guide to Progressive Discipline,* Policy Memorandum 2104, provides, in part:

> Verbal reprimand[s]/warning[s] may be issued when the deficiency or misconduct is not of a serious or repetitious nature. The verbal warning may contain all the elements of a written action and documentation may be retained only in an administrative file separate from the employee's personnel file maintained by the agency. This documentation may be destroyed in twelve months at the employee's request if deficiencies do not continue. If deficiencies continue, the verbal warning may be utilized as a foundation for subsequent disciplinary actions.

This provision does not apply to the present situation for a number of reasons. First, there is no evidence that Grievant ever requested that these warnings be destroyed. Second, there is ample evidence that the problems that led to the warnings persisted. Finally, these incidents are not introduced so much to demonstrate that Grievant received warnings, but rather to demonstrate Grievant's attendance record and to demonstrate that Respondent has followed progressive procedures prior to dismissing Grievant from employment.

Grievant also argues she produced physician statements for most of her absences

and those absences should not be considered in a charge of leave abuse. As a general proposition, an employee should not be disciplined for utilizing the leave which is supplied to her by the state. However, the Grievance Board has previously held that a physician's statement does not necessarily remove an absence from consideration for determining leave abuse, and that "whether Grievant abused sick leave must be based on all the facts in evidence." *Parker v. W. Va. Dep't of Health & Human Resources,* Docket No. 97- HHR-042B (Sept. 30, 1997). *Lynge v. W. Va. Dept. of Health & Human Res.*, Docket No. 00-HHR-258 (Dec. 15, 2000). Grievant has a history of absences that cannot be ignored. She has been absent so often that she has used more than her state allotted leave on more than twenty occasions**.** Given the totality of the facts in evidence, Respondent has proven by a preponderance of the evidence that Grievant's dismissal from employment was justified. Consequently, the grievance is denied.

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. *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*.

2. The misconduct which forms the basis for the dismissal of a tenured state employee must be of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (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 Service Comm'n*, 175 W. Va. 279, 281; 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. Whether Grievant abused sick leave to an extent to justify a disciplinary action must be based on all the facts in evidence. *Parker v. W. Va. Dep't of Health & Human Resources,* Docket No. 97- HHR-042B (Sept. 30, 1997). *Lynge v. W. Va. Dept. of Health & Human Res.*, Docket No. 00-HHR-258 (Dec. 15, 2000).

4. Considering the totality of the evidence related to Grievant's attendance record, Respondent proved, by a preponderance of the evidence, that the disciplinary action taken against Grievant was justified.

Accordingly, the grievance is DENIED

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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 (2008).

DATE: MAY 5, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE