THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DAWN MICHELE GODDARD,
Grievant,

v. **DOCKET NO. 2011-0545-DHHR**

DEPARTMENT OF HEALTH
AND HUMAN RESOURCES,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Dawn Michele Goddard, on October 12, 2010, challenging her dismissal by Respondent, the Department of Health and Human Resources. The statement of grievance reads:

> I was placed on medical leave of absence, my doctor faxed in my excuse having me off until further notice. On Sept. 29th I got a letter from Tanny O'Connell and Teresa Haught stating I was fired, as of Oct. 15th. Also I feel discriminated against due to my mental illness.

The relief sought by Grievant is not clearly stated on the grievance form.

A level three hearing was held before the undersigned Administrative Law Judge on May 16, 2011, at the Grievance Board's Westover, West Virginia office. Grievant appeared *pro se*, and Respondent was represented by Harry C. Bruner, Esquire, DHHR Legal Division. This matter became mature for decision on June 16, 2011, upon receipt of Respondent's Proposed Findings of Fact and Conclusions of Law. Grievant declined to submit written argument.

Synopsis

Grievant was dismissed from her employment by Respondent for failure to provide information required by HHR before it could grant a medical leave of absence without pay by the deadline of September 17, 2010, and failure to follow a corrective action plan related to her attendance and tardiness problems, and ultimately, failure to report to work when Grievant did not have approval to be off work. Respondent proved the charges against Grievant.

The following Findings of Fact are made based upon the record developed at the level three hearing.

Findings of Fact

1. Grievant was employed by the Department of Health and Human Resources ("HHR" or "Respondent"), as an Office Assistant 2, serving as the receptionist for the Wheeling, West Virginia, office. She had been an HHR employee for two years and nine months when she was dismissed from her employment.

2. Grievant's original work hours were 8:30 a.m. to 4:30 p.m., Monday through Friday. As the receptionist, Grievant sat at the front of the office and greeted all clients coming into the office, and directed them to the proper place. She also answered the telephone, distributed the mail, made copies, prepared documents, and worked on various projects.

3. As HHR has clients continually coming into the Wheeling office seeking financial assistance and assistance from its child protective services, adult protective services, and youth services sections, it is essential to have the receptionist desk manned,

it was essential that Grievant report to work on time, and it was essential that Grievant call the office promptly when she was not able to come to work.

4. When Grievant was not in the office, her supervisor, Linda Harmon, had to find someone else in the office to man the receptionist's desk to assist clients. There are only five employees in the Wheeling office, so Ms. Harmon had to man the receptionist desk when there was no one else available to do so. Grievant's absences caused disruption to the entire office, with some employees being denied vacation time when they wanted to take it, and some employees being unable to complete their own work because they were covering the reception area.

5. During the first year of her employment, Grievant missed 40 days of work. During the second year of her employment, Grievant missed 61 days of work. During the third year of her employment, Grievant missed 98 days of work. Grievant did not have enough annual or sick leave to cover all of the days she was absent, and on more than one occasion was off work on unauthorized leave. Grievant was granted seven medical leaves of absence ("MLOA") without pay.

6. Grievant received a rating of "needs improvement" on her performance evaluation for 2007-2008 in the area of "[e]mployee's presence can be relied upon for planning purposes." Grievant's supervisor commented on this rating, noting that "[e]mployee needs to use time more wisely. Expected to consider fellow employees pertaining to shortages when utilizing annual/sick leave." Grievant received a rating of "needs improvement" in the same category on the performance appraisal for the following rating period, 2008-2009, and her supervisor commented that Grievant needed to "[a]lways

be on time, and never miss work unless it is absolutely necessary. Request leave in accordance with the agency's policy."

7. During December 2009, Grievant used 18.21 hours of annual leave, 16.86 hours of sick leave, and 1.0 hours of holiday leave, all without prior authorization, including December 28 through 31, the week after Christmas. Many employees at the Wheeling HHR office take pre-authorized time off during the week after Christmas, leaving the Wheeling office short-staffed when Grievant did not come to work that week. On December 4, 2009, Grievant left for 1.5 hours because her child's school called for her to come. On December 11, 2009, Grievant did not come in because she had a headache, and on December 15, 2009, she overslept and was 1.5 hours late. On December 21, 2009, Grievant did not come to work because she felt her landlord was harassing her, and she did not call in to report off work until 12:30 p.m. On December 28, 2009, Grievant called in to say she would be late because of issues with her child, and then she called in later to say she was sick and would not be in at all. Grievant did not report to work on December 29 or 30, 2009, and did not call in to report off until after 4:30 p.m.

8. Grievant did not report to work the entire month of January 2010, and did not call in to report off work on several days. Grievant returned to work on February 8, 2010. On February 10, 2010, Grievant called in to report off work at 10:17 a.m., 11:00 a.m., and 1:46 p.m., stating she could not come in because her car was stuck in a ditch. On February 11, 2010, Grievant overslept and called in to report off work at 10:15 a.m. On February 17, 2010, Grievant arrived at work at 10:15 a.m., having called in earlier to report that her car battery was dead, and she would be late.

9. On March 19, 2010, Grievant was placed on a Corrective Action Plan ("CAP"), with the purpose of correcting Grievant's tardiness and absenteeism. Grievant was placed on sick leave restriction, meaning she was required "to provide a supporting statement verifying the cause of any sick leave absence," and "to present a physician's certificate for each absence due to personal illness" each time she reported off work sick. Second, Grievant was advised that requests for annual leave would not be approved unless she had a balance of 40 hours. Third, Grievant's work schedule was changed to 9:00 a.m. to 5:00 p.m. Fourth, Grievant was required to call in to report off work between 8:30 and 8:50 a.m., and she was to speak only to her supervisor, or to her back-up if her supervisor was off work that day. Fifth, Grievant was required to have all absences approved in advance. Finally, Grievant was advised that she was to report to work on time.

10. On March 23, 2010, Grievant sent Teresa Haught, Community Services Manager for Brooke, Ohio, and Hancock Counties, an email acknowledging her poor attendance, explaining that she was on medication which was helping her now, and thanking her for giving her another chance.

11. Grievant complied with the requirements of the CAP for about three months, but then she quit calling in as required, and her frequent absences started again. On July 8, 2010, Grievant did not call in to report off work until 10:29 a.m., and on July 9, 2010, she did not call in to report off work at all, and did not report to work that day. On July 13, 2010, Grievant's husband and her mother both called in to report that Grievant would not be at work, but Grievant did not call in to report off work that day, and she did not report to work. On July 15, 2010, Grievant called and left a message on Ms. Haught's voice mail

stating she would not be at work that day, and on July 16, 2010, Grievant called in at 2:10 p.m. to report off work for that day.

12. Grievant was at Northwood Crisis Unit for some period of time in July, and she told Ms. Haught this. Ms. Haught reminded Grievant that she needed to request a leave of absence, and provide a return to work date. At some point Grievant provided a doctor's statement showing her return to work date as August 23, 2010. Grievant did not return to work on that date, nor did she contact anyone at HHR to advise that she would not be returning to work that day. On August 27, 2010, Grievant told Ms. Harmon that she had a doctor's appointment on August 30, 2010. On August 30, 2010, Grievant called Ms. Harmon and told her the doctor's appointment was September 7, 2010, not August 30.

13. On September 9, 2010, HHR received a doctor's excuse for the period July 13, 2010, through September 9, 2010, with a return to work date of September 13, 2010. Grievant was granted a medical leave of absence without pay for the period August 23, 2010, through September 12, 2010.

14. Grievant returned to work on September 13, 2010.

15. On September 9, 2010, Ms. Haught sent Grievant a letter acknowledging the receipt of her request for another medical leave of absence without pay. Ms. Haught's letter advised Grievant that she was required to have her physician complete a state DOP-L3 form and an Americans with Disabilities Act ("ADA") form. The letter further stated clearly that "[t]hese forms must be returned to us by September 17, 2010. This information is critical in granting your MLOA request. . . . a failure to comply with this request may result in disciplinary action and denial of your MLOA application."

16. On September 15, 2010, Grievant called the office at 6:00 a.m., and left a message on Ms. Harmon's voice mail stating she needed to go to the doctor again, as she was "having issues." Grievant did not call back later to speak to Ms. Harmon as she was required to do.

17. On September 16, 2010, HHR received a doctor's statement from a Dr. Cholak, indicating that Grievant could not return to work at that time. Dr. Cholak's statement provided "no return to work date at this time."

18. On September 16, 2010, Nancy Monroe, Ms. Haught's secretary, sent Dr. Cholak's office a memorandum informing the office that HHR was "required to note a date as to how long this employee will be incapacitated. If the employee is still unable to return to work by the date the doctor notes on the DOP-L3, additional DOP-L3's would need to be completed for Ms. Goddard."

19. Neither Dr. Cholak, nor any other doctor, provided HHR with a properly completed form DOP-L3 by September 17, 2010.

20. Grievant did not return to work on September 17, 2010, nor did she provide the documentation needed by HHR to grant her a medical leave of absence without pay by that date, or request an extension of time to provide the information. Grievant knew that she had not received approval for a medical leave of absence.

21. By letter dated September 29, 2010, Grievant was dismissed from her employment, effective October 15, 2010. The dismissal letter states that Grievant is being dismissed for "failure to provide the requested ADA information by the deadline of September 17, 2010 and your failure to follow your corrective action plan and procedure established for calling off work on numerous occasions."

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*.

"Respondent must prove its charge that Grievant abandoned her job by failing to return after the expiration of her approved leave of absence." *Kitchen v. Dep't of Health and Human Res.*, Docket No. 05-HHR-175 (Oct. 18, 2005). "Failure of an employee to report to work at the end of such a leave of absence or to provide, in advance, justification for continued leave is grounds for dismissal." *Hayden v. Dep't of Health and Human Res.*, Docket No. 98-HHR-133 (1999); 143 C.S.R. 1 § 14.8(d).

The Division of Personnel's Rules set forth the requirements for an employee to obtain a medical leave of absence, stating as follows:

> An injured or ill permanent employee upon written application to the appointing authority shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve month period provided:
>
> a. The employee (1) has exhausted all sick leave and makes application no later than fifteen (15) calendar days following the expiration of all sick leave or (2) has elected not to use sick leave for a personal injury received in the course of and resulting from covered employment with the State or its political subdivisions in accordance with W. Va. Code §23-4-1 and makes

> application no later than fifteen (15) calendar days following the date on which the employee filed a claim for Worker's Compensation;
>
> b. The employee's absence is due to an illness or injury which is verified by a physician/practitioner on the prescribed physician's statement form stating that the employee is unable to perform his or her duties *and giving a date for the employee's return to work or the date the employee's medical condition will be re-evaluated*;
>
> c. A prescribed physician's statement form is submitted each time the employee's condition is re-evaluated to confirm the necessity for continued leave; and,
>
> d. The disability, as verified by a physician/practitioner on the prescribed physician's statement form, is not of such nature as to render the employee permanently unable to perform his or her duties.

143 C.S.R. 1 § 14.8(c). (Emphasis added.)

In this case, although Grievant did report to work for one or two days at the conclusion of her last approved leave of absence, she then again quit coming to work even though her eighth MLOA had not yet been approved. Grievant did not do anything to assure that the paperwork needed by HHR was provided before she began missing work again. Grievant simply asked at the hearing on this grievance for a second chance. It is clear from the record that Respondent repeatedly tried to impress upon Grievant the importance of reporting to work when she was able to do so, and the importance of reporting to work on time, but to no avail. The record reflects that HHR gave Grievant many chances before finally deciding it was time to terminate Grievant's employment. While no one disputes that Grievant did have personal and mental health issues, the record does not reflect that Grievant was incapable of following the established rules for reporting off work, or that Grievant was unable to assure that the required paperwork was properly completed and submitted to HHR by September 17, 2010. It is also clear from the

record that it was an extreme hardship on HHR when Grievant called off work without prior approval, and when she did not call in to report off work promptly. Respondent could not grant Grievant a MLOA with no ending date, and was provided no information from which an ending date could be determined. Grievant did not have approval to continue to be off work, and knew she did not have approval. Nonetheless, she did not do anything to assure that the required documentation was provided to HHR by the deadline of September 17, 2010, she did not request an extension of time to provide the paperwork, and she did not report to work. Respondent proved the charges against Grievant.

Finally, Grievant asserted a claim of discrimination on the grievance form. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant presented no evidence in support of her claim of discrimination. Accordingly, she has not shown that she was discriminated against.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Failure of an employee to report to work at the end of an approved medical leave of absence without pay is grounds for dismissal. *Hayden v. Dep't of Health and Human Res.*, Docket No. 98-HHR-133 (1999). "Failure of an employee to report to work at the end of such a leave of absence or to provide, in advance, justification for continued leave is grounds for dismissal." *Hayden v. Dep't of Health and Human Res.*, Docket No. 98-HHR-133 (1999).

3. An employee can only be granted a medical leave of absence if, among other things, she provides a verified physician's statement form "stating that the employee is unable to perform his or her duties *and giving a date for the employee's return to work or the date the employee's medical condition will be re-evaluated*." 143 C.S.R. 1 § 14.8(c). (Emphasis added.)

4. Respondent met its burden of proving it justifiably dismissed Grievant when she failed to provide the paperwork required to obtain a medical leave of absence without pay, she did not report to work as required, and she failed to successfully complete a corrective action plan.

Accordingly, this grievance is **DENIED.**

Any party or the Division of Personnel 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: July 11, 2011