THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LISA D. KESNER,
Grievant,

v **Docket No. 2012-0600-DHHR**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondent.

DECISION

Grievant, Lisa D. Kesner, filed a grievance on December 09, 2011, against her employer, West Virginia Department of Health and Human Resources/Bureau of Child Support Enforcement, (Department), challenging the termination of her employment. She seeks to have her job restored, including back pay with interest and benefits restored.

A level three hearing was conducted before the undersigned Administrative Law Judge on May 29, 2012, in the Grievance Board's Westover office location. Grievant appeared in person, and by her representative, Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Michael E. Bevers, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on July 13, 2011.

Synopsis

Grievant was terminated for absenteeism. Grievant had a long history of absenteeism, and had received reprimands and suspensions. Despite numerous attempts

at counseling sessions and a plan of improvement, Grievant continued a pattern of absenteeism. Respondent met its burden of proof and demonstrated that Grievant was suspended and terminated for good cause. This grievance is DENIED.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant, was employed by the Department as a Child Support Supervisor in the Bureau for Child Support Enforcement in the Lewis County Office. The Department dismissed Grievant from employment effective November 23, 2011.

2. Grievant had attendance problems and performance deficiencies in the last few years preceding her termination. The Department placed Grievant on an Attendance Improvement Plan from September 2009 to August 2010. Again the Department placed Grievant on another Attendance Improvement Plan from January 2011 to August 2011. Grievant received a written reprimand for absenteeism in March 2011. Grievant received a three-day suspension for absenteeism in May 2011.

3. Grievant and other Bureau for Child Support Enforcement employees would sit on picnic tables outside the Bureau's office for hours at a time.

4. Grievant would go out the back door to smoke and leave the door ajar about twice a week for a couple of years. The door would be left ajar for fifteen minutes or more, despite a sign with red letters on the door reminding employees to use a key card to open the door and to make sure the door closed behind them.

5. Grievant was notified of the protocol that they were to use their swipe cards to enter the building.

6. Grievant would take extended breaks, and prop the door open so it would not latch.

7. A Crminal Investigator with the Office of Inspector General installed a video surveillance camera in the Child Support wing of the Department's Lewis County Office Building. The camera was pointed down the hallway toward the only entrance to the Bureau of Child Support Enforcement and recorded several weeks of video surveillance.

8. While on surveillance, Grievant reported, on form OPS-2A, working eight hours a day on the following eight days. However, surveillance tapes show actual time for those days:

June 16, 2011, Grievant was out of her office area 153 minutes, or 2.55 hours. Crediting one hour for lunch and breaks this would make her known workday 6.45 hours:

June 30, 2011, Grievant was out of her office area 211 minutes, or 3.51 hours. Crediting one hour for lunch and breaks, this would make her known workday 5.49 hours;

July 1, 2011, Grievant was out of her office area 276 minutes, or 4.6 hours. Crediting one hour for lunch and breaks, this would make her known workday 4.4 hours;

July 5, 2011, Grievant was out of her office area 219 minutes or 3.65 hours. Crediting one hour for lunch and breaks, this would make her known workday 5.35 hours.

July 6, 2011,Grievant was out of her office area 99.5 minutes, or 1.65 hours. Crediting her one hour for lunch and breaks, this would make her known workday 7.35 hours.

July 7, 2011, Grievant was out of her office area 209.5 minutes, or 3.49 hours.

Crediting one hour for lunch and breaks, this would make her known workday 5.51 hours.

July 8, 2011, Grievant was out of her office area 188 minutes, or 3.13 hours. Crediting one hour for lunch and breaks, this would make her known workday 5.87 hours.

On July 11, 2011, Grievant was out of her office 159 minutes, or 2.65 hours. Crediting one hour for lunch and breaks, this would make her known workday 6.35 hours.

9. Grievant's frequent absences were compromising the Department's efficiency and effectiveness. Grievant went off the payroll two or three times due to absenteeism.

10. Grievant stated that she never left the door propped open so she was not concerned about the posted signs. She states that she was never informed of the swipe card protocol and that all the time she spent away from her office area during work hours was work related. Grievant stated that she spent two to three hours per day scanning documents, which would explain why she was out of her office between 1 ½ to 4 ½ hours on the sampled days.

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 Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence

which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

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 of the 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).

Respondent met its burden of proof and demonstrated that Grievant demonstrated a continuing pattern of inability to work as scheduled which constituted absenteeism as outlined in Respondent's policy. The record is clear that Respondent repeatedly tried to impress upon Grievant the importance of discharging her duties and responsibilities, but

to no avail. In addition, the record is clear Grievant was counseled on numerous occasions about her excessive absenteeism and that she needed to comply with her Attendance Improvement Plans. Respondent's time and attendance leave records for calendar years 2009 through 2011 document Grievant's excessive absenteeism.

It is undisputed in this case that Respondent afforded Grievant progressive disciplinary action.

Notwithstanding, Grievant failed to improve her attendance. Grievant received numerous verbal warnings, written warnings, and a suspension, but she continued her pattern of absenteeism. 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 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). Respondent has met its burden of proof and demonstrated Grievant abused her leave, and that her termination was warranted in this case.

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); "Good cause for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Virginia Civil Service Commission*, 180 W.Va. 420, 549 S.E. 2d 294 (2001).

3. Grievant's action were in violation of Department of Health and Human Resources Policy 2108, Department of Health and Human Resources Policy 2102, and Common Chapters Manual §1250. 22

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

Accordingly, this 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: August 27, 2012

Hunter D. Simmons Administrative Law Judge