WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JILL SURBAUGH,

Grievant,

v. **Docket No. 2011-1637-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/LAKIN HOSPITAL,

Respondent.

DECISION

Grievant, Jill Surbaugh, was employed by the Department of Health and Human Resources ("DHHR") Bureau of Behavioral Health and Health Facilities ("BBHHF") at Lakin Hospital in Mason County, West Virginia. She was classified as a Health Service Worker ("HSW").[1] Ms. Surbaugh filed a grievance form[2] dated May 23, 2011, alleging that her employment was terminated without cause. As relief, Grievant requested, "To be made whole including back pay with interest & restored benefits."

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on October 31, 2011. Grievant personally appeared and was represented by Gordon Simmons and Judith Warner, both of whom are with the West Virginia Public Workers Union, UE Local 170. Respondent was represented by Anne B. Ellison, Esquire, Assistant Attorney General. At the close of the hearing, the parties agreed to submit proposed findings of facts and conclusions of law, the last of which was

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[1] Some Health Service Workers are also referred to as Certified Nursing Assistants at Lakin Hospital. Grievant was often referred to as a Certified Nursing Assistant.

[2] Since Grievant was contesting a dismissal from employment, she exercised her rights pursuant W. VA. CODE § 6C-2-4(a)(4) to file directly at level three of the grievance procedure.

received by the West Virginia Public Employees Grievance Board on December 1, 2011. The grievance became mature for decision on that date.

Synopsis

Grievant was dismissed from employment for violating the DHHR Absence Control Policy by falsifying all, or a portion of, a Physican's/Practioner's Statement that she submitted related to her absence from work for the period of May 10, 2011 through May 13, 2011. Respondent proved that the form had several irregularities, including a signature that was different from the doctor Grievant actually saw. Grievant alleged that the form was filled out by an assistant who mistakenly placed the wrong name on the form. Given the totality of the evidence, Respondent proved the reasons for the dismissal by a preponderance of the evidence.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Jill Surbaugh, has been employed by the DHHR/BBHHF as a HSW at Lakin Hospital for over a decade.

2. On May 6, 2011, Grievant called off work because she had been involved in an automobile accident the previous day and suffered injuries.[3] At that time, Grievant indicated she would be absent for the period of May 6 through May 14.

3. Grievant returned to work on May 14, 2011, but called in ill the next day and was scheduled to be off work on May 16, 2011.

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[3] Respondent's Exhibit 4, Lakin Hospital Absentee Call-In/Incomplete Work Day Report.

4. On May 17, 2011, Grievant returned to work and presented a Physician's/Practioner's Statement[4] to her immediate supervisor, Vicky Berkley, Assistant Director of Nursing.

5. The Physician's/Practioner's Statement is a form that DHHR employees must have completed by a treating medical professional if they have been absent from work for more than three consecutive days.[5] The document is also referred to as a DOP L-3 form. The form lists the date the employee was seen, as well as any limitations or restrictions the employee may have regarding performance of her regular work duties as a result of the illness or injury.

6. The DOP L-3 form Grievant submitted to Ms. Berkley on May 17 contained the following information:

- EXAM DATE: *05/10/11*
- PATIENT WAS: under my professional care *05/10/11 - 05/13/11*;
- PERIOD OF INCAPACITY *05/10/11 - 05/13/11*;
- Patient will be able to resume full duty employment, with no restrictions in work activities, on *05/16/11*;
- LIMITATIONS/RESTRICTIONS: *Work no longer than 8 hrs. a day*;
- *Holzer Clinic, Jackson Pike, Gallipolis, Ohio*;
- SIGNATURE: *Dr. Jones Md.*[6]

7. Assistant Director of Nursing Berkley shared the DOP L-3 with her supervisor Kimberly Billups, Director of Nursing. The two supervisors thought it was odd that the form was signed "Dr. Jones MD." In their experience they had noted that doctors tended to use

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[4] Respondent's Exhibit 1.

[5] *See* Respondent's Exhibit 3, DHHR/BBHHF Absence Control Policy.

[6] Respondent's Exhibit 1. Words in all capital letters appear that way on the form. Words in italics are hand written on the form and usually fill in blanks left for the information.

the designation “Dr.” or “Md.” in their signatures but not both. They also noted that the printing style used on the form appeared to be the same as was used in prior DOP L-3's submitted by Grievant from other medical professionals. *See* Respondent’s Exhibit 2.

8. Director Billups asked Wanda Smith, Lakin Hospital Director of Human Resources, to verify with the Holzer Clinic that the DOP L-3 was valid. Director Smith contacted Holzer Clinic and was told that the only Doctor Jones on staff was a female urologist who did not work in the Urgent Care Clinic that Grievant visited.

9. On May 17, 2011, Director Billups and Ms. Berkley met with Grievant and asked her about the DOP L-3 form. Grievant Surbaugh indicated that she had seen a male doctor named Johnson and produced a medication bottle prescribed by Dr. Johnson. She stated that Dr. Johnson’s assistant filled out the DOP L-3 form. Grievant opined that the assistant must have put down the wrong name of the doctor on the form.

10. At the conclusion of the May 17, 2011, meeting, Grievant was suspended from employment without pay while an investigation was conducted into the validity of the DOP L-3 form. A written verification of the suspension was provided to Grievant the next day. Respondent’s Exhibit 6.

11. Director Billups conducted the investigation. She contacted the secretary for the Holzer Urgent Care Clinic and was told that Grievant had been seen by Dr. Johnson the previous week. Director Billups then faxed the DOP L-3 to the secretary so that she could verify that the form had been filled out there. The secretary told Director Billups that the signature on the form was not Dr. Johnson’s and she could not verify that it was completed by anyone at the Holzer Urgent Care Clinic.

12. Because Lakin Hospital must be staffed for twenty-four hours each day of

the year, it is often necessary for employees to work overtime when other staff calls off work. If no volunteer can be found, staff is required to work overtime. This is an unpopular assignment, but mandatory unless an employee has a valid medical reason for being unable to perform overtime. Grievant had received a written reprimand previously for refusing mandatory overtime.[7]

13. After several unsuccessful efforts were made to verify that the DOP L-3 was completed by a medical professional or designee at the Holzer Urgent Care Clinic, the Chief Executive Officer of Lakin Hospital issued a letter to Grievant Surbaugh dated May 23, 2011, terminating Grievant's employment at Lakin Hospital.[8] The reason for the dismissal was falsification of a Physician's/Practioner's Statement in violation of the DHHR/BBHHF Absence Control Policy.

14. In October of 2011, Grievant obtained two documents from the Holzer Urgent Care Clinic regarding her visit to the Clinic in May 2011. The first document was a DOP L-3 form completed by "Dr. Ajay Kottapalli signing for Dr. Johnson who is on medical leave." Grievant's Exhibit 1. This DOP L-3 contained the following information:

- EXAM DATE: *May 13-2011*;
- PERIOD OF INCAPACITY: *5/13/11 - 5/14/11*;
- LIMITATIONS/RESTRICTIONS: (none listed);
- ADDRESS: Holzer Clinic, 90 Jackson Pike, Gallipolis Ohio;
- SIGNATURE: Dr. Ajay Kottapalli signing for Dr. Johnson who is on medical leave.[9]

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[7] The term "mandation" is used to describe mandatory overtime and if an employee refuses to work a mandatory overtime shift, the employee is disciplined for "refusing mandation."

[8] Respondent's Exhibit 7.

[9] A very short cursive scribble appeared on the signature line which one may assume is what passes for Dr. Kottapalli's signature.

15. The second document is an examination form from Grievant's medical records from the Holzer Clinic which Dr. Kottapalli used to complete the DOP L-3 form he supplied to Grievant. Grievant's Exhibit 2. This document indicates that Grievant was examined by D. Johnson MD on May 13, 2011. In addition to various diagnostic information, the document notes that Grievant was discharged, her status was marked "good" and she was to be excused from work "today."[10] There is nothing on the record indicating that Grievant had a condition which would prevent her from performing all the duties of her job upon her return to work. The form was signed "D G Johnson."[11]

16. There is nothing in the medical record documents supplied by Grievant that indicates that she was examined at the Holzer Clinic on May 10, 2011 or that any medical professional recommended that she be required to work no more than eight hours per day as set out in the DOP L-3 which Grievant supplied to Vicky Berkley on May 17, 2011. It is more likely than not that this particular DOP L-3 form was fabricated by Grievant.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance

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[10] The doctor printed the word "today" on the form indicating that Grievant should be excused for May 13, 2011, the day of the examination.

[11] Grievant's Exhibit 2. The second letter in the signature was not easy to read but the undersigned is satisfied that it is a capitol G.

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). "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 DHHR terminated Grievant's employment for violating the DHHR Absence Control Policy by submitting a falsified Physican's/Practioner's Statement. Grievant's main defense during the investigation and at the hearing appeared to be that she was actually examined at Holzer Clinic on May 13, 2011, so she did not violate the policy. However, Respondent does not contend that Grievant was not examined at the clinic. Respondent's basis for dismissal is that the DOP L-3 was prepared by Grievant instead of any medical professional. Respondent contends that the document was made to enable Grievant to improperly avoid mandatory overtime. The policy relied upon by Respondent states the following:

1. If the employee does not produce a valid Form DOP L-3 within two days of an absence of over three consecutive working days, the provisions below apply:
    a. Falsification of any portion of a Physican's/Practioner's Statement shall be cause for dismissal.

Respondent's Exhibit 3, DHHR/BBHHF Absence Control Policy, Section C.

The original DOP L-3 submitted by Grievant indicated that she had been examined by Doctor Jones on May 10, 2011, that her period of incapacity was from May 10 through May 16, 2011, and that she would be limited in her work activities to the extent that she could *"Work no longer than 8 hrs. a day*." Respondent's Exhibit 1. The actual medical records from the Holzer Clinic, which were introduced into evidence by Grievant, indicate that she was examined by Doctor David Johnson on May 13, 2011, and her period of incapacity was that day only. These documents state that Grievant was discharged that day, in good shape and no limitations were made regarding her work duties. Grievant's only explanation was that the doctor's assistant filled out the form and he made a mistake when he listed the doctor's name on the DOP L-3. This explanation is not consistent with the information supplied by the Clinic and it does not explain the discrepancy between the examination date in the Clinic's records and the DOP L-3 provided by Grievant.

The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *See Gramlich v. Div. of Motor Vehicles,* Docket No. 2010-0929-DOT (June 14, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999).

In the present situation, the information from an unbiased source, the Holzer Clinic, is wholly inconsistent with the document provided by the Grievant. Her explanation of the differences between the documents is not plausible and therefore lacks credibility. Given the totality of the evidence, Respondent proved by a preponderance of the evidence that Grievant violated DHHR/BBHHF policy by providing a falsified DOP L-3 form in an effort to avoid mandatory overtime.

Since Grievant was a tenured employee in the state's classified service, the employer must also demonstrate that misconduct which forms the basis for the dismissal was 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, ___,] 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).

Respondent demonstrated that Grievant submitted a falsified document in an effort to avoid mandatory overtime. While mandatory overtime is unpopular with virtually all of the employees at the hospital, it appears to be necessary to ensure the availability of sufficient staff to meet the needs of the physically fragile population served at Lakin.

Grievant's violation of the absence control policy was significant and eroded the trust that her employer must have that she would perform her job in a professional manner. Accordingly, the grievance is DENIED.

Conclusions of Law

1. In disciplinary matters, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "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 while 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).

2. Since Grievant was a tenured employee in the state's classified service, the employer must also demonstrate that misconduct which forms the basis for the dismissal was 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).

3. Respondent proved by a preponderance of the evidence that Grievant violated the absence control policy in a way that justified her dismissal.

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: MARCH 16, 2012

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE