WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BUFFY PAYNE,
Grievant,

v. **Docket No. 2013-0968-DOA**

DEPARTMENT OF ADMINISTRATION/
FINANCE DIVISION,
Respondent.

D E C I S I O N

Buffy Payne, Grievant, filed this grievance against her employer the West Virginia Department of Administration, Finance Division ("Division"), Respondent, on December 20, 2012, protesting the termination of her employment. Grievant alleges "[d]ismissal without good cause." The relief requested is "[t]o be made whole including backpay with interest & benefits restored."

As authorized by W. VA. CODE § 6C-2-4(a)(4), this grievance was filed directly to level three of the grievance process. A level three hearing was held before the undersigned Administrative Law Judge on April 19, 2013, at the Grievance Board's Charleston office. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Stacy L. Nowicki, Assistant Attorney General. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on May 20, 2013, on receipt of the last of these proposals.

Synopsis

Grievant was terminated from her position in Respondent's finance division after submitting a falsified physician's statement. Grievant acknowledges the alteration of the form submitted. Grievant altered the form to extend her time off from work. Grievant is seeking reinstatement into her position and back pay. Grievant contends the penalty imposed by Respondent is too severe, alleging her conduct is simple misconduct, and does not warrant dismissal. Respondent has substantial discretion to determine the penalty in these types of situations. In accordance with applicable standard, Respondent established 'good cause' for termination of Grievant's employment by a preponderance of the evidence. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed in the Finance Division of the West Virginia Department of Administration as an Accounting Tech III. Grievant was primarily tasked with processing of the payment of invoices.[1] Grievant began employment with Respondent on January 2, 2009.[2]

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[1]ACCOUNTS PAYABLE -- Under general supervision perform full-performance accounting support duties by processing the accounts payable for various agencies in the DOA and the Boards & Commissions. Also, will provide assistance elsewhere in the Accounting Section as needed. R. Ex. 6

[2] Grievant worked as an Office Assistant/Receptionist for approximately two years prior to her promotion to the position of Accounting Technician 3.

2. In July 2011, Grievant began experiencing periods of taking leave without pay. Grievant commenced to be habitually absent from work, and continually dropped off of the payroll. R. Ex. 1

3. Reportedly, Grievant's absenteeism facilitated problems within the Division because her work was not getting accomplished, and other employees were required to help "pick up the slack."

4. West Virginia Division of Personnel (DOP) Administrative Rule delineates "Leave of Absence Without Pay" at W. VA. CODE R § 143-1-14.8. Two forms of leaves of absence without pay are discussed in the facts/circumstances of this case, a personal leave of absence (PLOA) and a medical leave of absence (MLOA).[3] These two forms of leave are not synonymous leaves without pay.

5. The decision to approve a Personal Leave of Absence is discretionary for the agency employer. *See* DOP Administrative Rules, R. Ex. 7 and West Virginia Department of Administration Employee Handbook, G. Ex.1.

6. A MLOA generally requires medical documentation. Typically with regard to a MLOA, an employee's absence is due to an illness or injury which is verified by a physician/practitioner's statement form stating that the employee is unable to perform his/her duties and giving a date for the employee's return to work, or the date the employee's re-evaluated. *See* DOP Administrative Rule 14.8.c.

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[3] W. VA. CODE R § 143-1-14.8.d.3 End of Leave - Failure of the employee to report to work promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to and approved by the appointing authority, is cause for dismissal.

7. On October 31, 2012, Grievant was informed that continued use of leave without pay would result in leave restriction.[4] John Smolder Testimony and R. Ex. 4.

8. Grievant, by typed memorandum, requested a personal leave of absence on October 31, 2012. G. Ex. 3 This personal leave of absence was approved.

9. On November 8, 2012, Grievant contacted her employer and stated that a doctor had excused her from work until November 13, 2012. R. Ex. 4 This is the date that appears on the unaltered doctor's excuse. R. Ex. 5.

10. On November 14, 2012, Grievant again contacted Respondent and stated that her leave was extended until November 18, 2012, because she had another doctors appointment on November 19, 2012. The November 18, 2012, date appears on the altered doctor's excuse. R. Ex. 3.

11. On November 20, 2012, Grievant contacted her employer, stating that she was released to come back to work on November 26, 2012. However, on November 26, 2012, Grievant called in sick. Grievant returned to work on November 27, 2012.

12. When Grievant returned to work on November 27, 2012, she did not have any of her doctor's excuses or her release paperwork with her.[5] She was sent home until she could provide that documentation. Grievant returned to work later in the day and tendered paperwork, consisting of doctors excuses and a release to work, to her employer.

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[4] Grievant was never actually placed on any leave restriction. Grievant's immediate supervisor, John Smolder clarified Grievant was warned that, repeated use of personal leave without pay was detrimental and upon the next occasion Grievant would be placed on restricted leave. John Smolder L-3 Testimony.

[5] Any employee requesting sick leave for an absence of more than three consecutive scheduled work days or scheduled shift must, within two days of returning to work is to provide a prescribed physician's statement from the attending physician. DOP Administrative Rule 14.4.g.2

13. Grievant asked Kelly Williams, Grievant's co-supervisor, to look at a doctor's excuse with a return to work date of November 18, 2012, and asked Ms. Williams, "if it looked ok." Ms. Williams told Grievant that it looked to her as if it had been altered.

14. Grievant admitted to her friend, Dawn Webster, that she [Grievant] had altered her doctor's excuse.

15. Grievant's paperwork was sent to Linda Coleman, the HR Coordinator for Department of Administration. Linda Coleman called Dr. David W. Thomas's office to verify the date of return to work for the excuse dated November 8, 2012. R. Ex. 3.

16. The doctor's office faxed Ms. Coleman the excuse as written by the doctor. R. Ex. 5. The doctor had only excused Grievant until November 13, 2012.

17. The return to work date on the written doctor's excuse had been changed from November 13, 2012 to November 18, 2012. At the time of the absences in question, Grievant had exhausted all sick and annual leave. Further Grievant had utilized approximately 405 hours of leave without pay between July 2011 and November 2012.

18. At the predetermination meeting on December 4, 2012, Grievant addressed her rationale for changing the return to work dates.[6]

19. Joe Thomas, Assistant Director for Employee Relations for the West Virginia Division of Personnel was consulted regarding Grievant's termination. Director Thomas advised that even a long tenured employee with no history of discipline can be terminated for tendering a forged or altered doctor's excuse to an employer. Director Thomas was of the opinion that discipline in the form of termination was appropriate in this instance.

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[6] To some degree Grievant indicated that she changed the number on the doctor's excuse with permission of the doctor. This information was not validated by any reliable source. Further, the doctor's office indicated specifically that the doctor had authorized Grievant's leave to November 13, 2012. Grievant did not produce a valid doctor's excuse excusing her from work for the dates of November 14, 15, 16, 17, and 18.

20. Acting Director of Finance David Mullins testified that based on this incident, he had lost faith in Grievant as an employee.

21. Grievant's December 5, 2012 termination letter, signed by Acting Director David Mullins, in pertinent part, states:

> On December 4, 2012, I, along with John Smolder, your immediate supervisor, and Linda Coleman, Human Resources Coordinator for the Department of Administration, met with you to present the allegation of falsification of a physician's statement you presented to your supervisor upon your return to work from a medical leave of absence without pay on November 28, 2012. At that time it was shared with you that your dismissal from employment was being considered. Your response was that you had admitted to changing the date to return to work from November 13th to November 18th. After reviewing your response and having considered all information made known to me, I have decided that your dismissal is warranted.

R. Ex. 8.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for cause. W. Va. Code R. § 143-1-12.2. "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).

In the instant matter, Respondent articulated its reasons and rationale for dismissing Grievant from employment. Grievant willfully presented an altered document to gain a benefit. This action was deceitful. Respondent highlighted that the State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct, which will not reflect discredit on the abilities and integrity of an employees' capability to perform their duties and responsibilities. Respondent demonstrated by a preponderance of the evidence that Grievant submitted a falsified document in an effort to justify her absence from the workplace.[7]

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[7] Failure of an employee to report to work promptly at the expiration of a leave of absence without pay, except for satisfactory reasons, is cause for dismissal. DOP Administrative Rule 14.8. Further, any employee requesting sick leave for an absence of more than three consecutive scheduled work days or scheduled shift must, within two days of returning to work is to provide a prescribed physician's statement from the attending physician for the entire absence. DOP Administrative Rule 14.4.g.2

Grievant's representative highlights that Form DOP L-2 is for the purpose of requesting "personal (leave) without pay," and specifically states, "Do not use this form for requesting a medical leave of absence ...." G. Ex. 4 Form DOP L-4 is used in requesting a MLOA, as well as any leave under the Family Medical Leave Act. Grievant's contention that the switching of the identified leaves of absence, PLOA to MLOA necessitated or excused Grievant's conduct was not persuasive. Further, Grievant inference that she changed the number on the doctors excuse with permission of the doctor is not consistent with any other evidence, information and/or testimony presented during the entirety of this matter. Grievant had commenced to being habitually absent from work, at the time of the absences in question, Grievant had exhausted all sick and annual leave. Grievant did not produce a valid doctor's excuse excusing her from work for the dates of November 14, 15, 16, 17, and 18. Grievant was exercising the option of leave with out pay and her conduct of altering her return to work slip was fraudulent. Respondent contacted the doctor's office. The doctor's office faxed Linda Coleman, the HR Coordinator for Department of Administration, the excuse as written by the doctor. R. Ex. 5 The doctor had only excused Grievant until November 13, 2012.

Grievant worked in the Finance Division as an Accounting Tech III, primarily tasked with processing of the payment of invoices. Trustworthiness and reliability are fundamental elements of her duties. Acting Director of Finance David Mullins testified that based on Grievant's conduct he had lost faith in Grievant as his employee. Grievant's failure to routinely report to work and her act of deception eroded the trust that Respondent must have that Grievant would perform her duties in a professional manner.

Grievant has stated that the penalty in this matter was too severe, and that the employer should have used a form of discipline, less than termination. Mitigation of the punishment imposed by a responsible state agency is not done routinely. This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge can not substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra.* In review of the instant record, it is this ALJ's determination that Respondent established good cause to terminate Grievant. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001). Grievant has not met this burden.

In the instant matter, Respondent established, by a preponderance of the evidence good reason for dismissing Grievant from employment. Grievant's conduct was not trivial. Grievant exhibited behavior that indicated she was undependable, and caused her supervisor to lose faith and trust in her as an employee of the Division.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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, a party has not met its burden of proof. *Id.*

2. 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. *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579, (1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Service Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dept of Health and Human Res./Welch Emergency Hosp*., Docket No 96-HHR-183 (Oct 3, 1996).

4. "An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action." *Miller*, *supra*, citing *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

5. Grievant did not demonstrate the penalty levied was clearly excessive or reflects an abuse of Respondent's discretion. Grievant did not establish that mitigation was mandated in the circumstances of this grievance matter.

6. Respondent established by a preponderance of the evidence that it dismissed Grievant from employment for good cause.

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 15, 2013

Landon R. Brown
Administrative Law Judge