THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KARA ANDERSON,
Grievant,

v. **Docket No. 2012-0804-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
MILDRED MITCHELL-BATEMAN HOSPITAL,
Respondent.

DECISION

Grievant, Kara Anderson, was previously employed by Respondent, Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital. On June 27, 2011, in Docket Number 2012-0002-DHHR, Grievant grieved her suspension by Respondent stating, "Grievance filed due to disciplinary action taken against grievant related to failure to meet expectations regarding attendance and performance (inaccurate records regarding absences and tardies). Performance expectations are unrealistic due to multiple factors." The parties agreed to waive the grievance to level three. Grievant then, on February 3, 2012, in Docket Number 2012-0800-DHHR, grieved her dismissal without good cause directly to level three[1]. Upon Grievant's motion, the actions were consolidated. For relief, grievant seeks for her suspension and termination to be reversed, including back pay, interest, and all benefits restored.

A level three hearing was held on November 16, 2012, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on December 17, 2012, upon final receipt of the

[1] As is permitted under W. VA. CODE § 6C-2-4(a)(4).

parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was terminated from her position as Weekend Nursing Supervisor after repeated tardiness and other performance deficiencies persisted over the course of four years and multiple counseling and disciplinary actions. Grievant alleged she was entitled to an accommodation under the Americans with Disabilities Act. Grievant did not provide sufficient information to Respondent for it to determine if accommodation was required or reasonable. Regardless, the requested accommodation was likely not reasonable due to the essential functions of Grievant's key position. Respondent met its burden of proof that it had good cause to terminate Grievant.

Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Prior to her termination, Grievant had been employed as a registered nurse by Respondent at Mildred Mitchell-Bateman Hospital since 1998. Bateman is a State-operated hospital, required to have licensed staff provide care to patients twenty-four hours a day, seven days a week.

2. In 2004, Grievant was promoted to Nurse IV, Nurse Manager, and acted as a shift supervisor. While on shift, Grievant was responsible for all staff for the entire shift for the entire facility. At the time of both the grieved suspension and termination, Grievant served as a Weekend Nursing Supervisor, working two double shifts on Saturday and Sunday, with an additional eight hour shift during the week on duty as a

staff nurse. Grievant was assigned on the weekends to facilitate her childcare needs as a single parent. Grievant was supervised by the Assistant Director of Nursing ("ADON"), Belinda Ackerson and the Director of Nursing ("DON"), Patty Ross.

3. It was very important for Grievant to report to work on time and as scheduled as she had responsibility for the entire hospital during her shift. When she was late, the previous shift supervisor would be required to stay until Grievant arrived. Arriving late also delayed transfer of care and required meetings of staff. Grievant was also required to attend Nurse Manager meetings to receive important information. It was especially important for Grievant to attend all meetings because when she was on shift she was responsible for the entire hospital with no backup.

4. Grievant received positive Employee Performance Evaluations and was a good nurse.

5. The site-specific Functional Job Description includes as its first item in the list of essential duties and responsibilities that a Nurse IV "[m]ust be able to attend work regularly as scheduled" and "[m]ay be required to work on weekends and/or holidays, during odd hours, shift work, and for extended periods." This job description has been in effect since before Grievant was hired, and she acknowledged receipt of the job description upon her hire.

6. On November 18, 2008[2], Grievant was counseled regarding Respondent's absence policy after being tardy twenty times between January 2008 and September 2008, although it was noted that several instances were excused. During the

[2] Respondent had provided evidence of previous counseling and disciplinary action, but that information is too remote in time so was given no weight and not included in this decision.

counseling, ADON Ackerson reviewed the policy with Grievant and cautioned her to arrive for work on time and to contact either the ADON or the DON for schedule adjustment in case of emergency.

7. On March 6, 2009, Grievant was placed on a Performance Improvement Plan ("PIP"). The PIP identified the following as needing improvement: "1) Employee needs to attend work as scheduled and on time. 2) Employee needs to prioritize assigned duties, paperwork, and reports in a timely manner. 3) Employee needs to attend Nurse Manger meetings as assigned. 4) Employee needs to minimize coworker's efforts to socialize and maintain professional boundaries. 5) Employee needs to voice concerns and needs to DON/ADON or designee." Among other expectations, Grievant was to obtain a monthly schedule for her personal reference, request scheduling by the tenth of each month, obtain prior approval for any shift change or overtime, to comply with the nursing call-in policy for absence or tardy, and to attend all scheduled nurse manager meetings unless excused by the DON or the ADON.

8. In April 2009, Grievant's father was diagnosed with cancer, requiring surgery and six months of chemotherapy. Grievant's father was her babysitter at the time. There were times she was tardy because of that situation. Thereafter, Grievant's mother, who was a health services worker at the hospital, assisted with child care. Respondent worked with Grievant and her mother on scheduling so that Grievant's mother would be available for child care.

9. On July 24, 2009, Grievant received a Verbal Reprimand for excessive absenteeism for calling in seven times within three months, five of which occurred on Fridays. Grievant was to continue on the PIP and to report to work as scheduled.

10. On August 7, 2009, Grievant received a second Verbal Reprimand for performance and attendance. The verbal reprimand details that Grievant had failed to complete the nursing administration portion of "fresh air monitor"[3] on August 2, 2009 and did not contact nursing supervisor to report her absence or inability to complete the monitor. The reprimand states nothing further regarding attendance. Grievant was to continue on the PIP and report to work as scheduled.

11. On December 18, 2009, Grievant received a Written Reprimand for "continued non–adherence to the Absence Control policy regarding continued absenteeism and attendance issues." In addition to the events of the previous PIP and verbal reprimands, Grievant had failed to clock in/out per policy on thirteen separate days, had stayed past her scheduled time an "exorbitant" amount of time on sixteen different occasions, was tardy eighteen more times, had called in twice more, had failed to provide a leave slip on one occurrence, and her absences showed a pattern of being on Fridays.

12. Sometime in 2010, Grievant was diagnosed with clinical depression, a condition which persisted throughout the remainder of her employment. Respondent was aware of Grievant's condition.

13. In a March 29, 2010 memorandum, from DON Ross, Grievant was informed that, since being placed on a PIP March 2009, issues had continued and additional issues had been identified. As such, Grievant would be placed on a revised PIP.

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[3] Respondent is required to provide time outdoors to the patients. The "fresh air monitor" is a recordkeeping requirement of management to make sure this is being done.

14. On April 6, 2010, Grievant was placed on another PIP stating, "1) Employee to attend work as scheduled and on time. 2) Employee needs to prioritize assigned duties, paperwork, and reports in a timely manner. 3) Employee needs to attend Nurse Manager meetings as assigned. 4) Employee to attend all assigned inservices and maintain current certifications. 5) Employee to improve communication with Nursing Administration and notify managers of identified needs. 6) Employee needs to voice concerns and needs to DON/ADON." Grievant was provided a list of sixteen expectations including a requirement to seek prior approval for any shift changes or overtime, to clock in/out and sign in/out every shift, and to refrain from working more than half an hour past her shift.

15. On April 14, 2010, Grievant obtained a handwritten note from her doctor stating, "Pt. should work Day shift while Adjusting medication. Also, cannot work greater than 8 hr shift." Grievant presented the note to DON Ross and ADON Ackerson, who denied it on the spot. The note was not provided to the human resources department.

16. On April 19, 2010, a predetermination conference was held with ADON Ackerson, Director of Human Resources ("DHR") Worden, and Grievant. Grievant explained that she was "going through a very difficult time in [her] personal life and was under a physician's care." However, Grievant requested no accommodation.

17. On May 12, 2010, Grievant was suspended for three days. The suspension considers the actions since the March 6, 2009 PIP and states: "[Y]ou have continued to fail to meet our expectation regarding attendance and performance. As a weekend Shift Supervisor, you are responsible for the operation of the facility. Not only

is your continuation of reporting late to work against the attendance policy, it serves as a negative model for your peers and those assigned to work under your direction. In addition, you continue to have difficulty meeting deadlines for reports and other paperwork needed for planning and quality advancement in Nursing Services. Your inability to complete required reports in a timely fashion (largely due to poor concentration and allowing other staff [to] interrupt you with social visits or non-consequential issues) has resulted in your inability to complete all of your tasks within the regularly scheduled shift and has resulted in of [sic] a substantial cost for overtime."

18. On September 24, 2010, yet another PIP was issued with essentially the same areas of improvement needed, with the addition that Grievant was required to complete all mandatory training. Along with other expectations, Grievant was to refrain from being tardy or clocking out greater than one hour after the end of her shift.

19. On March 3, 2011, a PIP meeting was held. There was a PIP document dated the same date that was introduced by Respondent, but was not admitted into evidence. This document was unsigned by a supervisor, but had notes that were in ADON Ackerson's handwriting. The document also had Grievant's signature, which looked identical to Grievant's signature on another document, indicating it might even have been copied from the other document rather than an authentic signature from Grievant. However, this document was not thereafter introduced by Grievant. Furthermore, although the March 3, 2011 meeting was referenced in a later suspension, no PIP from that date was referenced.

20. On May 3, 2011, a predetermination conference was held with DON Ross, DHR Worden, and Grievant. During the meeting, Grievant stated she tried to get to

work on time but that she "just can't do it."

21. On May 25, 2011, Respondent received a DOP-L3, Physician's/Practitioner's Statement, from Grievant's physician. In it, he states Grievant would have a period of partial incapacity from May 24, 2011 to May 24, 2012 and that, "Pt. cannot work greater than 8 hour shift due to medical problems. Rest period, away from facility must not be less than 10 hrs or may compromise this patient's health!" No other information was provided.

22. The same day DHR Worden responded to the physician's statement by letter entitled "Request for Accommodation." DHR Worden provisionally approved the request for thirty days. The letter explained that Grievant's functional job description, physician's restrictions, and facility needs would be reviewed as well as the impact of Grievant's impairment on her capacity to perform her work and the ability of the hospital to accommodate her restrictions. DHR Worden further states:

> Since the restricted duty assessment is an interactive endeavor, your participation and cooperation in it is necessary. In order to implement the restricted duty assessment process, we will need addition information from you treating physician. In order to obtain the information I have enclosed several forms that need to be completed. The enclosures include a DOP-L3 (Physician's Statement), an analysis of your work as a Shift Supervisor and an Americans with Disabilities Act Medical Inquiry form. You will need to present the enclosed forms to your doctor for completion and return it to me by no later than June 15, 2011, so we have sufficient time to make a timely assessment and determination. This information is critical in determining the level of accommodations you need and our capability to provide them. Your cooperation in this effort is essential and a failure to comply with this request may result in disciplinary action.

23. On May 27, 2011, Grievant was suspended for five days for continued failure to meet attendance and performance expectations. The letter documents that between January and May, Grievant was tardy twenty-six times, and left late five times. Since added as a requirement in the PIP, Grievant had missed half of the twelve Nursing Management Meetings, although three of those absences were excused. She had missed two required trainings, one of which was completed only after she had missed three scheduled training sessions. In addition, the letter lists the following concerns regarding Grievant's leadership:

- Multiple request[s] from Human Resources to clarify In/Out times for August 2010 through October 2010, as you failed to follow policy to clock in and out
- July 13, 2010 Overtime Sheet was received for approval-they were due in April 2010
- October 2010-multiple messages were sent to schedule a PIP meeting
- December 2010 Multiple requests from Human Resources to clarify time as you did not clock In/Out, as you failed to follow policy to clock in and out
- February 25, 2011 copies of Overtime Sheets were sent to you as you had not sent them from December 2010, January and February of 2011 to be processed
- March 26, 2011 excused a Health Service Worker for refusing mandatory overtime instead of communicating circumstances to the Nurse Manager for consideration and approval
- April 15, 2011, Root Cause Analysis on patient in crisis reflects that staff were unable to find you after the initial Code was called. Your position requires you to be reachable to staff at all times
- April 19, 2011, you made the decision to adjust the schedule of your mother (a Health Service Worker) without conferring with her Nurse Manager -- you are aware that you are not to make employment decisions for members of your immediate family as required by the Division of Personnel's Administrative Rule, Section 17.2 *Nepotism*.

24. On July 1, 2011, Respondent received an updated DOP-L3 completed by

Grievant's physician from an exam date of June 21, 2011. The other two required documents were not submitted, and the information was supposed to be submitted to Respondent by June 15, 2011. There is no evidence that Grievant notified Respondent she would need more time, or that she explained to Respondent why she did not submit the other required documents.

25. On July 14, 2011, a predetermination conference was held with DON Ross, DHR Worden, and Grievant. At the meeting, it was decided that Grievant would be allowed a four week period to show improvement by not reporting late for work or staying over to complete assignments. The meeting reconvened on August 16, 2011 to review Grievant's attendance, which revealed she had been tardy three times and stayed late six times.

26. On August 19, 2011, Grievant was suspended for ten days for failure to meet expectations of attendance and performance.

27. On January 30, 2012, a predetermination conference was held with DON Ross, DHR Worden, Grievant, and Grievant's representative, Jay Miser. During the meeting, Grievant stated she was ill, had had trouble adjusting to her medication, and that her back-to-back double shifts made it difficult to sleep.

28. On January 31, 2012, Grievant was terminated after being tardy for work fifteen times since the ten-day suspension. The termination addressed Grievant's medical condition:

> Our records reflect on May 25, 2011, you were sent a memorandum in response to your supplying a physician's statement (also dated May 25, 2011) requesting an accommodation. You were to supply your physician a copy of your functional job description (we supplied you with one to give to your physician) and have him complete a Medical

> Inquiry Form and return it to us within 30 days. We did not receive the form back, so could not respond to the request. Although you did provide documentation of you [sic] illness, your physician did not suggest that your condition would impact your ability to appear for work on time.

29. On February 3, 2012, Respondent received a Form DOP-L5, Medical Leave of Absence without Pay and/or Federal Family and Medical Leave Act (FMLA) Certification of Health Care Provider for Employee's Serious Health Condition, completed by Grievant's health care provider.

30. For the entire year of 2011, Grievant took sixty-three and a half hours of sick leave and worked one hundred fourteen and a half hours of overtime. A portion of the overtime was due to Grievant working over to complete her regular duties, when she had been directed not to do so.

31. Of the string of disciplinary actions beginning in 2009, only the May 2011 suspension and the termination were grieved.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove that the action taken was justified, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *See* W. VA. CODE ST. R. § 156-1-3 (2008); *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 &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.*

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); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

This grievance presents some disputed facts, which requires a credibility assessment of the witnesses. In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

During the hearing, Grievant, DHR Worden, and ADON Ackerson all testified. All three witnesses displayed appropriate demeanors, attitudes toward the proceedings and had similar opportunities to perceive and communicate. There was no admission of prior untruthfulness or allegations of dishonest reputations. Grievant has an obvious interest in trying to regain her job, however, the Respondent's witnesses are also interested in defending their actions in this case. Therefore, the credibility assessment in this case comes down to inconsistent or inaccurate statements.

Grievant testified she had not grieved her first suspension because she needed the break, but that she grieved her second and third suspensions. The record clearly shows she grieved only the May 2011 suspension. Also, she maintained that her first request for accommodation was made in May 2011, using that assertion to attack ADON Ackerson's credibility when, in reality, Grievant's own exhibits show that she first requested accommodation in April 2010.

Grievant points out that ADON Ackerson could not explain the aborted March 3, 2011 PIP document or the seemingly identical signatures on that document. This is somewhat troubling, however, ADON Ackerson's explanation that this was a draft document is sloppy practice, but plausible. Furthermore, Respondent's records do not reflect this document as a PIP and only references a PIP review meeting. Also problematic in finding that ADON Ackerson is not credible due to this document is that Grievant objected to the admission of the document, so it does not appear in evidence for review. Grievant further asserts that ADON Ackerson is not credible due to her referencing a request for accommodation in March of 2011 in handwritten notes in that document, when the accommodation was not requested until May 2011. As noted

above, Grievant actually first requested accommodation in April 2010, and, again, the document is not in evidence to review.

DHR Worden testified that the provisions of the Family and Medical Leave Act ("FMLA") were not relevant to this case as Grievant had already missed more than the twelve weeks allowed under FMLA. This is certainly an inaccurate statement as the record clearly shows Grievant had taken only 63.5 hours of sick leave in 2011. In addition, there were quite a few details of the case DHR Worden was unable to recall during her testimony.

In sum, all three witnesses had inconsistencies or inaccuracies in their testimony. Rather than conclude that all three witnesses are dishonest, it is more reasonable to conclude that these inconsistencies are simply lapses in memory of a disciplinary history that spanned years. There is no compelling reason to find any of the witnesses any more credible than the others.

Respondent contends it had no choice but to terminate Grievant after attempts to improve Grievant's attendance through the progressive discipline process failed.

> It is axiomatic that an employer may expect its employees to arrive at work, and be ready to work, on time at the beginning of their shifts. When an employee fails to arrive, in a setting such as MMBH, the employee he is relieving must stay over until replaced. This can have a direct negative effect on patient care, and certainly is an administrative and logistical nightmare. It is a violation of policy, and can be a form of insubordination. . . [T]he continual, repeated and unrepentant habit exhibited by Grievant in this case rises to the level of a substantial issue, for which termination is a reasonable outcome.

Holland v. Dep't of Health &Human Res./Mildred Mitchell-Bateman Hosp, Docket No. 06-HHR-126 (May 31, 2006). Indeed, Respondent has proven that it utilized extensive

efforts to correct Grievant's behavior through the progressive discipline progress; since 2008 issuing PIPS, verbal reprimands, written reprimands, and three suspensions. Respondent met with Grievant regarding her attendance problems repeatedly over the course of four years. Respondent even layered an unusual third suspension in an attempt to avoid termination. Respondent was clear in identifying Grievant's deficiencies and identifying its expectations of Grievant throughout the counseling and discipline process. Grievant never showed any significant improvement. Ms. Worden testified that Grievant was a good nurse that they did not want to lose, but that the attendance problems simply could not be corrected and could not continue to be tolerated in Grievant's position. As Weekend Shift Supervisor, Grievant was in a vital position, in control of the entire facility with no back up. Grievant's habitual tardiness was especially problematic given the nature of her position. Her continuing problems submitting appropriate leave slips and following clock in/out procedures exacerbated her lack of reliability.

Grievant argues that Respondent did not have good cause to terminate Grievant because it did not properly follow procedures in the discipline process and because it failed to grant Grievant reasonable accommodation for her disability. Impacting both of Grievant's arguments is that fact that, of the many actions taken by Respondent since 2008, Grievant grieved only the May 2011 suspension and her termination. Those actions that were not grieved are presumed valid. *See Teel v. Bureau of Employment Programs/ Workers Comp. Div.*, Docket No. 01-BEP-466 (June 10, 2002). Therefore, the undersigned is limited to considering only the grieved actions.

Regarding the allegation that Respondent had failed to follow its policies regarding the duration of improvement plans and removal of documentation after one year, Respondent did comply with policy. When Grievant was suspended in May 2011, she had been placed on yet another PIP in September 2010, and had been suspended for the same behavior in May 2010. These instances show consistent and timely action by Respondent to require Grievant to correct her deficiencies. The other instances of counseling and discipline mentioned by Grievant are not only presumed to be valid as they were not appealed, but also are offered by Respondent simply to show that the principles of progressive discipline were followed.

Grievant also disputes the factual bases of the suspension and termination, stating that Respondent's records regarding her attendance are inaccurate, and pointing out her reasonable use of sick leave and significant hours of overtime. Grievant testified that she had proven in some meetings with Respondent that some of the attendance records were inaccurate. She alleges there were instances of tardy or staying late that were actually excused. Grievant provided no specific examples of dates that this happened, nor any corroborating evidence. As discussed above, there is no reason to find Grievant more credible than Respondent's witnesses. Even if it were true, that would simply act to reduce the total number of occurrences, and unless most of the records were inaccurate, Grievant would still have been consistently tardy. Looking specifically at the tardies recorded in the May 2011 suspension, Grievant was tardy roughly 40% of the time considering that her schedule had her working only three days per week. Even if some of those records were in error, the remaining rate of tardiness alone would have justified suspension, and there were multiple other

deficiencies upon which the suspension was based. Further, if this was a continuing problem Grievant was having with Respondent, which was leading to multiple instances of discipline, one would think that Grievant would keep careful track of any instances in which her tardiness was excused.

Grievant also argues she was entitled to a reasonable accommodation under the Americans with Disabilities Act ("ADA"), which would have prevented the disciplinary action because she alleges her disability is what caused her to be tardy. Although the Grievance Board has no authority to determine liability under the ADA, consideration of the act is still relevant to this case in determining whether Respondent had good cause to terminate Grievant. *See Martin v. W. Va. Dep't of Health &Human Res./Jackie Withrow Hosp.*, Docket No. 2011-1590-DHHR (May 18, 2012), *aff'd*, Kanawha County Circuit Court, Civil Action No. 12-AA-79 (December 7, 2012); Ruckle v. *W. Va. Dep't of Health & Human Res./Office of Maternal and Child Health*, Docket No. 04-HHR-367 (December 22, 2005); *Cf. Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

> [The ADA] prohibits employers from discriminating against individuals with disabilities in all employment practices and all employment related activities. Disability is defined as a physical or mental impairment that substantially limits one or more major life activities. The U.S. Equal Employment Opportunity Commission (EEO) considers the following as major life activities: walking, seeing, speaking, hearing, breathing, learning, performing manual tasks, caring for oneself, working, sitting, standing, lifting, reaching, thinking, concentrating, interacting with others, and sleeping. Reasonable accommodation is defined by the ADA as any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.

Martin, Docket No. 2011-1590-DHHR.

From the information provided to Respondent by Grievant, it is not at all clear that Grievant's condition would qualify as a disability[4] under the ADA, that it was the cause of her tardiness, or that limiting her schedule as requested would have alleviated the problem. Grievant's depression did not onset until 2010, and her tardiness predated that diagnosis. Also, Grievant had child care issues and trouble with the schedule itself, which caused tardiness. Grievant simply never provided enough information for Respondent to make a determination, although Respondent's process in responding to this issue was also somewhat lacking. Grievant first requested accommodation in April 2010, when she provided a note from her doctor that stated she could not work more than eight hours. The record reflects that Grievant's supervisors summarily rejected this request, and it does not appear that Grievant's supervisors reviewed this issue with DHR Worden. However, Grievant did not grieve their refusal to adjust her schedule, file a complaint with the EEOC, notify DHR Worden of the request when discipline was then pursued against her, or grieve the next disciplinary action.

Grievant's tardiness continued, but she did not request adjustment to her schedule again until the suspension was contemplated in May 2011. At that time, she provided better information from her doctor, and Respondent did agree to accommodate her by changing her schedule for thirty days while Grievant obtained additional information from her doctor for Respondent's review. Respondent was justified in requiring additional information from Grievant to make an assessment regarding

[4] While depression is a serious condition and can certainly be considered a disability under the ADA, what is disabling for one person is not necessarily disabling for another. In assessing whether someone is disabled under the ADA that particular person must be substantially limited in one or more major life activities.

whether the requested accommodation was required or was reasonable. Respondent very clearly stated to Grievant in the May 25, 2011 letter that the accommodation was temporary and that she must cooperate by providing specific other documents from her doctor for Respondent to consider. Grievant failed to respond properly to this request, providing only an additional DOP-3, which did not provide enough information for Respondent to make a determination regarding the requested accommodation. As the disciplinary process and tardiness continued over the next six months, Grievant still failed to provide any additional information to Respondent. In fact, she provided no other information until after she was terminated, and at that time provided FMLA paperwork, and not the information previously requested by Respondent.

It is disturbing that Respondent's process in responding to Grievant's requests for accommodation was lacking. ADA considerations are important and Respondent should have taken them more seriously. Obviously, it was completely unacceptable for Grievant's supervisors to summarily reject her request for accommodation in 2010, but that action was not grieved. Respondent should have been more responsive to Grievant during the review of her ADA considerations. Certainly, Respondent should have been more clear and documented the reasons why an accommodation was not given. However, Grievant also failed to take responsibility and provide the proper information to Respondent for consideration, and, in the end, there simply was not enough information to make a proper determination.

Further, even if Grievant had provided more information, Grievant's request for accommodation does not appear reasonable in light of her position. Working more than eight hours a day does appear to be an essential function of a shift supervisor, both by

virtue of its appearance in the job description and by analysis of the nature of the work. The job description, as acknowledged by Grievant upon her hire, specifically states that she "[m]ust be able to attend work regularly as scheduled" and "[m]ay be required to work on weekends and/or holidays, during odd hours, shift work, and for extended periods." In analyzing the position, continuity of care must be achieved and the work required of a shift manager cannot be left undone. The position is supervisory of all staff and the entire facility, and the weekend shift supervisor has no back up. Respondent is not required to remove essential functions of a job under the ADA, and that is what Grievant's request seems to propose. Grievant cites the *Martin* case, and the authorities relied upon in *Martin*. This case is distinguishable from *Martin* due to the differences in the job responsibilities and behavior between Ms. Martin and Grievant. Ms. Martin was a food service worker. She was not a member of management and working more than eight hours a day was not an essential function of her job. In addition, there was no evidence in *Martin* that Ms. Martin had any attendance problem. Ms. Martin was reliable for her regular forty hour workweek, she just simply could not work any more than that. Grievant, on the other hand, was continually tardy to the point of unreliability.

It does appear that there were some irregularities in Respondent's discipline of Grievant. However, the burden of proof is that it was more likely than not Respondent was justified in the termination. These irregularities, while somewhat troubling and indicative of sloppy management practices, do not rise to the level of preventing Respondent from meeting the burden. Respondent worked with Grievant for years

attempting to correct her tardiness and other deficiencies, which could simply be tolerated no longer in Grievant's key position.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove that the action taken was justified, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *See* W. VA. CODE ST. R. § 156-1-3 (2008); *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 &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. "It is axiomatic that an employer may expect its employees to arrive at work, and be ready to work, on time at the beginning of their shifts" and termination is a "reasonable outcome" for continued violation. *See Holland v. Dep't of Health &Human Res./Mildred Mitchell-Bateman Hosp*, Docket No. 06-HHR-126 (May 31, 2006).

3. Although the Grievance Board has no authority to determine liability under the ADA, consideration of the act is still relevant to this case in determining whether Respondent had good cause to terminate Grievant. *See Martin v. W. Va. Dep't of Health &Human Res./Jackie Withrow Hosp.*, Docket No. 2011-1590-DHHR (May 18, 2012), *aff'd*, Kanawha County Circuit Court, Civil Action No. 12-AA-79 (December 7, 2012); Ruckle v. *W. Va. Dep't of Health & Human Res./Office of Maternal and Child*

Health, Docket No. 04-HHR-367 (December 22, 2005); *Cf. Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

4. Respondent was justified in terminating Grievant, who displayed unacceptable levels of tardiness and other deficiencies over a four-year period, showing no significant improvement after counseling and progressive discipline of performance improvement plans, verbal and written reprimands, and three suspensions. Grievant did not provide sufficient information to Respondent for Respondent to make a determination whether accommodation of Grievant's alleged disability was required or possible, and the accommodation requested was likely not reasonable given the nature of her position.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: March 27, 2013

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Billie Thacker Catlett
Administrative Law Judge