THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHERI GAIL ROBINSON,

Grievant,

v. **DOCKET NO. 2013-1533-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION

On March 6, 2013, Sheri Gail Robinson ("Grievant") filed a grievance directly at Level Three of the grievance procedure challenging her termination by her employer, the West Virginia Department of Health and Human Resources ("DHHR" or "Respondent"). The undersigned Administrative Law Judge conducted a Level Three hearing in this matter on June 5, 2013 at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant was represented by Stephen P. New, Esquire, and Respondent was represented by Assistant Attorney General Michael E. Bevers. This matter became mature for decision on August 5, 2013, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was terminated from her employment by Respondent on the basis of job abandonment when she did not return to work following an extended Medical Leave of Absence, followed by a shorter Personal Leave of Absence. Based upon multiple anomalies in the administration of the disciplinary process, it was determined that

DHHR committed harmful procedural error when it terminated Grievant for "job abandonment" without first providing notice that her termination was being contemplated on those grounds, failing to conduct any investigation to determine whether Grievant received the February 7 notice of proposed termination, and failing to reconsider that decision after receiving an update on her medical condition from her Care Manager prior to the effective date of her termination. DHHR further failed to establish by a preponderance of the evidence that Grievant engaged in "job abandonment" as that term is defined by the Division of Personnel. The appropriate remedy for this violation is to reinstate Grievant to her status at the time of her termination, without back pay. DHHR may then reinitiate the termination process if, by that time, Grievant has not been medically cleared to return to work, and resume her essential duties.

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 Respondent, Department of Health and Human Resources ("DHHR"), as a Social Services Worker 3 in the Fayette County DHHR Office, in Oak Hill, West Virginia.

2. Donna Stump is employed by DHHR as a Secretary I in the Fayette County DHHR Office. Ms. Stump is the Secretary to the Community Services Manager and performs duties that include serving as the Human Resources Coordinator.

3. Andrew Garretson is employed by DHHR at its headquarters in Charleston, West Virginia, in the Office of Human Resources Management, where he serves as the Disability Manager. Mr. Garretson's duties include providing guidance to managers on medical and personal leaves of absence, and monitoring such approved absences.

4. Skip Jennings is employed by DHHR as the Community Services Manager ("CSM") in charge of the Fayette County DHHR Office.

5. Joe Bullington is employed by DHHR as Regional Director ("RD") for Region IV, with management responsibility for 13 DHHR offices, including the Fayette County DHHR Office where Grievant was employed.

6. Mr. Bullington serves as an Appointing Authority with delegated authority to make final decisions regarding the hiring and firing of employees.

7. Grievant was placed on a Medical Leave of Absence ("MLOA") without pay starting on April 27, 2011. Initially, Grievant's MLOA was granted to permit treatment for her infant son who required open heart surgery in Morgantown, West Virginia. Approximately three months after Grievant's MLOA began, she was diagnosed with cancer, and began a treatment regimen with Cancer Treatment Centers of America ("CTCA") in Philadelphia, Pennsylvania. *See* J Ex 1.

8. Grievant's MLOA was extended through July 31, 2011. On July 8, 2011, RD Bullington wrote to Grievant advising her that her MLOA would expire on July 31, 2011, and that she would be dismissed from employment for job abandonment if she did not return to work on August 1, 2011. *See* J Ex 1.

9. RD Bullington's July 8, 2011 correspondence, described above in Finding of Fact Number 8, was sent to Grievant via certified mail. It was returned to sender unclaimed. *See* J Ex 1.

10. On July 25, 2011, RD Bullington sent additional correspondence to Grievant advising her that she would not be granted a Personal Leave of Absence (PLOA) upon the expiration of her MLOA. DHHR Ex 12.

11. On July 26, 2011, Dr. Sramila Aithal, Grievant's treating oncologist at CTCA, provided a medical statement indicating that Grievant would be able to return to work on August 8, 2011. DHHR Ex 2.

12. Against medical advice, Grievant elected to return to duty on August 8, 2011, without any work limitations, and continued working, while undergoing further medical treatment, until June 25, 2012.

13. On July 24, 2012, Grievant was granted a second MLOA, retroactive to June 25, 2012, through correspondence signed by CSM Jennings. DHHR Ex 9.

14. Based upon a form completed by her physician, Dr. Aithal, the June 2012 MLOA was due to expire on August 20, 2012. *See* DHHR Ex. 9.

15. By correspondence dated September 28, 2012, DHHR's Disability Manager, Mr. Garretson, extended Grievant's June 2012 MLOA to December 25, 2012. DHHR Ex 8.

16. Beverly Caldwell-Musciano is a Registered Nurse employed by CTCA in Philadelphia, Pennsylvania, where she serves as a Care Manager.

17. Ms. Caldwell-Musciano was responsible for managing various aspects of Grievant's treatment. In addition, she personally assured Grievant that she would timely submit all documentation required by her employer to verify her treatment status.

18. On November 5, 2012, Ms. Caldwell-Musciano faxed correspondence to Ms. Stump advising that Grievant was continuing her medical treatment at CTCA and was not expected to be medically able to return to work until at least January 7, 2013. *See* DHHR Ex 3.

19. Shortly before December 25, 2012, Grievant spoke by telephone with Mr. Garretson regarding her status. Grievant understood Mr. Garretson to tell her that he could approve an additional Personal Leave of Absence up to six months, so long as her medical provider continued to provide documentation stating that she was unable to return to work due to her medical condition. Mr. Garretson did not recall this conversation.

20. On December 26, 2012, CSM Jennings approved Grievant's request for a Personal Leave of Absence without pay from December 26, 2012 to February 11, 2013, as authorized by the West Virginia Division of Personnel's Administrative Rule, Section 14.8(a). *See* DHHR Ex 10[1].

21. On December 28, 2012, Ms. Caldwell-Musciano faxed correspondence to Mr. Garretson advising that Grievant would not be medically able to return to work until February 11, 2013, at the earliest. *See* DHHR Ex 4.

22. On January 11, 2013, RD Bullington issued a letter to Grievant which stated the following:

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[1] This letter contains a typographical error in that it is dated "December 26, 2013."

> The purpose of this letter is to notify you that your employment with the West Virginia Department of Health and Human Resources has been terminated pursuant to the reasons outlined in the letter dated July 24, 2012. As a consequence of your failure to contact our office or return to work on January 7, 2013, you are being dismissed from employment due to job abandonment. Your dismissal is effective Monday, January 14, 2013, and is in accordance with section 12.2 (C) of the Division of Personnel Administrative Rule.
>
> * * *

J Ex 2 (emphasis in original).

23. On January 14, 2013, RD Bullington wrote to Grievant as follows:

> The purpose of this letter is to amend the previous termination letter dated January 11, 2013 with a termination effective date of January 14, 2013.
>
> Due to a miscommunication, there will not be any action taken regarding termination at this time.
>
> I received a new physician's statement to cover your leave thru February 11, 2013. At that time, your leave of absence will be re-evaluated and a determination will need to be made regarding your intent with the Department.
>
> If you have any questions, feel free to contact me.

DHHR Ex 14 (emphasis in original).

24. RD Bullington's correspondence dated January 14, 2013, described above in Finding of Fact Number 23, was sent to Grievant via certified mail. DHHR received and maintained the return receipt showing that the correspondence was signed for by Grievant's husband on January 19, 2013. *See* DHHR Ex 14.

25. In addition to sending the letter advising that her termination was being rescinded by regular and certified mail, RD Bullington asked Ms. Stump to call Grievant and make sure she understood that she was not being terminated. This was the only

time anyone was asked to make any contact with Grievant by any method except the postal service.

26. On February 7, 2013, RD Bullington wrote to Grievant notifying her that he was contemplating her dismissal as follows:

> According to our records, you have been on a Medical Leave of Absence 06/25/12 through 12/25/12 and on a Personal Leave of Absence beginning 12/26/12. Your Personal Leave of Absence will expire on 2/10/13. An extension of your personal leave of absence cannot be granted at this time. You are expected to return to work and submit a current DOP-L3 physician's statement returning you to full or less than full duty by 02/11/13.
>
> Please be advised that the West Virginia Administrative Rule, Section 14.8 D 3, states, "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."
>
> If such action becomes necessary, in accordance with section 14.8(d) of the Administrative Rule and in compliance with DOP Administrative Rule 12.2 this letter will serve as a fifteen (15) day notification of your dismissal from the Department of Health and Human Resources, effective February 23, 2013.
>
> You have the opportunity to either meet with me in person or present me with a written explanation indicating why you believe the facts and grounds contained in this letter are in error and why you may think this action is inappropriate. You must submit your explanation within fifteen (15) days of the date of this letter.

* * *

DHHR Ex 15.

27. DHHR did not send the February 7, 2013 letter proposing Grievant's termination described above in Finding of Fact Number 26 by certified mail. Grievant

was in Philadelphia, Pennsylvania, receiving medical treatment at CTCA at the time this correspondence would have been mailed. Grievant never received this notice.

28. On February 8, 2013, Grievant requested Ms. Caldwell-Musciano to notify DHHR that she was under a new treatment regimen, and needed additional time off from work to determine the side effects of the chemotherapy. Ms. Caldwell-Musciano assured Grievant she would send the information to Grievant's employer that same day.

29. On February 19, 2013, RD Bullington signed correspondence to terminate Grievant's employment which included the following relevant statements:

> The purpose of this letter is to notify you that your employment with the West Virginia Department of Health and Human Resources has been terminated pursuant to the reasons outlined in the letter dated February 7, 2013. As a consequence of your failure to contact our office or return to work on February 11, 2013, you are being dismissed from employment for job abandonment. Your dismissal is effective February 23, 2013 and is in accordance with section 12.2(c) of the Division or Personnel Administrative Rule.
>
> You will be paid for any accrued and unused annual leave available as of your last work day. You are not eligible for severance pay. Your final paycheck will be available for you to pick up and sign for within 72 hours of the effective date of 02/23/13.
>
> You may respond to the matters of this letter in writing or in person, provided you do so within fifteen (15) calendar days of the date of this letter. . . .

DHHR Ex 15.

30. The correspondence described above in Finding of Fact Number 29 was postmarked "February 26, 2013," after the effective date of Grievant's termination. *See* G Ex 1.

31. On February 20, 2013, Ms. Caldwell-Musciano faxed correspondence to Ms. Stump stating that Grievant was continuing cancer treatment and would not be medically able to return to work until June 13, 2013, due to a change in her treatment plan. *See* DHHR Ex 5. This was the information Ms. Caldwell-Musciano had assured Grievant would be submitted to her employer on February 8, 2013. However, Ms. Caldwell-Musciano neglected to submit the information until February 20, 2013, at which time she realized her oversight, and immediately submitted the medical update to Ms. Stump.

32. Ms. Stump received Ms. Caldwell-Musciano's faxed correspondence on February 20, 2013, and provided it to Mr. Jennings that same day, or the following morning, at the latest.

33. After receiving the February 20, 2013 update from CTCA on Grievant's medical circumstances, neither CSM Jennings nor RD Bullington made any effort to further communicate with Grievant regarding her status, or her ability to return to work before June 13, 2013.

34. On March 6, 2013, Ms. Caldwell-Musciano wrote to DHHR regarding the update on Grievant's treatment provided on February 20, 2013, apologizing for her delay in forwarding that information to Grievant's employer. *See* DHHR Ex 7.

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 Rule of the W. Va. Public Employees

Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). The generally accepted meaning of preponderance of the evidence is "more likely than not." *Riggs v. Dep't of Transp*., Docket No. 2009-0005-DOT (Aug. 4, 2009) *citing Jackson v. State Farm Mut. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). *See 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. *Leichliter, supra.*

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 51, 380 S.E.2d 216, 218 (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 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. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965); *Smith v. Clay County Health Dep't*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012).

Certain facts relating to the charges against Grievant were the subject of conflicting testimony. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit

credibility determinations are required. *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). *See Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

The Administrative Rule of the West Virginia Division of Personnel authorizes dismissal of an employee for job abandonment as follows:

> An appointing authority may dismiss an employee for job abandonment who is absent from work for more than three consecutive workdays **without notice to the appointing authority of the reason for the absence** as required by established agency policy. The dismissal is effective fifteen calendar days after the appointing authority notifies the employee of the dismissal. Under circumstances in which the term job abandonment becomes synonymous with the term resignation, an employee dismissed for job abandonment is not eligible for severance pay.

143 C.S.R. 1 § 12.2(c) (2012) (emphasis added).

When the employing agency establishes that an employee has engaged in job abandonment, as defined by the Division of Personnel, such circumstance will provide

good cause for that employee's termination. *See Toler v. Dep't of Health & Human Res.*, Docket No. 2012-0189-DHHR (July 31, 2012); Cook *v. W. Va. Dep't of Health & Human Res.*, Docket No. 99-HHR-298 (Nov. 30, 1999); *Hayden v. Dep't of Health & Human Res.*, Docket No. 98-HHR-133 (Nov. 30, 1999). However, the situation presented in this grievance does not constitute what would ordinarily be recognized as job abandonment. *See Koblinsky v. Putnam County Health Dep't*, Docket No. 2011-1772-CONS (Oct. 23, 2012), *aff'd*, Cir. Ct. of Kanawha County (July 24, 2013).

First of all, Grievant did not receive RD Bullington's February 7, 2013 letter proposing her termination. This notice is itself unusual because it was issued before Grievant's PLOA had expired, and appears to presume that she would not be returning from her leave on schedule. The notice makes particular reference to a completely different provision in the West Virginia Division of Personnel's Administrative Rule, § 14.8(d)3, which provides that failure to promptly return from an unpaid leave of absence constitutes cause for dismissal. *See* 143 C.S.R. 1 § 14.8(d)3 (2012). Further, Grievant's employer was well aware of the reason for her absence: she was receiving medical treatment for cancer and was on an approved Personal Leave of Absence based upon that treatment.

The next correspondence from RD Bullington is dated February 19, 2013, and advises Grievant that she is being terminated for "job abandonment" based upon her failure to respond to his earlier correspondence dated February 7, 2013. This appears to be a premature conclusion given that the prior correspondence afforded Grievant 15 days to respond and that date (February 22, 2013) had not yet arrived. However, RD

Bullington's February 19 termination letter gives Grievant yet another 15 days to respond to this new allegation of job abandonment.

On the following day, February 20, 2013, well before the expiration of the new 15-day response period, Ms. Caldwell-Musciano at CTCA in Philadelphia faxed correspondence to the CSM's secretary and HR coordinator, which contains an update on Grievant's medical treatment, and indicates that she is still receiving cancer treatment. Although this correspondence indicated that Grievant was not then medically able to return to work, it certainly indicates that Grievant had no intention of abandoning her job, and was continuing to communicate with her employer regarding her situation. The evidence indicates that neither CSM Jennings nor RD Bullington took any action in response to this information.

In her grievance, Grievant asserted that her termination violated the prohibition in W. Va. Code § 5-11-9 against disability discrimination. Other than quoting her original grievance statement, Grievant's post-hearing argument does not address this issue. Generally, failure to pursue a particular claim such as this will justify a determination that the claim has been abandoned. However, out of an abundance of caution, because Grievant at least repeated this assertion in her post-hearing argument, this issue will be addressed.

It is well-settled that the Grievance Board does not have jurisdiction to determine whether the ADA has been violated, based upon the West Virginia Supreme Court of Appeals' holding in *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995). *Adkins v. Dep't of Labor*, Docket No. 04-DOL-071 (Jan. 25, 2005); *Teel v.*

Bureau of Employment Programs Workers' Compensation Div., Docket No. 01-BEP-466 (June 10, 2002). *See Prince v. Bd. of Trustees*, Docket No. 7-BOT-276 (Nov. 5, 1997); *Keatley v. Mingo County Bd. of Educ.*, Docket No. 95-29-257 (Sept. 25, 1995).

Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination" as that term is defined in W. Va. Code § 6C-2-2(d), includes jurisdiction to remedy discrimination that would also violate the ADA. In other words, the Grievance Board does have subject matter jurisdiction over handicap-based discrimination claims. *Smith v. W. Va. Bureau of Employment Programs*, Docket No. 94-BEP-099 (Dec. 18, 1996). *See Vest, supra.*

The West Virginia Human Rights Act prohibits discrimination on the basis of a disability as follows:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the state of West Virginia or its agencies or political subdivisions:
>
> (1) For any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment **if the individual is able and competent to perform the services required** even if such individual is blind or disabled. . . .

W. Va. Code § 5-11-9 (emphasis added).

In order to establish a *prima facie* case of disability or handicap discrimination pursuant to W. Va. Code § 5-11-9 of the West Virginia Human Rights Act, a claimant must prove, *inter alia*, that she is a “qualified individual with a disability” as that term is defined in 77 C.S.R. 1 § 4.2 (1994). The Human Rights Commission’s Rule defines "qualified Individual with a disability" as “an individual who is able and competent, with

reasonable accommodation, to perform the essential functions of the job . . . ." *Id*. The Rule goes on to define "able and competent" to mean "that, with or without reasonable accommodation, an individual is currently capable of performing the work and can do the work without posing a direct threat . . . of injury to the health and safety of either other employees or the public." *Id*. at § 4.3. Because Grievant was not cleared to return to work by her doctor at any time from the time her most recent MLOA began in 2012, she was not capable of performing the essential functions of her job, with or without reasonable accommodation, and therefore failed to establish a *prima face* case of disability discrimination under W. Va. Code § 5-11-9. *See* Syl. pt. 6, *Hosaflook v. Consolidation Coal Co.*, 201 W. Va. 325, 497 S.E.2d 174 (1997). *See also Williams v. Charleston Area Med. Ctr., Inc.*, 215 W. Va. 15, 592 S.E.2d 794 (2003); *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 65, 479 S.E.2d 561, 575 (1996) at n.9.

As a tenured public employee, Grievant has property and liberty interests which entitle her to procedural due process in regard to the termination of her employment. *Bd. of Educ. v. Wirt*, 192 W. Va. 568, 573-74, 453 S.E.2d 402, 407-08 (1994); *Adkins v. Dep't of Health & Human Res.*, Docket No. 2013-0264-DHHR (July 19, 2013). *See Matthews v. Eldridge*, 424 U.S. 319 (1976). Ordinarily, when misconduct is asserted in a notice of dismissal, it must be identified by a date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the employee will have no reasonable doubt as to their identity. *See generally*, *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981); *Snyder v.*

Civil Serv. Comm'n, 160 W. Va. 762, 232 S.E.2d 842 (1977). *See Arnett v. Kennedy*, 416 U.S. 134 (174).

The actions taken by the employer to accomplish this termination are confusing, to say the least. DHHR began by notifying Grievant on January 11, 2013, that she was going to be terminated, effective January 14, 2013, for failing to return to work. *See* J Ex 2. At that time, Grievant was absent with authority in accordance with a Personal Leave of Absence ("PLOA") granted by CSM Jennings on December 26, 2012. *See* DHHR Ex 10. That PLOA was not set to expire until February 11, 2013. On January 14, 2013, DHHR sent correspondence to Grievant via certified mail advising her that no action would be taken "due to a miscommunication," and the earlier termination notice was being rescinded. *See* DHHR Ex 14. DHHR's explanation for this aborted attempt to terminate Grievant's employment involved a simple "mistake," apparently arising out of the confusion over whether doctor's statements needed to be provided to Mr. Garretson in Charleston or CSM Jennings (through Ms. Stump) in Oak Hill.

Thereafter, prior to the expiration of her PLOA, on February 7, 2013, DHHR again prepared correspondence notifying Grievant that she was now going to be terminated, effective February 23, 2013, for failure to return from approved leave. *See* DHHR Ex 15. Grievant was given 15 days (until February 23, 2013) to respond. *Id.* Unlike the previous termination notices, this one was not sent by certified mail and Grievant did not receive it.

Finally, prior to the expiration of the 15-day response period in the letter proposing her termination, on February 19, 2013, RD Bullington issued a letter advising

Grievant that she was being terminated for "job abandonment," effective February 23, 2013, although she is again given 15 days to respond to the notice. On February 20, 2013, CSM Jennings receives correspondence from Ms. Caldwell-Musciano at Cancer Treatment Centers of America, providing an update on Grievant's medical situation via telephone facsimile submitted to Ms. Stump. CSM Jennings makes no further inquiries regarding Grievant's status, and allows the termination to proceed.

Generally, the sufficiency of a notice of dismissal to a classified civil service employee depends on whether the employee was informed with reasonable certainty and precision of the cause of her removal. *See* Syl. pt. 2, *Snyder v. Civil Serv. Comm'n*, 160 W. Va. 762, 238 S.E.2d 842 (1977). Here, DHHR defended its decision on the basis of the original termination notice which Grievant never received, the notice which required her to return to work not later than February 11, 2013. However, DHHR could not explain why Grievant was terminated for "job abandonment" beyond explaining that she could not return to work due to her medical conditions, and they needed someone to fill her position and do the work.

The Administrative Rule of the West Virginia Division of Personnel, 143 C.S.R. 1 § 12.2(c), states that an "appointing authority may dismiss an employee for job abandonment who is absent from work for more than three consecutive workdays without notice to the appointing authority of the reason for the absence as required by established agency policy." To the extent Respondent relies upon "job abandonment" as the basis for Grievant's termination, the evidence does not support that charge. Unlike other proceedings where the employee was found to have abandoned his or her

job, Grievant here made a consistent effort, to the best of her ability, while she was receiving out-of-state specialized medical treatment for a life-threatening illness, to keep her employer informed of her progress, and to return to her work as soon as she could safely do so. *See*, *e.g.*, *Toler v. Dep't of Health & Human Res*., Docket No. 2012-0189-DHHR (July 31, 2012); *Cook v. W. Va. Dep't of Health & Human Resources*, Docket No. 99-HHR-298 (Nov. 30, 1999); *Hayden v. Dep't of Health & Human Resources*, Docket No. 98-HHR-133 (Nov. 30, 1999). This is particularly true where, as here, Grievant did not receive the notice upon which the determination that Grievant had "abandoned" her job was apparently based.

Further, the Respondent does not have the option of reverting back to the first reason given for her termination, the need to fill her position if she was not going to return to work at the expiration of her MLOA and additional PLOA. Grievant was not afforded due process in regard to that basis for termination because she never received that notice, and the agency failed to follow its usual practice of sending such notices via certified mail with return receipt requested. Further, DHHR subsequently revised the termination notice to state a different reason, and is bound by that action.

In this matter, the Respondent's failure to establish good cause for Grievant's termination involves various procedural deficiencies. An employer is expected to comply with the administrative procedures established for terminating the employment of tenured public servants. *See* Syl. pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d. 220 (1977). Further, a preponderance of the evidence indicates that the actions taken by Grievant, and the outcome of the process, might have changed if DHHR had

followed the proper procedure, and afforded Grievant all of the due process of law to which she was entitled. *See McFadden v. W. Va. Dep't of Health & Human Res.*, Docket No. 94-HHR-428 (Feb. 17, 1995). *See generally Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980).

Therefore, this grievance will be granted, and Grievant will be reinstated under the circumstances hereinafter specified.[2]

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. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The employer must also demonstrate that misconduct which forms the basis for dismissal of a tenured state employee is 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). *See Smith v. Clay County Health Dep't*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012). Non-probationary state employees in the classified service may 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

[2] Given this outcome, it is not necessary to consider or decide Grievant's contention that DHHR abused its discretion by either failing to reassign Grievant's work to other employees, or use the funds not being spent while Grievant was off the payroll to a hire a temporary employee or contract worker, until she could return to work, nor her allegations that the penalty of termination imposed by DHHR in this matter represented an abuse of discretion, or an arbitrary and capricious determination of an appropriate penalty, given her positive work record as an employee.

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 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965).

3. The West Virginia Division of Personnel Administrative Rule, 143 C.S.R. 1 § 12.2(c), authorizes an agency to terminate an employee who fails to follow established agency policy for accounting for an absence from employment. *See Toler v. Dep't of Health & Human Res*., Docket No. 2012-0189-DHHR (July 31, 2012).

4. Respondent failed to prove by a preponderance of the evidence that Grievant engaged in job abandonment as that term is used in 143 C.S.R. 1 § 12.2(c). Thus, Respondent did not establish a valid basis for terminating Grievant's employment.

5. By initially proposing to terminate Grievant for failing to return to her duties following an approved leave, and subsequently, without amending and reissuing the previous notice, deciding to terminate Grievant for job abandonment when she failed to respond to the termination notice, a notice which Grievant did not receive, Respondent failed to afford Grievant procedural due process of law. *See Bd. of Educ. v. Wirt*, 192 W. Va. 568, 573-74, 453 S.E.2d 402, 407-08 (1994); *Snyder v. Civil Serv. Comm'n*, 160 W. Va. 762, 238 S.E.2d 842 (1977)

Accordingly, this grievance is **GRANTED.** Grievant shall be reinstated to the same employment status she held at the time of her termination, that being a tenured civil servant on a Personal Leave of Absence. Grievant may not return to her regular

duties and be placed back on the payroll until she provides her employer with the ordinarily required medical clearance to return to work. Because a preponderance of the evidence demonstrates that Grievant was not medically cleared to return to work as of the date of her termination, she is not entitled to back pay. Any award of back pay would be unreasonably speculative in this matter given that there is no evidence to establish when, or if, Grievant would have returned to her duties. Once Grievant is reinstated, should she remain medically disqualified from performing her duties, nothing in this decision is intended to preclude DHHR from proceeding to terminate her employment in accordance with properly established rules and policies.

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 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).

Date: August 26, 2013

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LEWIS G. BREWER
Administrative Law Judge