ROBERT BONAR,

Grievant,

v. **Docket No. 99-DOH-379**

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Robert Bonar, filed this grievance against his employer, the Division of Highways ("DOH"), on September 14, 1999. Grievant's Statement of Grievance reads:

> **Injured on June 28, 1999 while working. [W]ent to Health Plus (St. Albans). Next injury worsened went to Thomas Memorial followed up with Dr. Minardi[.] [H]e excused me from Driving until further notice. Took excuse to work they said no light duty [on] 7.5.99. 7.15.99 seen Mr. Minardi [sic] eye doctor again. (See footnote 1) Missed appointment the first part of Aug. Mr. Minardi's [sic] mother ill said will not be making appointments till After 1st of Sept. Made me on[e] for Sept. 7, 1999. Went to appointment on 7th[,] gave me a returned to drive excuse. Took it to Chet at S.A. Shop. (See footnote 2) He said I needed to talk with Mr. Haynes (DA). So I did[,] he said I was FIRED.**
>
> **The Relief Sought is: To be reinstated and to drop all hardships between the two parties. Plus back pay.**

This grievance was filed directly to Level IV on September 15, 1999, and a Level IV hearing was held on April 29, 2003. (See footnote 3) This case became mature for decision on June 24,2003, when the undersigned Administrative Law Judge received the last of the parties' arguments and responses. The original date for submission was June 6, 2003, the date DOH elected to submit proposed findings of fact and conclusions of law. (See footnote 4)

Procedural History

This grievance was originally filed in 1999, and a hearing was not conducted until April 2003, because of Grievant's numerous requests for continuances and to place the grievance in abeyance. Grievant sought to resolve what he saw as Workers' Compensation issues before the Level IV hearing was held. At the close of the Level IV hearing, Grievant requested a decision not be issued until he resolved these issues. The undersigned Administrative Law Judge informed Grievant that although Workers' Compensation and the Grievance Board were both state agencies, they were not related in any way, and this grievance would be decided shortly after the final submissions were received. After a review of the evidence presented, it appeared there had been no change in Workers' Compensation's original decision dated November 24, 1999. See Finding of Fact 32.

Issues and Arguments

Respondent asserts Grievant was terminated for his failure to return to work following an on-the-job injury, and he was considered to have abandoned his position. Grievant also failed to respond to repeated attempts to contact him, and he failed to pick up certified mail notifying him that a response was needed. Respondent noted Grievant has a history of not returning to work and not picking up his certified mail.

Grievant maintains he was on Workers' Compensation leave the entire time, and DOH's attempts to contact him during this time were deficient. He avers if he had known he needed to respond to something he certainly would have done it.

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

Findings of Fact

1. At the time of his discharge, Grievant had been employed by DOH for approximately ten years.

2. Prior to this injury, Grievant had a history of problems with leave abuse.

3. On March 16, 1995, Grievant received a letter from Carl Thompson, the then District Engineer, stating Grievant had failed to turn in the required documents for medical leave. The rules, regulations, and reasons regarding this needed medical data were explained in detail. It

was noted Grievant had been on unauthorized leave for approximately two months because of his failure to document his time off due to an on-the- job injury. Numerous requests for the information had been made without avail. This letter was sent by certified mail, and Grievant did not pick it up. Grievant was informed that further behavior of this type would result in disciplinary action.

4. On May 19, 1995, Grievant was sent another letter directing him to report to Mr. Thompson's office to discuss a medical leave of absence. Grievant was informed that failure to report would result in disciplinary action. This letter noted there had been multipleattempts to contact Grievant without success. This letter was also sent by certified mail, and Grievant did not pick it up.

5. On September 16, 1998, Grievant received a Notice of Disciplinary Action for failure to report to work and placement on unauthorized leave. Grievant was informed that further behavior of this type could result in disciplinary action. Grievant was given this Notice, but he refused to sign it.

6. On November 12, 1998, Grievant received a written reprimand for failure to report off in a timely manner. Grievant was informed that further behavior of this type could result in disciplinary action. Grievant was given this written reprimand, but he refused to sign it. (See footnote 5)

7. On January 14, 1999, Grievant received a written reprimand for use of unauthorized leave. Grievant was informed that further behavior of this type would result in disciplinary action.

8. On June 28, 1999, Grievant was injured when an object flew into his eye while he was at work. There is no contemporaneous report of Grievant's treatment, but a subsequent report for the Workers' Compensation Division, dated October 30, 1999, gives a brief summary. This brief summary indicated that on June 29, 1999, Grievant was seen at Health Plus. He was diagnosed with conjunctivitis, no treatment was given, and the problem was expected to resolve on its own. Grievant was only to return if he was no better. He did not need a referral to another physician, rehabilitation, nor was hetemporarily or totally disabled. This form then states Grievant can return to work on the day the form was completed, October 30, 1999. Grievant's address on the form is 7 Carriage Way, Hurricane (See footnote 6)**, but this address**

has been marked through by Grievant, and the new address is listed as 2727 Roosevelt Ave., St. Albans. Grt's Exh. 3.

9. Grievant went to Thomas Memorial Care Center Services on the morning of June 30, 1999, again complaining of pain in his right eye. Grievant was examined and nothing was found in the eye, but there was some swelling of the upper eyelid and the conjunctiva. The diagnosis was conjunctivitis. Grievant was discharged within an hour as stable. He was given eye drops and told to seek follow-up care with Dr. Minardi within the week. The Physician Statement Form listed Grievant's period of incapacity as June 30, 1999, to July 2, 1999, and Grievant could return to work on July 3, 1999. On the admission form, he gave his address as 7 Carriage Way, Hurricane.

10. On July 2, 1999, Grievant's girlfriend, now wife, gave this Physician Statement Form to his supervisor, Chet Burgess, along with a request for 24 hours of medical leave without pay. This request was granted. Ms. Bonar was given the proper paperwork to fill out with instructions.

11. On July 5, 1999, Grievant was seen by Dr. Minardi. No report on this injury was submitted into evidence other than a note from the doctor stating Grievant was not to drive until further notice. Grievant gave this excuse to his supervisor.

12. Grievant was apparently seen again on July 8, 1999, by Dr. Minardi, but these notes were not submitted into evidence. 13. Grievant was to return to the doctor on July 15, 1999, but he did not keep this appointment, nor did he call to reschedule.

14. On that same day, July 15, 1999, Grievant's girlfriend again picked up Grievant's paycheck and again was given the required paperwork for Grievant and his doctor to fill out.

15. Because Grievant missed his appointment, Dr. Minardi's office attempted to call Grievant and left messages for him, without success, on July 16, 19, 20, and 22, 1999. The last message indicates Grievant was "no longer staying at the motel - checked out." Dr. Minardi's number was also sent to Grievant's pager.

16. On July 16, 1999, Mr. Burgess received a call from Dr. Minardi's office about Grievant's missed appointment, and the need for him to get his eye checked. **(See footnote 7)** **Because Mr. Burgess knew Grievant frequently did not stay at his given address, he went to three motels in the area, and when he found Grievant gave him Dr. Minardi's message.**

17. On July 18, 1999, Jesse Haynes, Mr. Burgess's supervisor, came to St. Albans to discuss whether Grievant had abandoned his job. He asked Mr. Burgess to search for Grievant, and Mr. Burgess did so without success.

18. By certified letter dated July 30, 1999, sent to Grievant's last known address, 7 Carriage Way, Mr. Haynes notified Grievant his requested medical leave of absence expired on July 2, 1999. Grievant was informed he must either return to work or request, in writing, an extension of his leave of absence. Grievant was directed that he must adviseDOH of his decision within five days. If Grievant chose to extend his medical leave of absence, he must have the proper forms completed and his expected return date identified. A Physician Certificate Form was included in the letter.

19. This letter was returned unclaimed. (See footnote 8)

20. The letter referred to in Finding of Fact 19 was also sent by certified mail to 2727 Roosevelt Avenue, another address where DOH thought Grievant could be found. This letter was also returned unclaimed.

21. Grievant was again scheduled to see Dr. Minardi on August 4, 1999, but he did not keep this appointment, and he did not call.

22. On August 10, 1999, Grievant's girlfriend again came to the office to check to see if there was any mail. She was given notice of the certified letter that had been mailed earlier.

23. By notice dated August 9, 1999, Grievant was advised he had not responded to the July 30, 1999 letter, his requested medical leave of absence had expired on July 2, 1999, and his dismissal was recommended. Grievant was given an appointment, for August 17, 1999, to meet with the District Engineer to discuss the situation before final action would be taken.

24. Grievant did not keep this appointment. 25. On September 6, 1999, Grievant came to Mr. Burgess's office and requested doctor's certificate and papers to fill out to return to work.

26. On September 8, 1999, Grievant came to Mr. Burgess's office and said he was ready to return to work. He did not have any doctor's certificate or paperwork to support his time off. Mr. Haynes directed Mr. Burgess to bring Grievant to his office and Mr. Burgess did. At Mr. Haynes office, Grievant stated he had a doctor's excuse to cover his time off. Mr. Haynes told Grievant to get it, and Mr. Burgess took Grievant to Dr. Minardi's office to obtain this data.

27. Dr. Minardi's exam of September 8, 1999, diagnosed "resolved filamentary keratitis OD." (See footnote 9) Grt's Exh. 7. Grievant still complained of occasional blurring, and Visine Tears (an over-the-counter medicine) was prescribed. Dr. Minardi also completed a Physician's/Practioner's Statement for Mr. Haynes stating Grievant's period of incapacity was from July 5, to July 8, 1999, and he had not kept his appointments from July 8, 1999 to present. (See footnote 10)

28. Grievant was given an appointment to return to see Dr. Minardi in six weeks, but a note in the chart states, "Pt [patient] said he would not come back because we would not cover all the time he was off." Id. 29. On September 10, 1999, Mr. Haynes met with Grievant and informed him he was recommending his dismissal because DOH had not heard from him while he was off work. (See footnote 11)

30. Grievant worked September 26 - 29, 1999, in Elkview, while his dismissal was being discussed and reviewed by DOH. (See footnote 12)

31. By letter dated September 29, 1999, Grievant was terminated from his position for "failure to comply with attendance and leave regulations." These failures were detailed in the letter, and the failure of Grievant to pick up his mail was discussed. Grievant was dismissed immediately, and he was given severance pay in lieu of working out the fifteen-day notice period. This letter was sent to 7 Carriage Way. Resp. Exh. 10.

32. The paperwork on Grievant's Workers' Compensation claim was also placed into evidence. By letter dated September 17, 1999, and mailed to 7 Carriage Way, Workers' Compensation noted it had received his claim but had been unable to contact him for additional information. By letter dated September 29, 1999, and mailed to 2725 Roosevelt Avenue, Grievant was informed his injury was covered, but because his disability from working was less than four days, he was not eligible for temporary total disability benefits ("TTD's"). By letter dated October 8, 1999, and mailed to 2725 Roosevelt Avenue, Grievant was informed he would be eligible for TTD's from June 30,1999, through July 7, 1999. On November 24, 1999, Grievant's claim was closed for TTD's as information had not been received to demonstrate further disability.

33. Grievant owns the residences at both 2725 and 2727 Roosevelt Avenue, and has resided at both. This is why he has received mail at both addresses.

34. Grievant did not keep DOH notified of his frequent changes of addresses.

35. Grievant did not have a doctor's excuse from work after July 8, 1999.

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. W. Va. Code § 29-6A-6; 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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

In order to dismiss a tenured state employee, the employer must meet the judicial standard set out in Syllabus Point 2, of Buskirk v. Civil Service Commission, 332 S.E.2d 579, 581 (W. Va. 1985), which 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." See Oakes v. W. Va. Dep't of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Serv. Comm'n, 141S.E.2d 364 (W. Va. 1965); Scragg v. Bd. of Dir. W. Va. State College, Docket No. 93- BOD-436 (Dec. 30, 1994).

I. Credibility

Because the testimony of the parties is in conflict on whether or not Grievant's then girlfriend received the paper work from Mr. Burgess, there is a need to assess the credibility of these individuals. 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. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that this testimony is offered in written form

does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness'information. (See footnote 13) **See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.**

In assessing the testimony presented, the undersigned Administrative Law Judge does not accept Ms. Bonar's version of the facts. She says she did not receive any paperwork from Mr. Burgess, and Mr. Burgess says he and/or his secretary gave her information at least twice.

Mr. Burgess refreshed his memory with contemporaneous notes, his information was plausible, and there is no reason for him to say other than the truth. Grievant's wife had an interest and/or bias in the outcome of this case. As previously stated by this Grievance Board, "[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." Chin v. Dep't of Treasury, 44 M.S.P.R. 201 (1990). See Loundman-Clay v. Higher Educ. Policy Comm'n, Docket No. 02-HEPC-013 (Aug. 29, 2002).

II. Merits of the case

Respondent maintains Grievant abandoned his position, and this was just cause for his dismissal. Grievant asserts DOH did not try hard enough to find him, he did not receive any notices that were sent to him, and if he had known there was a problem, he would have resolved the problem. This grievance is controlled by the Division of Personnel's Rules which discuss job abandonment, medical leave, and the necessary paperwork an employer requires an employee to complete to obtain a leave. These will be examined in some detail.

The Division of Personnel Rule 3.51 defines "Job Abandonment" as "[t]he absence from work under such conditions as to be synonymous with resignation." Additionally, Division of

Personnel Rule 3.83 defines "Resignation" as "[v]oluntary separation from employment, including job abandonment, by an employee." According to these sections of Division of Personnel's Rules, abandonment of a position by an employee is just cause for his dismissal. The question here is whether Grievant abandoned his position.

DOH maintains it followed Division of Personnel Rule 12.2(c) which states:

> **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.**

Division of Personnel Rule 14.4(f)(7) offers an employee a choice:

> **An employee may elect to use sick leave due to a personal injury received in the course of and resulting from covered employment with the State or its political subdivisions in accordance with W. Va. Code §23-4-1. However, an employee who elects not to use sick leave under this paragraph must apply for a medical leave of absence without pay as provided under part 14.8(c)1.a.2 of this rule.**

Grievant applied for three days of medical leave without pay with the proper supporting documents. This request was granted. After that time, Grievant failed to submitthe proper documentation to support his continued time off or to request another medical leave of absence. He did submit a note written on a prescription pad from Dr. Minardi, dated July 5, 1999, stating he could not drive until further notice, but this note gave no further data, and it was not accompanied by a request for additional time off. (See footnote 14)

Division of Personnel Rule 14.4(g)(2) mandates the type of Physician's Statement an employee on sick leave must fill out, and the time it is due.

> **Within two days of return to work, an employee shall furnish a prescribed physician's statement form from the attending physician/practitioner for all consecutive days of sick leave granted beyond three working days. The physician's statement form shall specify the period of incapacity and state that the employee was unable to perform his or her job or that the employee's absence was due to reasons provided in Paragraph 14.4(f)6 of this rule for a member of the employee's immediate family.**

Pursuant to Division of Personnel Rule 14.4(g)(2), if an employee does not provide the proper documentation "the entire absence shall be charged to unauthorized leave as provided in subsection 14.6 of this rule . . . ."

Division of Personnel Rule 14.8 (d)(3) states that at the end of an approved medical leave of absence, "[f]ailure of the employee to report promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to the appointing authority, is cause for dismissal."

A review of the above-stated Rules clearly demonstrates DOH had just cause to terminate Grievant's employment. Grievant did not follow the required process to document his absences, and did not notify DOH of his status. As eventually revealed bythe evidence, Grievant did not have documentation to substantiate his lengthy absence from work.

Grievant was injured and asked for and received an approved medical leave of absence. He brought in one excuse, covering him from June 30, 1999, to July 2, 1999, and then another note dated July 5, 1999, that said he could not drive. This note was not in the proper form, and it did not have the required data. There was no further request for medical leave.

After that time, DOH made numerous attempts to locate Grievant. DOH sent letters to several addresses, and twice Mr. Burgess went out to look for him at several motels he was known to frequent. Even though Grievant did not pick up the certified letters, it is clear he was aware he was required to submit a physician's excuse because he had been disciplined before for the failure to submit this paperwork. Grievant was also aware he did not have a physician's statement excusing him from work after July 8, 1999, because that is the last doctor's visit he made.

As for Grievant's failure to pick up his certified mail and not notify his employer, the term that best describes this behavior was given by Jeff Black, DOH's Director of Human Resources, - "willful blindness." Grievant did not pick up his mail, he did not come into the office several times when his girlfriend went in, he did not take any responsibility to notify his supervisor of his whereabouts, he did not keep his doctor's appointments, and he did not submit the required information. All DOH had was an excuse to cover Grievant's absence until July 2, 1999, a request for leave without pay to cover until that same date, and a note dated July 5, 1999, that said Grievant could not drive. Grievant asserts DOH's attempts to find

him were insufficient. It is no wonder DOH was unsure where to find Grievant; Grievant had not told them where he was. DOH tried its best to find Grievant and keep him apprised of the situation. As for Grievant's claim he did not know anything else was required from him, this claim is not believed. Grievant was aware of his responsibilities to notify his employer of his medical status, and certainly he was aware he should return to work when he was able.

This is where the "willful blindness" comes into play. It appears Grievant believed if he did not keep the medical appointments that would release him to return to work, if he did not pick up his certified mail, and if he merely told his supervisors he had medical excuses, there would not be any consequences for his failure to report to work and to keep DOH informed of his status. Unfortunately for Grievant, he is mistaken in this regard. An employer has the right to expect his employee to come to work, and if the employee cannot, the employee is to advise the employer why he cannot, submit the required documentation to support his absence, inform his employer where he can be reached, and explain when he will return to work.

The above discussion will be supplemented by the following Conclusions of Law.

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. W. Va. Code § 29-6A-6; 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 ismore likely true than not." Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. In order to dismiss a tenured state employee, the employer must meet the judicial standard set out in Syllabus Point 2, of Buskirk v. Civil Service Commission, 332 S.E.2d 579, 581 (W. Va. 1985), which 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." See Oakes v. W. Va. Dep't of Finance

and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Serv. Comm'n, 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).

3. The Division of Personnel Rule 3.51 defines "Job Abandonment" as "[t]he absence from work under such conditions as to be synonymous with resignation." 4. Division of Personnel Rule 3.83 defines "Resignation" as "[v]oluntary separation from employment, including job abandonment, by an employee."

5. Division of Personnel Rule 12.2(c) states:

> **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.**

6. DOH has met its burden of proof and demonstrated Grievant abandoned his position, and this action was of a "substantial nature directly affecting rights and interests of the public." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985).

Accordingly, this grievance is DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State 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 record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 22, 2003

Footnote: 1

See Finding of Fact 13.

Footnote: 2

See Finding of Fact 26.

Footnote: 3

Grievant represented himself, and Respondent was represented by its Attorney Barbara Baxter.

Footnote: 4

Grievant had elected not to submit these proposals at hearing, but later changed his mind. Grievant also objected because DOH's proposals were submitted a few days late, and he asserted they should not considered. As the delay was only a few days, and Grievant did not appear to be harmed, they were considered. Grievant also objected to DOH's submission of a certified mailing slip and envelope because this had not been submitted at hearing. This slip was discussed at hearing, and the failure to submit it at hearing is found to be inadvertent. Accordingly, these documents are admitted into evidence.

Footnote: 5

At hearing, Grievant objected to the admission of this document because it did not have his signature. Since he did not assert he had not received it, this document was admitted.

Footnote: 6

This is Grievant's mother's address.

Footnote: 7

Mr. Burgess testified he was told Grievant had missed an appointment a week ago. Since Dr. Minardi's office notes that Grievant submitted into evidence did not cover that period, it is unclear when Grievant missed his first appointment.

Footnote: 8

Grievant had argued this letter was not sent to this address, but the certified receipt proving that it had was the exhibit previously discussed in note 4, and attached to Ms. Baxter's proposals. Grievant also asserted the certification was wrong because the mailing date was July 28, 1999. Jeff Black, DOH's Director of Human Resources, explained that these type of letters were dated later than the date sent so the recipient would have the full five days to respond, and this is DOH's typical practice.

Footnote: 9

OD is the medical abbreviation for right eye.

Footnote: 10

This statement also said Grievant could resume his duties on September 8, 1999, the date of the exam, as Dr.

Minardi had no knowledge of Grievant's status from July 8, 1999, to the present.

Footnote: 11

The typed form recording this meeting is dated September 14, 1999, signed by Mr. Haynes, but not by Grievant, as he was not present when the form was typed.

Footnote: 12

At hearing, Grievant wanted to include a charge of harassment for this time frame, but as this had not been included in the Statement of Grievance, another grievance had not been filed, and Respondent objected to this change in the grievance, this request was denied.

Footnote: 13

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. See Borninkhof v. Dep't of Justice, 5 MSBP 150 (1981).

Footnote: 14

It should be noted that July 5, 1999, was a state holiday.