TONI BREEDEN,

Grievant,

v. **Docket No. 04-HHR-287**

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES/

BUREAU for CHILDREN and FAMILIES,

Respondent.

D E C I S I O N

Grievant, Toni Breeden, was employed by Health and Human Resources ("HHR") as a Health and Human Resources Specialist in the Bureau of Children and Families. On May 18, 2004, she filed this grievance. Her Statement of Grievance reads:

> I believe WV Code 29-6A et. Seg. [sic] was used to wrongfully terminate my full time status. I was incapacitated at the time of termination due to vertigo, strong pain meds for surgeries for cholesteatoma in left ear.
>
> Relief sought: full time employment status returned.

This grievance was filed to Level II and denied as untimely, as well as denied for lack of authority to grant the relief sought. Grievant appealed to Level III, and a Level III hearing was held on July 13, 2004. This grievance was denied by Level III Decision dated July 20, 2004. Grievant appealed to Level IV on July 23, 2004, and the grievance was put in abeyance at Grievant's request. A Level IV hearing was held on October 4 & 5, 2004, and this case became mature for decision on that date as the parties elected not to file proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative LawJudge makes the following Findings of Fact. It should be noted that the information possessed by HHR about Grievant's medical condition was limited to the letters from Workers' Compensation and the reports of Drs. Bachwitt and Saldanha. See Findings of Fact, infra.

Findings of Fact

1. Grievant was employed as a Health and Human Resources Specialist, and had worked for HHR since 1997.

2. On March 11, 2001, Grievant suffered an on the job injury, and she has not returned to work since that time. Grievant had complaints of back pain and problems from that injury. By her own admission, Grievant indicates she takes high doses of pain medication, including methadone and Lortab. Resp. No. 5 at Level III (Report of Dr. Paul Bachwitt).

3. Harold Clifton, Safety and Loss Control Specialist with HHR, worked on Grievant's claim from October 2002. His goal was to return Grievant to work, and he worked with vocational rehabilitation counselors to achieve that goal. In that regard, there was no question of giving Grievant accommodations if they were needed. Once HHR received notice Grievant's claim was closed for Temporary Total Disability Benefits, HHR then followed the Division of Personnel's rules. Test. Clifton, Level III Hearing.

4. On August 21, 2003, Dr. Paul Bachwitt evaluated Grievant for her Workers' Compensation Claim. In a letter to Workers' Compensation dated September 10, 2003, he found Grievant had not yet reached her maximum degree of medical improvement, but should do so when she completed a series of pain injections with Dr. Monty Baylor. Hereported Grievant would be able to do sedentary and light work. Grievant's weight was 346 pounds.

5. On or about the first of November 2003, Grievant called her supervisor, Mary Hodge, and asked her to box up her personal things, as she would not be returning to work at the Bureau for Children and Families; she was obtaining a position outside the agency. Ms. Hodge boxed up Grievant's possessions as directed, but Grievant never came to pick them up.

6. No one at the Bureau for Children and Families heard anything further from Grievant until she called on May 4, 2004, after receiving her letter telling her if she did not return to work by May 3, 2004, she would be considered as having abandoned her position.

7. On February 27, 2004, Grievant received a letter from Workers' Compensation stating her Temporary Total Disability Benefits were suspended because she had reached her maximum degree of medical improvement, as she had completed the pain injections from Dr. Baylor. This letter stated

Grievant had either returned to work or was able to return to work.

8. On March 5, 2004, Grievant went to see Dr. David Ede, her physician for her back. He indicated on Workers' Compensation from WC-219 that Grievant was to return to see him on April 2, 2004, and he expected Grievant to return to work on a trial basis on April 30, 2004. (See footnote 2)

9. On March 11, 2003, Grievant was seen by her primary physician, Dr. Kristi Hensley. These notes are largely unreadable, but do indicate Grievant had complaints of left lumbar pain and thyroid problems. Her weight was 337 pounds.

10. On March 11, 2003, Grievant was seen in CAMC's emergency room for abdominal pain. (See footnote 3) Grievant was treated with Demerol and Phenergan intravenously, and responded well to this treatment, laughing and joking with her family. G.R. No. 3 at Level IV.

11. On March 15, 2004, Grievant was again seen by Dr. Hensley. A problem was noted with her ears.

12. On March 16, 2004, Grievant went to the emergency room and reported a two-day history of problems with her ears and vertigo. She presented with symptoms of dizziness, pain, and drainage from her ears. Dr. Stephen Dawson diagnosed otitis media with bilateral labyrinthitis and operated on Grievant that night. He put tubes in both ears because of pressure and drainage. The diagnoses and history indicated Grievant had chronic ear problems.

13. In his discharge summary dated March 19, 2004, Dr. S. Balarishnan noted Grievant was discharged with significant clinical improvement.

14. Grievant returned to see Dr. Dawson on March 22, 2004. He noted Grievant had gone to the emergency room the day before for nausea and vomiting, but was not admitted. Grievant presented with nausea, sensitivity to light, diarrhea, and decreased vertigo. Grievant was described as "awake, alert, apprehensive. She's having a tendencyto hyperventilate." G.R. No. 2 at Level IV. Grievant was referred to Dr. Hensley for her stomach problems and for a possible neurological referral.

15. Grievant also went to see Dr. Hensley on March 22, 2004, with complaints of vertigo, diarrhea, and nausea. Dr. Hensley sent Grievant to CAMC for tests. The documents submitted by Grievant from these tests did not find a reason for Grievant's diarrhea. G.R. No. 4 at Level IV.

16. Dr. Hensley also referred Grievant to Dr. Hazen Ashhab for acid reflux. Dr. Ashhab performed a gastroscopy on Grievant on March 25, 2004. These findings were minimal and did not

explain Grievant's symptoms. Weight loss and lifestyle modification were recommended, and Grievant was discharged to home the day of the test. G.R. No. 5 at Level IV.

17. Grievant went to the emergency room on March 26, 2004, with complaints of nausea, vomiting, dizziness, and diarrhea. Grievant gave a rather detailed history of her ear problems and complained she had been dizzy for three weeks, and this had made her quite nauseated. She stated the ear surgery did not help. Grievant was treated with medication and sent home. Her weight was 300 pounds.

18. On March 28, 2004, Grievant was seen in CAMC's emergency room for right sided weakness and numbness. She was assessed as being alert and oriented with judgment appropriate to age. It was noted again that there was little objective evidence to support Grievant's symptoms.

19. Grievant was admitted to the hospital by Dr. Kevin Sipsy on March 28, 2004. He noted Grievant had multiple complaints and work-ups without documented pathology. Grievant was also seen by Dr. Harry Reahl, a neurologist. He noted Grievant was "awakeand alert. Good historian. Speech was fluent and appropriate." G.R. No. 7 at Level IV. He noted there was a "possibility of a functional issue given her multiple somatic complaints." Dr. Reahl indicated Grievant "may need MMPI, as out p[atien]t, given her multiple complaints." (See footnote 4) G.R. No. 7 at Level IV. During a CT scan of her brain, a problem was noted in Grievant's left ear, and she was directed to follow up with a repeat CT of her left ear. Grievant was discharged on March 30, 2004, as improved.

20. Dr. Hensley sent Grievant for a repeat scan on April 6, 2004, and a possible cholesteatoma was indicated. (See footnote 5) G.R. No. 7 at Level IV.

21. Grievant was seen by Dr. Richard Lough for her ear problems on April 8, 2004, as Dr. Dawson was out of town. He placed Grievant on I.V. antibiotics and operated on Grievant's left ear on April 9, 2004. The diagnosis of cholesteatoma was confirmed.

22. Grievant was again placed in the hospital for another round of I.V. antibiotics and discharged as improved on April 14, 2004. She was seen by Dr. Dawson in his office on that same day. Grievant was alert and in "no apparent distress." G.R. No. 7 at Level IV. Surgery for the cholesteaoma was discussed, and Grievant understood what was explained to her. Testimony of Dr. Dawson.

23. On April 16, 2004, Grievant was seen by Dr. Francis Saldanha for an Independent Medical Examination at the request of Workers' Compensation. Dr. Saldanha reviewed Grievant's medical

history. He noted Grievant's treatment for depression andreported Grievant stated that problem had improved considerably. He also noted Grievant had under gone extensive physical therapy and pain management treatment. During this examination, Grievant discussed the accident, the treatment she had received, and her current symptoms, in some length. Her dizziness was noted, this issue was discussed, and Grievant agreed to continue with the exam. Dr. Saldanha noted the exam was "completed without difficulty." Dr. Saldanha noted in his report, "[t]he claimant is able to take care of personal needs without assistance including attending to personal hygiene, eating, dressing etc. and the claimant can drive short distances." Dr. Saldanha found Grievant to be "[f]riendly and cooperative," oriented, with no difficulty with her intellectual and mental functioning. Resp. No. 1 at Level IV. Dr. Saldanha noted Grievant weighed 310 pounds. (See footnote 6) He also noted Grievant's responses to the range of motion test were not valid. He found Grievant had reached her maximum degree of medical improvement, and Dr. Saldanha rated her as having a 7% whole person impairment.

24. By letter dated April 16, 2004, Workers' Compensation informed Grievant pursuant to the February 27, 2004 letter, Grievant's claim was now closed for Temporary Total Disability Benefits.

25. After Grievant received the April 16, 2004 notice from Workers' Compensation and did not return to work, she was on an unauthorized leave of absence. 26. On April 21, 2004, Grievant hand-delivered to Workers' Compensation the Attending Physician's report, WC-219, for the March 5, 2004 visit to Dr. Ede. (See footnote 7)

27. Grievant was seen by Dr. Hensley on the afternoon of April 21, 2004, for follow-up for complaints of left arm swelling after I.V. antibiotics. Apparently Grievant was seen in the emergency room for treatment, and the redness was now resolved. Grievant's complaints of nausea and dizziness were well controlled with medication. Grievant was seeking muscle relaxants for TMJ problems. (See footnote 8) No complaints of pain were noted. Her weight was 318 pounds. She was given medications for dizziness and TMJ.

28. Grievant called Dr. Dawson to complain of pain and pressure in her left ear on April 22, 2004, and medication was prescribed over the phone.

29. By letter dated April 26, 2004, HHR noted Grievant had not worked since April 12, 2002, and informed Grievant her eligibility for any approved leave of absence without pay benefits terminated when her Workers' Compensation benefits were discontinued on April 16, 2004. This

letter noted that although the Division of Personnel's Rule 14.8 gave the employer the discretion to provide for a personal leave of absence at the expiration of a medical leave of absence, this leave was not available within HHR because of current staffing patterns and caseloads. HHR directed Grievant to return to work on May 3, 2004, "with a physician's statement releasing her to return to full duty employment without restrictions." Grievant was informed if she failed to report to work on May 3, 2004, the agency would conclude she had abandoned her position and this letterwould then serve as her fifteen-day notification of her dismissal, effective May 11, 2004. This letter was sent by certified mail. Resp. No. 2 at Level III.

30. By letter dated April 27, 2004, Workers' Compensation informed Grievant that the WC-219 dated March 5, 2004, could not be used as a basis for paying Temporary Total Disability Benefits, and again noted Grievant's claim had been closed for Temporary Total Disability Benefits.

31. Grievant had surgery for the cholesteatoma on April 29, 2004, after an informed consent for this surgery was signed. G.R. No. 2 at Level IV. Grievant was fully cognizant at the time she signed this form and understood what was explained to her. Testimony of Dr. Dawson. Grievant was discharged on May 1, 2004.

32. Grievant received the notice of the certified letter on or about May 1, 2004, after she left the hospital. She received the certified letter on May 4, 2004, and called her employer that same day, but was told her dismissal would stand.

33. On May 18, 2004, Grievant hand delivered her grievance form to the Grievance Board. In an attached letter, Grievant stated she was still not released to return to work by Dr. Ede, but she hoped he would release her to return to work on May 20, 2004.

34. Dr. Ede did not release Grievant to return to work at that time.

35. Grievant met with Brenda Howell, Director of Families and Children Tracking System, on June 4, 2004, for the Level II grievance conference. Grievant informed Ms. Howell that Dr. Ede would not release Grievant to return to work until she completed a functional capacity evaluation and her blood pressure was under control.

36. At the Level IV hearing held on October 4, 2004, Grievant reported Dr. Ede had said she could return to work after the functional capacity evaluation she received inthe summer of 2004, but Grievant did not have a letter from Dr. Ede releasing her to return to work.

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 Res., 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, 175 W. Va. 279, 332 S.E.2d 579, 581 (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., 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); Scragg v. Bd. of Director. W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994). (See footnote 9)

I. Credibility Because Grievant's testimony, and the testimony of her family members about her physical and mental state, is in direct conflict with numerous doctor's reports, there is a need to assess Grievant's and her family members' credibility. The testimony of these individuals was that Grievant "did not have any good days" from mid-March until the first of May, and was totally unable to function.

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 Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., 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 Res./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'sinformation. (See footnote 10) See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

Grievant and her family have 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).

The testimony of Grievant and her family is found not to be credible. Grievant's family stated Grievant had "no good days." This testimony is contradicted by many doctors. These health care providers had no motive to fabricate data, and in fact it would be important to them to be as accurate as possible. Additionally, while these reports were done on different days and by different doctors, and these reports were consistent with each other. Accordingly, the testimony of Grievant's family is not considered believable.

Further, the testimony of Grievant is also not trustworthy. One reason is because Grievant changed her testimony. At first, Grievant stated she did not remember anything from the start of her ear problems until she was discharged from the hospital in late April. At Level III, Grievant stated her ear problems started on March 6, 2004. At Level IV when Grievant presented medical records, these records reveal Grievant's ear problems started on March 15, 2004. When Grievant was questioned about the February 27, 2004 letterfrom Workers' Compensation, which she would have gotten before the start of these problems, she then testified she really did not remember anything from December 2003 on. Additionally, during the Level III hearing when it appeared the filing of this grievance might not be timely, Grievant stated that she really was not able to think until the third week of May.

Further, Grievant had a proclivity for overstating her problems. This tendency is established by the report of Dr. Saldanha when he found Grievant's results in certain range of motion tests to be invalid,

and in the report of Dr. Gregg which stated Grievant "embellished" her symptoms. (See footnote 11)

Even more serious in terms of Grievant's credibility, are her reports that she remembers nothing at all and was basically bedridden during this time - unable to read or understand anything. Grievant's testimony in this regard is contradicted by the testimony of the numerous doctors she went to see. For example, Grievant discussed her surgery with Dr. Dawson on April 14, 2004, and signed an informed consent form for this surgery. Dr. Dawson testified Grievant was competent to make this decision and understood what she was signing. He noted if he had any questions about this issue he would not have performed the surgery.

Dr. Saldanha's report dated April 16, 2004, found Grievant was able to take care of her personal needs without assistance including attending to personal hygiene, eating, dressing, etc. and could drive short distances. He also found Grievant friendly,cooperative, and oriented. He noted no difficulty with Grievant's intellectual and mental functioning, as demonstrated by the discussion of her medical history.

Dr. Reahl noted that on March 29, 2004, Grievant was awake, alert, and a good historian, and her speech was fluent and appropriate. As revealed in the Findings of Fact, a variety of other doctors and care givers found Grievant was alert, not in severe distress, and able to report her recent medical history in some detail. Grievant's response to this evidence is she just does not remember visiting the majority of these doctors. This assertion is implausible and inconceivable.

Further, Grievant states because she did not open her mail and neither did anyone else in her family, she was totally unaware of what was happening to her Workers' Compensation benefits. The undersigned Administrative Law Judge does not believe this assertion. It is interesting to note Grievant did not hand-deliver her WC-219 report of her March 5, 2004 visit to Dr. Ede until after she should have received the April 16, 2004 Workers' Compensation letter informing her that her claim was now closed for Temporary Total Disability Benefits. Further, when Grievant went to see Dr. Saldanha on April 16, 2004, he explained this evaluation was to assess the amount of permanent injury caused by the March 2002 accident. (See footnote 12)

II. Merits of the case

Respondent maintains Grievant abandoned her position, and her failure to return to work was just cause for her dismissal. Grievant asserts she was too ill to read her mailand to contact HHR, and she remembers almost nothing from this time period. It must be noted that at the time the dismissal

became final and at the Level III hearing on July 21, 2004, Grievant was still not released to return to work by her physician. At the Level IV hearing on October 4, 2004, the undersigned Administrative Law Judge asked Grievant if she had been released to return to work. Grievant's reply was evasive, and she finally stated Dr. Ede had verbally released her this summer, but she still did not have anything in writing stating she could return to work.

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 her position.

HHR 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 was on a medical leave of absence without pay as provided under part 14.8(c)1.a.2 while she was absent from work due to her on-the-job injury. 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."

Workers' Compensation's letter dated February 27, 2004, told Grievant she was expected to

return to work, and the letter dated April 16, 2004, notified Grievant that her case was closed for Temporary Total Disability Benefits. Grievant should have received the April 16, 2004 letter on or before April 19, 2004. Grievant was then absent from work on April 20, 21, 22, 23, and 26, 2004. HHR's April 26, 2004 letter informing Grievant to return to work was not sent until Grievant had been absent five days. The Division of Personnel's rules were followed.

While it is clear Grievant was ill a portion of the time from February 27, 2004, to her dismissal, it is also clear Grievant was able to function to the point where she was able to call HHR and inform the agency of her status. Grievant did not return to work, nor did she call HHR to discuss her options. She never informed them of her multiple medical problems and complaints, and she never informed HHR of her ear problems and surgeries. In fact, the last time HHR heard from Grievant, prior to May 4, 2004, was when she calledin the latter part of October 2003 to tell HHR she would not be returning to employment with the agency.

Grievant's failure to respond to her mail and to notify her employer, is best described as "willful blindness." It appears Grievant believed if she did not talk to HHR there would not be any consequences for her failure to report to work or to keep HHR informed of her status. Unfortunately for Grievant, she is mistaken in this regard. An employer has the right to expect its employee to come to work, and to advise the employer of her current status. Bonar v. Dep't of Transp., Docket No. 99-DOH-379 (July 22, 2003).

A review of the above-stated Rules demonstrates HHR had just cause to terminate Grievant's employment as Grievant did not notify HHR of her status, and did not return to work or call after she received letters from Workers' Compensation.

There is one problem presented by the facts of this case. It is clear from the testimony Grievant did not receive the April 26, 2004 letter until one day after she was to call. While HHR had no reason to expect Grievant to return to work given the last contact it had with Grievant, the undersigned Administrative Law Judge still finds the time given for Grievant to reply was too short. While the Division of Personnel rule does not specify a time frame, mailing a letter on April 26, 2004, for a response on May 3, 2004, approximately seven calendar days, is insufficient and unreasonable. Even if Grievant had received the letter on April 27 or 28, it would have been very difficult for her to meet the requirement in the letter to get a release from Dr. Ede in the short time provided.

However, in this case it makes little difference. Grievant was not released to return to work by the

date of her dismissal, May 11, 2004, and was not verbally released to return to work until sometime this summer. Additionally, Grievant still does not have a letterreleasing her to return to work according to her Level IV testimony in the October 4, 2004 hearing. Obviously, additional time of a week or so would not have helped in this case.

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 is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

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, 175 W. Va. 279, 332 S.E.2d 579, 581 (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., 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); Scragg v. Bd. of Director. 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. HHR has met its burden of proof and demonstrated Grievant abandoned her position, and this action was of a "substantial nature directly affecting rights and interests of the public." Syl. Pt. 2, Buskirk, supra.

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 EmployeesGrievance 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: October 29, 2004

Footnote: 1

Grievant represented herself, and Respondent was represented by Landon R. Brown, Assistant Attorney General.

Footnote: 2

WC-219 is Workers' Compensation's "Attending Physician's Report." It is completed each time the patient is seen and the patient is to turn it in to Workers' Compensation.

Footnote: 3

CAMC stands for Charleston Area Medical Center.

Footnote: 4

MMPI is the acronym for the Minnesota Multiphasic Personality Inventory, a psychological test frequently used for initial assessment purposes.

Footnote: 5

A cholesteatoma is a middle ear mass associated with chronic middle ear infections.

Footnote: 6

Grievant's weight is noted when it was recorded by a care givers because Grievant testified she lost thirty pounds during her "ordeal." It is noted Grievant weighed 337 pounds on March 11, 2004, and 318 pounds on April 21, 2004, for a net loss of nineteen pounds. Grievant is obese, and weight reduction was one of the desired goals for improvement of Grievant's over all health.

Footnote: 7

Grievant testified at Level III that she hand-delivered this letter on April 21, 2004. At Level IV, Grievant stated she did not know how Workers' Compensation got the letter.

Footnote: 8

This acronym stands for temporomandibular joint.

Footnote: 9

The Grievance Board has held that the employer has the burden of proof in job abandonment grievances.

Footnote: 10

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: 11

The report of Dr. Gregg was not admitted into the record because of Grievant's objections, but was used to impeach Grievant.

Footnote: 12

Grievant testified she must have known to go to this appointment because someone must have called her, but she does not remember this, and she does not remember keeping the appointment with Dr. Saldanha.