JAMES RUCKLE,

Grievant,

v. **DOCKET NO. 04-HHR-367**

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/ OFFICE OF MATERNAL AND CHILD HEALTH,

Respondent.

D E C I S I O N

Grievant, James Ruckle, filed this grievance against his employer, the Department of Health and Human Resources ("HHR") on October 1, 2004, following his dismissal for leave abuse. He was employed in the Office of Maternal and Child Health in the Birth to Three Program ("BTT"). His Statement of Grievance states, in part, "dismissal based on a misinterpretation of Employee Conduct Code and the Americans with Disabilities Act. . . ." Grievant makes numerous other allegations in his Statement of Grievance, and avers his absences from work improved, state policies and required standards were changed or not followed, and his "learning disability" prevented him from implementing the required changes as quickly as HHR wanted. He asserts his treatment was arbitrary and capricious for "someone with his type of condition." The relief sought is "Continuation in my position as Office Assistant II. . . ." (See footnote 1)

A level four hearing was held in the Grievance Board's Charleston office on July 12, and September 12 and 13, 2005. Grievant was represented by Robert Williams, Esq., and Respondent was represented by Landon R. Brown, Senior Assistant Attorney General. This matter became mature for decision November 22, 2005, the date the proposed findings of fact and conclusions of law were due.

Issues and Arguments

HHR asserts it did everything it could to assist Grievant in coming to work, without any change in Grievant's behavior, and being at work is an essential duty of any position. HHR noted BTT is a small

unit, and the consistent lateness and/or absence of one employee placed a burden on the unit and the other employees. HHR is sympathetic to Grievant's disabilities, but notes Grievant did not prove any disability but epilepsy. Grievant did not prove he had Asperger's syndrome or indicate what effect this disorder had on him. Additionally, HHR notes Grievant did not establish he had any other medical issues affecting his ability to come to work on time.

Grievant avers his tardiness was improving, and HHR did not give him enough time to correct his behavior. Additionally, Grievant asserts he can and will do better and believes HHR should accept occasional tardiness as a part of accommodating his "multi- tiered and complex disabilities." Grievant also avers his problems are medical, and the application of progressive discipline cannot result in any change. Grievant alleged HHR violated his rights under the American with Disabilities Act ("ADA"). Grievant also asserted HHR could not dismiss him while he was on a six month Improvement Plan. (See footnote 2)

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

Findings of Fact

1. Grievant is an epileptic. He suffers grand mal seizures for which he takes medication. He also probably has absence seizures which last 5 to 30 seconds and are characterized by a cessation of activity and a blank stare. (See footnote 3) Test. Dr. Brick, Level IV Hearing.

2. Grievant received a Bachelor's degree in psychology with a minor in Spanish in 1985, and thereafter obtained a Master's degree in Latin American studies with a minor in Spanish at Vanderbilt University. He worked at the Smithsonian for several years in the early nineties.

3. Grievant has difficulty with interpersonal relationships and does not communicate well with others. Jean Carlin, his former case worker from the Division of Vocational Rehabilitation ("Rehab"), testified Grievant's file stated he has been diagnosed with Asperger's Syndrome, a form of autism, but no medical proof of this diagnosis wasplaced into evidence. (See footnote 4) The effect of this disease process in Grievant's case was not clarified.

4. Dr. Kimberly Ramsey, Coordinator of Marshall University's Program for Students with Asperger's Syndrome, indicated the effects of this disease process varied greatly from individual to individual. Dr. Ramsey did not know Grievant or the effects of this disease process in his particular case, but did indicate most individuals with this diagnosis were bright, with a strong work ethic, and

liked routine and sameness. She also testified that to assist an individual with Asperger's Syndrome, the supervisor should put information in written form, role model the expected behavior, give clear, concrete commands, break tasks into smaller pieces, and make sure rules and expectations are in writing.

5. Grievant had been employed as an Office Assistant 2 by HHR since June of 1999. Prior to becoming a regular employee, Grievant worked in BTT as a temporary employee referred by Rehab. During this time, BTT discovered Grievant could not consistently perform the duties of an Office Assistant, but did have experience in runninga library. When he became a permanent employee, his duties were to run BTT's library. BTT is a small program with only three to four staff members.

6. The BTT library is a resource for the entire state, and it serves both professionals and parents who need assistance in working with children with disabilities. This library has written materials and loans out assistive devices to help professionals and parents working with handicapped children. Grievant's duties were to maintain the library, assist telephone and walk-in users, conduct research for needed information, mail out and seek the return of the library's materials, and conduct presentations on the library's resources. Any time a walk-in user came to the library, a staff member had to remain with the person until they left. When Grievant was not there, the other employees of the BTT sometimes had difficulty retrieving the information sought by users. Grievant was also expected to assist in organizing training packets and copying and collating. This activity was a frequent occurrence. Grievant had difficulty performing his duties and required constant supervision.

7. During the entire time of his employment, Grievant had difficulty with absenteeism and tardiness. This problem has waxed and waned, and, at times, he was required to go off the payroll because of insufficient leave.

8. Prior to June 2003, Grievant's supervisor was Pam Roush, and she spent much time assisting Grievant. She allowed Grievant to adjust his time when he came in late, turn in leave slips late, and to use sick leave without medical validation. Even with these accommodations, Grievant would go off the payroll and consistently had a low leave balance. Because she did not know what was causing Grievant's consistent lateness, and because Grievant thought some of his problems were related to illness or disability, Ms.Roush allowed Grievant to use sick leave liberally. She did not follow HHR's Policy on leave usage and treated Grievant differently than other employees in this

regard. Ms. Roush sought help for Grievant from many people so Grievant could identify his medical problems, receive help, and become a more productive employee. Ms. Roush saw these actions as temporary until Grievant could resolve his issues. She met with Rehab and sought this agency's assistance and advice in helping Grievant, found Grievant medical care, allowed him to adjust his time, and drove him to appointments. Ms. Roush's assistance did not result in any change in Grievant's tardiness and absenteeism. Test. Roush.

9. In June 2003, Ms. Roush was promoted, and Georgia White became Grievant's direct supervisor. At first, Grievant's tardiness improved after Ms. White became his supervisor, and Grievant started to build up some leave time. Grievant's 2003 performance evaluation completed by Ms. White reflected this improvement, and Grievant was rated as "Meets Expectations" or "Exceeds Expectations" in all categories except one, "Employee presence can be relied on for planning purposes." Grievant received an overall rating of 2.09, "Meets Expectations."

10. Grievant did not have a neurologist in Charleston, and he went to see Dr. John Brick in Morgantown in November 2003, and he had EEG testing in late December 2003. Dr. Brick discovered Grievant's medication was not preventing seizures, and, on January 20, 2004, he placed him on a new medication to replace his current medication. This was the last time Dr. Brick saw Grievant, but he did write prescriptions for his seizure medication as needed up until December 2004. This change in medication was to take place slowly to prevent breakthrough seizures, and Grievant was anxious about thischange. A change in seizure medication can create side effects such as drowsiness. Contrary to Grievant's assertions, neither his medication nor his seizure disorder causes an inability to move or the having cold feet. Grievant never told Ms. White about this change in medication or the effects it could have. Dr. Brick encouraged Grievant to find a neurologist in Charleston. When Grievant would call for an excuse for work, Dr. Brick did send these at times, but stated he could not send one every time, because Grievant may not report accurately.

11. In January of 2004, Grievant's scheduled work time was 8:30 a.m. to 5:00 p.m. with an hour for lunch. Out of 20 work days, Grievant was late eight days and took one day of non-pre-approved sick leave. Three of the late days were after the start of the new medication. Because Grievant frequently did not call in to say he would be late, Ms. White would call Grievant, and he would tell her he was sick and would not be in. Ms. White told Grievant he was to call if he was not coming to work, but Grievant continued to not do this. Grievant did not appear at work on two of

these late days, which were Mondays, until 3:00 p.m. Ms. White allowed Grievant to adjust many of these missed hours by letting him stay late or work through his lunch time.

12. From February 1 through 10, 2004, Grievant's scheduled work time was 8:30 a.m. to 5:00 p.m. with an hour for lunch. Out of 6 work days, Grievant was late every day, and his arrival times were: 11:30 a.m., 10:45 a.m., 10:30 a.m., 9:30 a.m., 12:30 p.m., and 1:00 p.m. On February 9, 2004, Ms. White (after checking with Human Resources) told Grievant he could not use sick leave for tardiness, if the lateness was caused by non- medical reasons such as oversleeping or missing the bus. 13. On February 10, 2004, Grievant's work time was changed to 9:00 a.m. to 5:00 p.m. with a half hour for lunch. During the remaining eleven February work days, Grievant took one day of non-pre-approved sick leave, one day of emergency annual leave, and was late seven days by approximately one to three hours. Grievant was still not calling in to say he was going to be late or would not be in. Some days he indicated he was ill, but other days he gave no excuse for his tardiness. Grievant was also not turning in his leave slips in a timely manner. Ms. White continued to allow Grievant to make up some of the missed time by adjusting his work schedule. Ms. White continued to remind Grievant to turn in his leave slips and to call when he would not be in.

14. In March 2004, Grievant's scheduled work time was 9:00 a.m. to 5:00 p.m. with a half hour for lunch. Out of 23 work days, Grievant was late 21 days and took emergency annual leave one day. His arrival times were varied from as early as 9:15 a.m. to as late as 12:45 p.m. Ms. White allowed Grievant to adjust some of this time, but he still had to go off the payroll. (See footnote 5)

15. On March 3, 2004, Grievant was placed on his first Improvement Plan. This Improvement Plan was short, clear, concrete, and in writing, and it was verbally reviewed with Grievant. Grievant was directed to call if he would be late or not coming in, turn leave slips in "first thing" upon his return to work, and to present a doctor's slip for all sick leave. Grievant was also informed he could not use sick leave for tardiness, the use of emergency annual leave was at the discretion of Ms. White, and any request to adjust his schedulemust be approved by Ms. White. Grievant was late every day in March after his Improvement Plan was started.

16. Because of Grievant's increasing tardiness, Lisa Steele, Personnel Coordinator for the Office of Maternal and Child Health, met with Grievant to ask what HHR could do to help him arrive on time. Grievant said he "didn't know."

17. In April 2004, Grievant's scheduled work time was 9:00 a.m. to 5:00 p.m. with an half hour

for lunch. Out of 22 work days, Grievant was late 12 days and had to go off the payroll several times. His arrival times were later than before, with the earliest arrival time being 10:48 a.m., most arrivals in the afternoon, and two arrivals as late as 3:00 p.m.

18. On April 6, 2004, Ms. White, with Grievant's permission, talked to Grievant's counselor, Tom Price. Mr. Price wanted to know if BTT was planning to terminate Grievant. Ms. White explained they were trying to help Grievant and informed Mr. Price Grievant was expected to follow policy the same as everyone else. She also explained to Mr. Price how often and by how much Grievant was late. On April 12, 2004, Grievant, Ms. White, and Ms. Steele had a conference call with Mr. Price. Mr. Price believed the Improvement Plan and its expectations were fair.

19. After several tries, Ms. White and Grievant met with Ms. Carlin, Grievant's Rehab counselor, on April 21, 2004. During that conference, Ms. White agreed Grievant could attend "speech class" on work time, and HHR would provide Grievant transportation to these classes. (See footnote 6) Ms. Carlin did not know how often and just how late Grievant was arriving to work. Grievant believed a personal wake-up call would be helpful, and Ms.Carlin agreed to make these calls until Grievant, or she, could arrange for someone else to do this. Ms. Carlin testified that although she made these calls, they were not always successful in getting Grievant up.

20. Grievant arrived to work on time for several weeks after these wake-up calls started, but by mid-April he was again repeatedly late, not turning in leave slips, and not calling in to report his status.

21. In early May 2005, Grievant submitted a letter/note from Dr. Brick explaining his seizure condition, and noting his seizure medication had been changed at the first of the year. (See footnote 7) At the time of this letter, Dr. Brick had not seen Grievant for months. Grievant wanted to use this letter to excuse his tardiness in general. Ms. White and Ms Steele met with Harriet Fitzgerald, Employee Resources Manager, and she decided this note was too vague to stand as general excuse, especially as the letter indicated the change in medications was started in January 2004, it was now May, and Grievant had not seen Dr. Brick for some time. Ms. Steele and Ms. White explained this to Grievant on May 6, 2004, and Grievant claimed he was being mistreated.

22. During the second half of the month of May, Grievant was late six of the ten days, but his latest time of arrival was 11:30 a.m. After Grievant arrived late on May 17, 18, and 19, 2004, Grievant was placed on his second Improvement Plan on May 21, 2004. The goals in this Improvement Plan

were the same as the ones before, and the Plan was again discussed with Grievant. The week following the institution of the secondImprovement Plan Grievant was late three times. Grievant was allowed to adjust some of this time. There was no evidence to indicate the reason for all these absences was medical.

23. In June 2004, Grievant's scheduled work time was 9:00 a.m. to 5:00 p.m. with an half hour for lunch. Out of 22 work days, Grievant was late 13 days, had one day of non-pre-approve sick leave, and one day of unauthorized leave. After arriving late or not coming to work seven days in a row, Grievant was given a verbal warning and a third Improvement Plan on June 9, 2004. Grievant did not grieve the verbal warning. Grievant was late the very next day.

24. On June 18, 2004, Ms. White and Ms. Steele had a lengthy meeting with Grievant to discuss his current situation and to impress upon him the seriousness of his failure to attend work on time. Grievant was also given information about the Employee Assistance Program ("EAP"). There was no evidence Grievant sought help from this program.

25. On June 22, 2004, Grievant's work hours were changed at his request to 8:30 a.m. to 5:00 p.m. with an hour for lunch. Grievant believed a half hour for lunch did not give him enough time to eat. Ms. White informed Grievant she did not think this change was a good idea because he was not able to meet the 9:00 a.m. time requirement, but she agreed to see if this switch helped Grievant. Grievant was late three of the next six remaining days of June, and his time was switched back to 9:00 a.m. to 5:00 p.m. with an half hour for lunch on June 30, 2004.

26. Ms. White recorded some of Grievant's reasons for lateness during June 2004. On June 7, 2004, Ms. White called Grievant at 1:37 p.m., and Grievant stated heslept through his alarm clock, that he was dizzy and his back hurt, he had been shaking for days and this condition is now permanent, but his doctor informed him this shakiness was not related to his seizures. On June 9 and 13, Grievant stated he missed the bus. On June 14, Grievant fell back to sleep after Ms. Carlin called him. On June 22, 2004, Grievant stated he needed medical attention and was waiting for someone to call him, but he did not later provide a medical excuse, and sick leave was not authorized. On the vast majority of late days, Grievant's excuse was either non-medical, or he gave no excuse.

27. Grievant was not late the first seven work days of July 2004. On July 13, 2004, he arrived late at 9:55 a.m. because he overslept. On that day, Grievant was given a written reprimand which he did not grieve, and Ms. Steele and Ms. White met with Grievant to make it clear he was to be at work

on time. Resp. No. 16. (See footnote 8) They also asked what else could be done to assist him in coming to work on time, and noted the disciplinary actions were getting more serious. Grievant did not identify any further accommodations. On July 15, Grievant arrived to work at 12:07 p.m. stating he thought he had a seizure and had lost consciousness. HHR did not think Grievant should be at work if he was losing consciousness, and Ms. White walked Grievant to the bus terminal to make sure he got there safely, and she told Grievant he had to get a doctor's excuse before he returned to work. Grievant obtained the release the next day. Later that month, Grievant was late because he missed the bus, and another time Grievant was late, the reason was unstated by the parties.

28. On July 30, 2004, Grievant was notified by letter that he would be suspended for three days starting on August 9, 2004 to August 12, 2004. This letter reviewed the events leading up to this action and informed Grievant of his grievance rights. The letter pointed out that missing the bus or oversleeping were not medical issues and sick leave could not be used. Additional reasons for the suspension were late notification of his supervisor about his absence or lateness, and failure to submit medical verification.

29. The next working day after this notification, August 2, 2004, Grievant was ninety minutes late because he overslept. On August 4, 2004, Grievant was notified by letter that his suspension would be increased to five days, and this suspension would now start on August 16, 2004, and end on August 20, 2004. The specific reasons for the extension of the suspension were outlined in the letter, Grievant was again encouraged to seek assistance from EAP, and he was informed the Improvement Plan would stay in effect for six months. Grievant was placed on notice that "[i]f during this six month period the tardiness/absences continued, further disciplinary action may occur, up to and including dismissal."

30. Grievant arrived late for work on August 10, 11, and 12, 2004, during the notice period for this suspension. The reasons for his late arrival were: 1) "bus missed me"; 2) lost his keys; and 3) "just didn't get up." He was notified by letter dated August 13, 2004, that he would receive a second suspension for ten days, from August 23, 2004 to September 3, 2004. Again, the events leading up to the suspension were listed, and help was offered through EAP. This letter made it very clear the situation was serious.

31. Grievant's suspensions ended on September 3, 2004. Monday, September 6, 2004, was a holiday. Grievant arrived on time the rest of that week. 32. On Monday, September 13, 2004,

Grievant arrived fifty minutes late to work because he overslept, and on September 16, 2004, Grievant was informed his dismissal was being recommended for his failure to arrive to work on time. At the meeting to discuss his dismissal, Grievant blamed HHR for putting him on an Improvement Plan that made him afraid to come to work and asserted HHR was in violation of the ADA because being unable to come to work on time was a disability. Grievant received his dismissal letter on September 17, 2004, and that day was also his last day of work. Resp. No. 3.

33. From January 2004 to September 2004, Ms. White and Ms. Steele met frequently with Grievant to discuss his lateness, and the need for him to arrive on time. He was repeatedly asked what other accommodations could be made to help him, and informed the situation was serious. In addition to Grievant's attendance problems, he continued either call in late or not call at all when he was going to be late, and Ms. White continued to have difficulty getting Grievant to fill out his leave slips in a timely manner.

34. While some of Grievant's lateness and failure to come to work were related to his seizure disorder, many of his late arrivals were caused by his failure to get up or to catch the bus. Some of Grievant's "medical" complaints were not related to Grievant's seizure disorder. (See footnote 9) Test. Brick. 35. Grievant did not grieve any of the disciplinary actions before the dismissal. His right to grieve the written reprimand and suspensions was clearly specified in the suspension letters.

36. The following is a list of the accommodations HHR granted to Grievant in 2004:

a. Grievant requested his schedule be changed and this request was granted three times.

b. Grievant was given a Palm Pilot to assist him in organizing his schedule, prioritizing his work, and setting alarms to wake him up, tell him when to eat lunch, and when to go home. (See footnote 10)

c. Allowed Grievant to use sick leave to attend speech classes at Rehab, and HHR arranged transportation for these classes. (See footnote 11)

d. Allowed Grievant to call in leaving a number on Caller ID, if he would not be in on time and believed he could not talk.

e. Met with Grievant's interpersonal counselor and Rehab counselor to seek suggestions to assist him in coming to work on time.

f. Referred Grievant to the Employee Assistance Program

g. Allowed Grievant to adjust and make up missed time.

h. Imparted information in many ways to ensure Grievant understood what was expected.

i. Prior to 2004, Ms. Roush attempted to help Grievant with many facets of his life. See Finding of Fact 8.

37. Grievant had great difficulty answering the questions presented to him at hearing. (See footnote 12) He frequently did not answer at all or there was a lengthy delay between the question and his response. Grievant remembered little about the work events in 2004, and often answered questions with "I don't know" or "I don't remember." He also had a great deal of difficulty in placing events in chronological order and was a poor historian.

38. When Grievant was late or did not come to work, the other employees in BTT, including Ms. White, had to cover his duties. When Grievant was late by only a few minutes or only occasionally, this tardiness did not place a great burden on BTT's other employees.

39. Both Ms. White and Ms. Roush spent a great deal of time with Grievant. Grievant required close supervision, frequent and multiple explanations, and reminders. Both of Grievant's prior supervisors did not think he should be rehired because they did not believe he would or could come to work on time on a consistent basis, and the amount of time he took to supervise decreased the amount time they could spend elsewhere. Both supervisors liked Grievant and were upset over the need to dismiss him.

40. Ms. White tried to communicate with Grievant in many different ways. She gave directions several times using different words, used both spoken and written communication, developed a form to specify the work that needed to be done, demonstrated to Grievant how she wanted a task accomplished, worked beside him on certain tasks, and helped him prioritize his duties.

41. Grievant does not believe he can arrive to work on time every day. See notes of meetings Resp. No. 5.

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.

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 C.S.R. § 12.2, Administrative Rule, W. Va. Div. of Personnel. The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980). As stated in Buskirk, supra, "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." See Blake v. Civil Serv. Comm'n, 172 W. Va. 711, 310S.E.2d 472 (1983); Serreno v. W. Va. Civil Serv. Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (1982).

I. Credibility

An issue to address is credibility, as Grievant asserted HHR was well aware of all his disabilities, and the effect they had on him. 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 [some of] 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 13) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

The undersigned Administrative Law Judge finds it is clear HHR knew Grievant had some type of seizure disorder, but did not know its severity, or that Grievant's medication had been changed until May 2004. There was no evidence Grievant had a Grand Mal seizure during his employment. Ms. White was aware Grievant had said he had Asperger's Syndrome, but she did not know about this disease or how this syndrome affected Grievant. She was aware Grievant had difficulty processing data and took multiple steps to communicate clearly to Grievant what her expectations were. Ms. Roush had a little more information about Grievant's medical status, but still did not know what caused Grievant's lateness, and if it was medical. This lack of knowledge is why Ms. Roush tried so hard to get Grievant medical assistance without avail. It should be noted Grievant had not given Ms. Roush permission to share any medical data that she may have possessed. Accordingly, HHR was aware Grievant had seizures and had problems with communication and following directions. They had no knowledge about a possible sleep disorder or diagnosed anxiety or depression.

While the undersigned Administrative Law Judge does not believe Grievant's testimony was untruthful, it was also unrevealing. Grievant remembered little of what happened during the time period in question. His memory of other prior events was also very limited. His answers, when given, were halting, and he was frequently unresponsive.

II. Merits

The next issue to address is whether Respondent met its burden of proof and demonstrated by a preponderance of evidence that Grievant failed to report to work as scheduled. The evidence of record clearly demonstrates Grievant engaged in excessive absenteeism. He did not follow the established guidelines in requesting leave, was frequently late to work, failed to submit leave slips in a timely manner, did not call off when he was late, adjusted his time without permission, and failed to follow the requirements established in his three Improvement Plans, and the written reprimand and two suspension letters. Beginning as early as January 2004, Ms. White alerted Grievant he was

missing too much work and was not following the proper procedures for completing leave slips and reporting off. While a day late here and there and for only a few minutes could be covered by BTT, Grievant's excessive lateness and frequent absences had a detrimental effect on the rest of the staff, who had to cover for Grievant.

Respondent demonstrated progressive discipline was instituted to no avail. Grievant received numerous counselings, a verbal warning, a written warning, and two suspensions, but he continued his pattern of leave abuse. In the instant case, it is clear Respondent followed its progressive discipline policy, and Grievant was given every possible opportunity to correct his behavior. Grievant knew his actions were unacceptable, but no sustainable correction occurred.

Further, these actions were not trivial in nature. Employers have the right to expect employees to come to work on time and to follow orders that are do not impinge on their health and safety. Brooks v. Dep't of Health and Human Res., Docket No. 03-HHR-183 (Nov. 4, 2003); Page v. Dep't of Health and Human Res., Docket No. 02-HHR-049 (July5, 2002); Price v. Dep't of Health and Human Res., Docket No. 00-HHR-302 (Mar. 19, 2001); English v. Div. of Corr., Docket No. 98-CORR-087 (June 29, 1998); Hatfield v. Dep't of Corr., Docket 98-CORR-020 (Apr. 30, 1998). See Scarberry v. Bureau of Employment Programs, Docket No. 94-BEP-625 (Jan. 31, 1995); Smith v. Dep't of Corr., Docket No. 93-CORR-538 (May 17, 1994). In similar cases where a grievant has received numerous warnings, reprimands, and suspensions for the same type of conduct, repeated violations amount to good cause for dismissal. English, supra. Respondent has met its burden of proof and demonstrated Grievant abused his leave, and termination was warranted in this case. See Scarberry, supra.

Grievant asserts he should have received more time to change his tardy behavior, and his tardiness improved with the wake up calls. This assertion is not demonstrated by the record. While Grievant did improve after the institution of these calls for a short time, this progress was not maintained. Even Ms. Carlin testified these calls did not always work, and Grievant reported to Ms. White he still frequently overslept. While HHR could have elected to continue with suspensions and Improvement Plans, HHR's determination that Grievant was not going to improve was reasonable, given that the problem was long- term and Ms. White had been working with Grievant on the issue for eight months at the time of his termination. See Conley v. Div. of Corrections, Docket No. 00-CORR-109 (June 30, 2000) (dismissal for absenteeism of an employee with physical difficulties).

III. Violation of the American with Disabilities Act ("ADA")

Grievant also argues his termination is in violation of the ADA. He asserts because HHR was aware of his problems, HHR had a duty to accommodate his disabilities by allowing him to come in late and take sick leave without documentation. As noted in theFindings of Fact, HHR made many accommodations for Grievant, including asking his counselors, as well Grievant, what else could be done to help. It appears the only accommodation Grievant would find sufficient was to be allowed to come and go at will, and to count all tardiness for whatever reason as sick leave. As he told Ms. White and Ms. Steele, he did not think he could come to work on time every day. While this is a case that tugs at the heart strings, an agency is not required to let an employee set his own schedule, not report absences, not fill out leave slips in a timely manner, and adjust his schedule without prior approval. BTT has work to do and it needed Grievant to be there to perform his duties.

While not stated by HHR, the undersigned Administrative Law Judge believes that if Grievant were only late by a few minutes, say five or ten, and was only late once or twice a month, his termination may never have occurred. But Grievant has never been able during his entire tenure with the agency, to meet even this standard. While Grievant now says he is ready to meet this condition of employment, the undersigned Administrative Law Judge also believes Grievant cannot or will not meet this requirement.

Even if Respondent could do something more to accommodate Grievant's problems and were required to do so under the ADA, "[i]t has previously been held that this Grievance Board does not have jurisdiction to determine whether the ADA has been violated, based upon the West Virginia Supreme Court of Appeal's holding in Vest v. Board of Education of County of Nicholas, 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). SePrince v. Bd. of Trustees/W. Va. Univ., 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 § 29-6A-2, 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.

Generally, an employee asserting an affirmative defense to a disciplinary action must establish

such a defense by a preponderance of the evidence. Smith, supra; McFadden v. W. Va. Dep't of Health & Human Res., Docket No. 94-HHR-428 (Feb. 17, 1995); Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991), aff'd, 192 W. Va. 540, 453 S.E.2d 374 (1994); Morris v. W. Va. Dep't of Health, Docket No. 91-DHS-112 (June 25, 1991). See Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D. Or. 1994) See also Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980). The ADA provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112.

A person making a claim of discrimination under the ADA bears the burden of proving a prima facie case of discrimination by a preponderance of the evidence. In a typical ADA case, the claimant must prove: (1) he was in the protected class;

(2) he was discharged;

> (3) at the time of the discharge, he was performing his job at a level that met his employer's reasonable expectations; and

> (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.

Ennis v. Nat'l Ass'n of Business & Educ. Radio, Inc., 53 F.3d 55 (4th Cir. 1995). See also Doe v. Univ. of Medicaid. Medical System Corp., 50 F.3d 1261 (4th Cir. 1995).

Applying these legal principles to the facts previously determined, it is clear Grievant had seizures and some form of communication disorder, HHR was aware of, but he did not evidence a "disability" as contemplated by the ADA. In the circumstances presented, DOP and HHR Policies require employees to come to work and to come on time. Grievant has not demonstrated he was "performing his job at a level that met his employer's reasonable expectations," as he was frequently not at work. Therefore, Grievant has not met his burden of establishing a prima facie case of discrimination because of handicap or disability. No inference of unlawful discrimination may be made from this set of facts.

Nonetheless, Grievant argues because HHR was aware of his multiple problems, the employer had a duty to accommodate his disabilities. The flaws in this argument are three-fold. Grievant did not demonstrate: 1) he had multiple, severe disabilities; 2) HHR was aware of these disabilities; and/or 3) these disabilities caused him to be chronically late. Further, Grievant did not cite any ADA cases involving this set of factors.

In terms of the Grievance Board's test for discrimination, W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as, "any differences in thetreatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 14)

> (a) that he or she has been treated differently from one or more similarly- situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant has not met his burden of proof and demonstrated he was treated differently from similarly-situated employees, or that his treatment was not related to his actual job responsibilities. Grievant produced no evidence of other similarly situated employees who retained their positions. It is clear Grievant suffers from seizures, and he has difficulty with interpersonal relationships. HHR was aware of these facts and made multiple accommodations. Still and yet, HHR requires employees to come to work on time, and is unwilling to grant the final accommodation Grievant seeks, to set his own schedule. Grievant has not met his burden of establishing a prima facie case of discrimination because of handicap or disability.

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. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064.

3. State employees who are in the classified service can only be dismissed for "good cause." See Oakes v. W. Va. Dep't of Finance & 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). 4. Employers have the right to expect employees to come to work on time and to follow orders that are do not impinge on their health and safety. English v. Div. of Corr., Docket No. 98-CORR-087 (June 29, 1998); Hatfield v. Dep't of Corr., Docket 98-CORR-020 (Apr. 30, 1998). See Scarberry v. Bureau of Employment Programs, Docket No. 94-BEP-625 (Jan. 31, 1995); Smith v. Dep't of Corr., Docket No. 93-CORR-538 (May 17, 1994).

5. Respondent has proven Grievant established a pattern of tardiness, absenteeism, and leave abuse during his employment.

6. Grievant was terminated for good cause and in compliance with the provisions of Respondent's progressive discipline policy.

7. The Grievance Board has determined it does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act, including a claim of handicap discrimination, or the ADA. See Bowman v. W. Va. Educ. Broadcasting Auth., Docket No. 96-EBA-

464 (July 3, 1997); Rodak v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-536 (June 23, 1997).

8. The Grievance Board does have authority to provide relief to employees for "discrimination," as that term is defined in W. Va. Code § 29-6A-2, including 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 v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995). 9. W. Va. Code § 29-6A-2(d) defines discrimination as, "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

10. In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals revised the legal test for discrimination claims raised under the grievance procedure statutes. A grievant must establish a case of discrimination by showing:

> (a) that he or she has been treated differently from one or more similarly- situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

11. Grievant has failed to establish a claim of discrimination.

Accordingly, this grievance is **DENIED**.

Any party 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. 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 theBoard 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: December 22, 2005

Footnote: 1

Grievant initially asked that "if he could not be rehired, class dismissal as not based on misconduct." HHR was willing to grant this relief, but Grievant decided he wanted reinstatement to his prior position.

Footnote: 2

This issue will not be addressed further as Grievant was clearly informed that if his tardiness/absences did not improve he could be discharged. See Finding of Fact 29.

Footnote: 3

No evidence or testimony indicated Grievant has partial, complex seizures. This category of seizure last a few minutes, and it is typified by a blank stare, nonsensical responses, and memory loss.

Footnote: 4

It should be noted the "Authorization for Release of Information Form" signed by Grievant restricted the information Ms. Carlin and Tom Price, Grievant's counselor, could give to only verbal testimony, and they were not allowed to release any document of any kind pursuant to HHR's subpoena. Specifically, Ms. Carlin was allowed "to refer to any diagnosis" but could do so only verbally. This restricted release prevented HHR from obtaining written documentation which could confirm Grievant's asserted diagnosis of Asperger's syndrome, and its specific signs and symptoms in Grievant's case. Grievant's attorney chose, at hearing, to not admit a document apparently diagnosing Grievant with Asperger's Syndrome and depression through Ms. Carlin. (It appeared Grievant's attorney did not want HHR to be able to cross-examine Ms. Carlin on this information.) He later attempted to admit a doctor's report through Grievant which might have confirmed this diagnosis, but Grievant could not remember ever seeing the document. For this reason, HHR objected to the admission of the report, and this document was not admitted. It should be noted the undersigned Administrative Law Judge reminded the parties while Ms. Carlin was on the stand, that while there was medical testimony on Grievant's seizure disorder, there was no medical confirmation of the asserted diagnoses of Asperger's Syndrome, sleep disorder, depression and/or anxiety.

Footnote: 5

The undersigned Administrative Law Judge notes Dr. Brick stated the change in medication that started in January 20, 2004, would take a while, but by then of February 2004 or the beginning of March 2004, this change should have been complete.

Footnote: 6

This class was to help Grievant improve his interpersonal skills. Grievant does not have a speech/diction problem.

Footnote: 7

Since this letter was not placed into evidence, the undersigned Administrative Law Judge has no knowledge of its actual contents. The parties disagreed on this letter's contents and clarity.

Footnote: 8

This written reprimand identified, in detail, the events that led up to this disciplinary action, directed Grievant to seek medical or psychological help, if this was causing his lateness, and informed Grievant of his grievance rights.

Footnote: 9

Grievant also asserted he had been diagnosed with anxiety and depression and had a sleep disorder. No documents were admitted to support these diagnoses. Ms. Carlin testified Grievant was depressed in 2002, and Dr. Brick testified Grievant was anxious about the change in medication. Grievant could not identify what time periods these issues were problems for him, but did indicate he at times had medication for emotional problems, but did not like to take them and so he didn't.

Footnote: 10

Palm Pilots are usually reserved for administrative positions at HHR.

Footnote: 11

It appears these classes were also paid for by HHR, but this is not clear from the record.

Footnote: 12

There was no attempt by HHR to ask Grievant "tricky" questions, and Grievant's attorney was allowed to lead him in his testimony. This leading questioning still did not seem to assist Grievant in answering the questions.

Footnote: 13

The undersigned Administrative Law Judge originally obtained this list of factors to use when assessing credibility from The United States Merit System Protection Board Handbook. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 14

In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in

which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).