THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

M. B. H.,

Grievant,

v. **Docket No. 2008-1591-DHHR**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ BUREAU FOR MEDICAL SERVICES,

Respondent.

DECISION

M. B. H.("Grievant") was employed by the Department of Health and Human Resources ("DHHR") until she received a letter dated February 22, 2008, dismissing her from her job. Prior to her dismissal, Grievant was classified as a Nurse 3 and was assigned to the Bureau for Medical Services in the Office of Program Quality and Integrity. Ms. H. filed a grievance contesting her termination on April 9, 2008. As her Statement of Grievance she wrote:

> February 11th I called off work for a week with my prior extended illness. I returned with a note from my doctor. See attached[1] On February 25th 2008, my husband called my work site and talked with my commissioner, Marsha Morris, to explain that there had been a mix up, due to my illness that I was unable to call off on Feb. 19, 2008 due to my illness. My husband explained that I would be off for an extended time and was under my doctor's care. He explained we would get a note from my doctor explaining my absence.

As relief Grievant seeks an unpaid medical leave of absence and the right to return to work.

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[1] Grievant did not actually return to work as the remainder of her Grievance Statement reveals. She did attach to her grievance a copy of a letter from her doctor, which is part of the grievance record.

Grievant originally asked that her grievance be filed at level three but it was mistakenly remanded to level one. By a letter dated June 6, 2008, the level one hearing examiner dismissed the grievance at level one and granted Grievant leave to re-file it at level three. Grievant re-filed her grievance at level three on June 9, 2008.[2]

A level three hearing was held in the Charleston office of the Public Employees Grievance Board on August 28, 2009. Grievant attended the hearing pro se. Jennifer Akers, Assistant Attorney General, appeared on behalf of the DHHR. Marsha Morris, Commissioner of the DHHR Bureau for Medical Services, appeared as the agency representative and testified. Ms. Morris was accompanied by Nora Antlake, Bureau for Medical Services General Counsel. Attorney Akers presented the case for the Respondent. At the close of the hearing, the parties agreed that, if they so desired, either party could submit fact/law proposals. The proposals were to be mailed no later than October 9, 2009. Grievant chose not to submit any additional material and Respondent's Proposed Findings of Fact and Conclusions of Law were received at the Grievance Board on October 9, 2009. The grievance became mature for decision on that date.

Synopsis

Respondent contends that Grievant abandoned her job by failing to appear at work and failing to contact her employer for three consecutive days. In support of Respondent's proposition it cites the Division of Personnel Rule related to "job abandonment" 143 C.S.R. 1 § 12.2 (c). Grievant argues that she had told Respondent that she would be missing work the previous week, her illness prevented her from calling in to work, and she never intended to abandon her job. Grievant seeks to be placed on an unpaid leave of medical

[2] Since this is a grievance contesting a dismissal, it is permissible for it to be filed directly at level three. W. VA. CODE § 6C-2-4 (a) (4).

leave of absence and to be allowed to return to work when her doctor gives his approval. Respondent failed to prove that Grievant's dismissal was based upon good cause. The grievance is granted.

After a thorough review of the entire record in this matter the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant M. B. H. was employed by the DHHR Bureau for Medical Services for approximately three years. She was assigned to the Office of Program Quality and Integrity in Charleston, West Virginia as a Nurse 3.

2. In 1990, Grievant was diagnosed with Bipolar Affective Disorder and has been under the care of Daniel B. Thistlethwaite, M. D. since that time.

3. Marsha K. Morris is the Commissioner of the DHHR Bureau for Medical Services and has held that position for approximately two years prior to the level three hearing. As Commissioner, Ms. Morris was Grievant's supervisor.

4. Prior to Ms. Morris becoming Commissioner, Ron Montgomery was the Commissioner for the Bureau and Grievant's supervisor. Mr. Montgomery was aware of Grievant's malady. During Mr. Montgomery's tenure there were a couple of occasions when Grievant called in and said she would not be able to come to work for a while because of her illness. When that happened, Mr. Montgomery would allow her to come back to work when she was well enough to return.[3]

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[3] On cross examination, Grievant was asked if she understood that this practice was in violation of DHHR and Division of Personnel rules and policies related to absences. Grievant stated that she did not know what the rules were but acknowledged that she had been given a copy of the relevant rules and policies when she was first employed.

5. On Monday, February 11, 2008, Grievant called the office and informed them that due to her ongoing illness she would not be able to come to work for the rest of the week.[4]

6. Grievant did not come to work on Monday, February 18, 2008, nor any day for the rest of that week. Grievant did not contact her office and report that she would not be at work that week and no one called for her.

7. During the week of February 18, 2008, Grievant was suffering a major depressive episode. During such times, she is not able to talk on the telephone. Grievant had asked her husband to call her work for her and he refused to do so.

8. Commissioner Morris asked the personnel department to provide her with a telephone number for Grievant. The number she was provided was for an apartment Grievant had been living in while separated from her husband. Commissioner Morris attempted to call Grievant at that telephone number but received no answer.

9. On or about February 21, 2008, Commissioner Morris called the State Police and asked them to visit Grievant's home in Jackson County to see if she was all right. The State Police referred Ms. Morris to a police force in Jackson County who agreed to check on Grievant.[5] Later that day, a police officer called Commissioner Morris to report that he had seen Grievant. He said that she was all right, but not able to report to work.

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[4] The record is not clear exactly who Grievant reported this to, but the testimony of the witnesses was consistent regarding the gist of her message.

[5] It is not completely clear which police force ultimately checked on Grievant, but it appears to have been a Jackson County Deputy Sheriff.

10. On Friday, February 22, 2008, Commissioner Morris mailed a letter to Grievant informing her that she was dismissed from employment "in accordance with Section 12.2 of the Administrative Rules of the Division of Personnel" which relates to "job abandonment." Among other things, the letter contained the following statement:

> You still have an opportunity to meet with me in person or present to me in writing, any grounds why you believe this action is unwarranted provided you do so during the notice period. [fifteen (15) calendar days]

Respondent's Exhibit 1.

11. Because Grievant was still incapacitated, she convinced her husband to call the Office of Program Quality and Integrity after she received the dismissal letter. Grievant's husband spoke to Commissioner Morris by telephone on Monday, February 25, 2008, and explained that Grievant had called in on February 11, 2008 due to her severe condition and she had not reported to work since that time for the same reason. The husband indicated that he probably should have called for her earlier. He explained to Ms. Morris that Grievant was under a doctor's care and that they would provide her with a written statement from the doctor if necessary.[6]

12. Subsequent to speaking to Grievant's husband, Commissioner Morris again asked the personnel department for Grievant's telephone number so that she could ask Grievant where she wanted her last check sent. This time, Commissioner Morris was supplied Grievant's telephone number in Jackson County where she was able to reach

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[6] Commissioner Morris testified that "it was timely" indicating that the husband had called within the notice period she set out in the dismissal letter. Commissioner Morris did not describe what she said during the conversation but indicated that the husband stated something to the effect of "It's okay we'll just file a grievance."

Grievant.[7] Grievant indicated that she could send it to her in Jackson County. She did not discuss her condition or her dismissal.[8]

13. Grievant did not provide Respondent with a statement from her doctor regarding her absence for the days following February 11, 2008.[9] But she attached to her grievance form a letter from her doctor that stated the following:

> Ms. H. has a diagnosis of Bipolar Affective Disorder, most recently manic. Her psychiatric illness has rendered her incapable of work since February 11, 2008. She remains off work at this time, although is showing slight improvement with pharmaceutical intervention. She will be allowed to return to work when it is deemed appropriate.

Grievance Attachment, Letter dated April 7, 2008 from Daniel B. Thistlethwaite, M.D.

Discussion

Grievant H. was dismissed from employment with DOH based upon a West Virginia Division of Personnel Administrative Rule which states, in part, the following:

> 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.

143 C.S.R. 1 § 12.2(c). Respondent asserts that Grievant abandoned her job when she

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[7] No explanation was given as to why she was not also supplied with this number when she was attempting to contact Grievant the previous week when she was absent from work.

[8] Commissioner Morris inferred from Grievant's failure to contest her dismissal in this telephone conversation that she acquiesced in the termination of her employment. Given the fact that Grievant was suffering from debilitating depression, it is more surprising that Grievant was able to converse with her supervisor at all.

[9] Grievant testified that she did not bring in the doctor statement because she had been fired.

did not return to work on February 19, 2008, as expected,[10] and was absent for four consecutive days without notice. Respondent's Exhibit 1.

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). Specifically, the Grievance Board has held that the employer has the burden of proof in job abandonment grievances. *Breeden v. Dep't of Health & Human Res.*, Docket No. 04-HHR- 287 (Oct. 29, 2004). "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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant was a permanent state employee in the classified service. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*,

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[10] It is unclear why Respondent did not expect Grievant to report to work on Monday, February 18, 2008.

149 W. Va. 461, 141 S.E.2d 364 (1965). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam). "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982)(per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

It is not contested that Grievant missed work from February 19, 2008 through February 22, 2008, and did not report to her employer on any of those days. That coupled with Grievant's failure to bring in a physician's statement for her absence the prior week are the only reasons cited by Respondent for dismissing Grievant from her job. Respondent's Exhibit, Dismissal Letter. Respondent contends that these facts alone may constitute a technical violation of 143 C.S.R. 1 § 12.2. However, a technical violation of the policy does not necessarily amount to good cause for dismissal of a permanent public employee. *See Sloan supra,* (finding that misplacing bone of a deceased was not good cause for dismissal of a medical examiner); *Blake v. Civil Serv. Comm'n,* 172 W.Va. 711, 310 S.E.2d 472 (1983) (finding no good cause for dismissal in petty theft of clothing donated to a state hospital); *Serreno, supra,*(finding no good cause for dismissal for minor errors in mileage reports); and *Drown supra,* (finding that an audit clerk's failure to discover embezzlement of $29,000 by direct subordinate was not good cause for dismissal).

The Grievance Board has addressed a similar situation in *Clark v. Dep't of Military Affairs/Div. of Juvenile Serv.*, Docket No. 99-DJS-428 (Nov. 30, 1999). In that case, the grievant was dismissed for job abandonment for failing to immediately return to work after a medical leave of absence and failing to submit a physicians statement verifying that he could not return to work. The Administrative Law Judge noted:

> While Grievant certainly did not follow the procedure to the letter, there is nothing in the record which demonstrates that Grievant did not, at all times, attempt to act in good faith, or intentionally disregarded the rules and regulations governing medical leaves of absence. DJS argues it was merely following the Administrative Rules in terminating Grievant's employment. However, the Administrative Rules provide that "the failure 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 <u>cause for dismissal</u>. The Rules do not require that termination take place. Grievant's error in this case does not amount to "misconduct of a substantial nature directly affecting the rights and interest of the public." Rather, Grievant's mistake rests more within the "trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention", which do not justify dismissal. *See Oakes, supra*.

(Emphasis in original) *Id*. at 9 &10.

143 C.S.R. 1 § 12.2 (c) provides that an appointing authority may dismiss an employee for missing three consecutive days without notice but it certainly does not require such dismissal. Further, the rule does not eliminate consideration of other factors such as the employees work record and the circumstances surrounding the incident that must be considered in a good cause determination. *See Conley v. Div. of Corrections*, Docket No. 00-CORR-109 (June 30, 2000); *Ferrell v. W. Va. Dep't of Transp./Div. of Highways*, Docket No.00-DOH-237 (Dec. 22, 2000) *rev'd on other grounds*, *W. Va. Dep't of Transp./Div. of Highways v. Ferrell,* Kanawha County Circuit Court Civil Action No. 01-AA-6, (May 30, 2002).

Grievant had called in and reported that she would be off work for an entire week with a serious and recurring illness on February 11, 2008. This had happened at least two other times during the three years Grievant had been employed by the Bureau for Medical Services and each time the previous Commissioner told her to come back to work when she was able. Commissioner Morris was unclear as to whether she had knowledge that Grievant suffered from Bipolar Affective Disorder but certainly others in the office knew of her condition.

The fact that Grievant called in is a clear indication that she did not intend to abandon her job. Grievant's condition made it extremely difficult to effectively communicate by telephone, but she asked her husband to notify her office that she was still unable to come to work. Unfortunately, he chose not to do so. When Grievant received the letter dismissing her, Grievant's husband immediately called Commissioner Morris, informed her that Grievant was too ill to work and that a written physician's verification of Grievant's illness would be provided if necessary. Commissioner Morris did not recount her side of this conversation but she did note that Grievant's husband indicated that they intended to file a grievance. These are not the words or actions of an individual who intends to abandon her job.[11]

Finally, no evidence was presented to indicate that Grievant's job performance during her three years with Respondent was anything less than competent. Her years of

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[11] In the dismissal letter, Commissioner Morris invited Grievant to present her within a fifteen day period grounds that the job abandonment dismissal was unwarranted. Respondent's Exhibit 1. Ms. Morris also acknowledged that the call from Grievant's husband was made promptly after receipt of the letter and within the specified notice period.

successful employment must be considered with the conditions surrounding the incidents that led to her dismissal. The letter from Grievant's doctor, that she attached to her grievance, confirmed what she told her employer on February 11, 2008, and what her husband reiterated on February 25, 2008: Grievant's absence from work was the result of a serious illness. If 143 C.S.R. 1 § 12.2(c) was violated it was a mere technical violation that does not amount to good cause for dismissal. *Oakes supra.* Given the totality of the circumstances, Respondent did not prove that it had good cause for the termination of Grievant's employment and the grievance is GRANTED.[12]

As relief, Grievant requests to be allowed to take a medical leave of absence and the right to return to work. Significantly, Grievant does not seek back pay and none can be granted since there is no indication as to when, or if, Grievant would have been able to return to work during the pendency of this matter. The Division of Personnel Rule states the following concerning a medical leave of absence:

> c) Medical Leave; Notice to Employee
> 1. An injured or ill permanent employee upon written application to the appointing authority **shall** be granted a medical leave of absence without pay not to exceed six (6) months within a twelve month period provided:
> a. The employee **(1) has exhausted all sick leave and makes application no later than fifteen (15) calendar days following the expiration of all sick leave** or (2) has elected not to use sick leave for 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

[12] This case differs from the case of *Bachman v. Potomac State Coll. of W. Va. Univ.*, Docket No. 07-HE-198 (Jan. 17, 2008), in a number of significant ways. Grievant Bachman's dismissal for job abandonment after missing three consecutive days without contacting his employer was upheld. However, unlike Grievant H., Bachman did not call in sick with a serious and long standing illness the week before his unexplained absence, he did not contact his employer with an explanation immediately after receiving his dismissal letter and, most significantly, he did not produce a statement from his treating physician stating that he was incapacitated from work the days he did not attend.

> and makes application no later than fifteen (15) calendar days following the date on which the employee filed a claim for Worker's Compensation;
> b. The employee's absence is due to an illness or injury which is verified by a physician/practitioner on the prescribed physician's statement form stating that the employee is unable to perform his or her duties and giving a date for the employee's return to work or the date the employee's medical condition will be re-evaluated;
> c. A prescribed physician's statement form is submitted each time the employee's condition is re-evaluated to confirm the necessity for continued leave; and,
> d. The disability, as verified by a physician/practitioner on the prescribed physician's statement form, is not of such nature as to render the employee permanently unable to perform his or her duties.
> 2. The appointing authority shall, at least 15 days prior to, if possible, but no later than five (5) days following the expiration of the employee's sick leave, mail to the employee a written notice of the employee's right to a medical leave of absence without pay and informing him or her that the leave will not be granted if he or she fails to apply within the time limits specified in subparagraph 14.8(c)1.a. of this rule.

(Emphasis added) 143 C.S.R. 1 § 14.8 (c).

By use of the word "shall" in the opening paragraph, it is clear that the appointing authority must grant a leave of absence upon receipt of a proper application.[13] However, to qualify for a medical leave of absence an employee must have exhausted his or her sick leave. There was no evidence presented regarding Grievant's sick leave; therefore, that relief may not be specifically granted at this time. Accordingly, Grievant is reinstated to her employment with Respondent immediately if she is able to return to work. If Grievant is unable to return to work she may apply for a medical leave of absence within fifteen days of her receipt of this decision. Upon receipt of Grievant's application for a medical leave

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[13] "It is well established that the word 'shall,' in the absence of language in a statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation." *Syllabus point 2, Perry v. Barker*, 169 W.Va. 531, 289 S.E.2d 423 (1982).

of absence in compliance with 143 C.S.R. 1 § 14.8 (c), Respondent shall grant said leave to Grievant.

Conclusion of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). Specifically, the Grievance Board has held that the employer has the burden of proof in job abandonment grievances. *Breeden v. Dep't of Health & Human Res.*, Docket No. 04-HHR- 287 (Oct. 29, 2004).

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam).

3. Respondent failed to prove that good cause existed for the termination of Grievant's employment.

Accordingly, the grievance is GRANTED. Respondent is Ordered to immediately reinstate Grievant to her employment if she is able to return to work. If Grievant is unable

to return to work, she may apply for a medical leave of absence within fifteen days of her receipt of this decision. Upon receipt of Grievant's application for a medical leave of absence in compliance with 143 C.S.R. 1 § 14.8 (c), Respondent shall grant said leave to Grievant.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: NOVEMBER 9, 2009

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE