THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN WOLFE,
Grievant,

v. **Docket No. 2008-1863-CONS**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondent.

DECISION

Grievant John Wolfe filed two separate grievances. On February 19, 2008, he filed a grievance claiming he was wrongfully terminated from his position. His requested relief was, "Reinstatement, back pay from 2-18-07. Removal of oral warning. Overtime pay previously worked. I also request that the unit be forced to go back 5 years and pay others who have been denied their right pay. I ask that each supervisor and our CSM be required to attend wage and legal training."

Grievant filed a second grievance on May 12, 2008, his statement of grievance and relief requested reads:

> I have a level 3 grievance filed. I just recently was terminated from insurance without due process maliciously. I just discovered that James Bradley, CSM, initiated an "informal investigation for fraud: by calling a business associate of mine and telling them I was under investigation through DHHR and his brother in state police in retribution for filing grievance. I seek 25,000 in direct damages.[1]

These two grievances were consolidated by Order dated June 27, 2008.

A level three hearing was held at the Grievance Board's Beckley office on December 1, 2009. Grievant was represented by Alan Howald, J.W. Hickey and

---

[1]No evidence was presented on these issues. Further, it is not clear that the facts stated identify issues that fall within the purview of Grievance Board authority. These claims are considered abandoned.

Associates, and Respondent was represented by Jennifer Akers, Assistant Attorney General. This case became mature on January 8, 2010, upon the parties' submission of proposed findings of fact and conclusions of law.

Synopsis

Respondent terminated Grievant for job abandonment. Respondent asserts Grievant's medical leave of absence without pay concluded on February 13, 2008, as he had been on leave for six months. Respondent avers that after sending Grievant a letter requesting he return to work on February 14, 2008, Grievant did not respond. Therefore, it was deemed Grievant abandoned his position.

Grievant asserts he was on approved medical leave through February 13, 2008. Grievant avers he mailed required documentation to show Respondent that his doctor cleared him to come back to work on February 18, 2008, two working days after the expiration of his approved medical leave. Grievant argues the final letter from Respondent informing Grievant that his medical leave of absence without pay expired on February 13, 2008, was confusing and automatically informed Grievant he would not be granted a personal leave of absence. Therefore, he never requested a personal leave of absence for the two working days between the expiration of his medical leave without pay and his release date from his doctor.

Respondent has met its burden. This grievance is denied.

Findings of Fact

1. Grievant was employed by the Bureau of Children and Families in its Mercer County office as an Economic Service Worker.

2. On August 13, 2007, Grievant was granted a medical leave of absence without pay from August 13, 2007, through August 17, 2007, contingent upon Respondent receiving a physician's statement and request for leave by August 24, 2007.

3. Grievant was informed of the approval of the medical leave of absence by letter. He was also provided with information regarding the West Virginia Division of Personnel Administrative Rule on medical leave of absence without pay.

4. The Division of Personnel's Administrative Rule allows that a medical leave of absence without pay is not to exceed six months in a twelve month period.

5. Grievant's medical leave of absence without pay was extended on the following dates:

- August 20, 2007, through September 14, 2007;
- September 17, 2007 through September 28, 2007 and;
- October 1, 2007 through November 1, 2007.

6. On November 16, 2007, Respondent sent Grievant a letter requesting he inform Respondent of his intentions relative to his employment, as there had been no further communication from Grievant since Respondent approved his medical leave of absence without pay through October 31, 2007.

7. Respondent received the required medical documentation from Grievant, and therefore, on December 4, 2007, Grievant was sent a letter extending his medical leave of absence from November 1, 2007 through November 30, 2007.

8. The following extensions were approved by Respondent:

- December 1, 2007, through December 31, 2007 and;
- January 1, 2008, through January 31, 2008.

9. Respondent sent a letter to Grievant on February 4, 2008, to determine his intentions with respect to his job, as Grievant once again had not been in contact with Respondent.

10. This letter explained Grievant was eligible for a six month medical leave of absence without pay, and Respondent would grant that through February 13, 2008, with appropriate documentation. The letter also informed that, at the expiration of medical leave without pay, Respondent had the discretion of authorizing a personal leave of absence without pay. The letter stated, "Please note that authorization of personal leave is discretionary and is to be approved or denied based on the business and staffing needs of the agency. Due to current staffing conditions and caseload demands in Mercer District, it is not feasible to offer you the opportunity for Personal Leave of Absence." The letter went on to say, "You [Grievant] have the opportunity to either meet with me in person or present me with a written explanation indicating why you believe the facts and grounds contained in this letter are in error and why you may think this action is inappropriate. You must submit your explanation within fifteen (15) days." The letter also informed Grievant that failure to return to work would result in his termination for job abandonment.

11. The February 4, 2008, letter also explained who to contact for insurance coverage.

12. Grievant had a Return to Work slip from his doctor releasing him back to work on February 18, 2008.

13. Grievant did not respond to Respondent's February 4, 2008, letter. His next contact with Respondent was on February 20, 2008, when Respondent received a copy

of the grievance form with a Return to Work slip attached showing Grievant could return to work on February 18, 2008.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Respondent asserts Grievant abandoned his position when he failed to respond to the February 4, 2008, letter. 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*, 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 well established that job abandonment is a valid ground for termination, even when the employee expresses a desire to eventually return to his position. *See Chapman v. Dep't of Health and Human Res.*, Docket No. 06-HHR-277(2006).

Grievant was on an approved medical leave of absence without pay up through and including January 31, 2008. When Respondent did not hear from Grievant, it sent him a letter on February 4, 2008, explaining Respondent was willing to extend his medical leave of absence to February 13, 2008, with appropriate medical documentation. Respondent also clearly stated Grievant was expected to return to work on February 14, 2008. The letter explained a personal leave of absence without pay, and informed him that it was discretionary. The letter also stated that based on the needs of the agency at the time, it was not feasible to offer that to Grievant.

Grievant first asserts that he sent in his medical documentation showing he could return to work on February 18, 2008. He argues Respondent is to blame for misplacing it. Respondent, however, asserts it did not receive the Return to Work slip until Grievant filed his grievance on February 20, 2008.

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; *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066. An Administrative Law Judge is charged with assessing the credibility of the witnesses. *Lanehart v. Logan County Board of Education*, Docket No. 95-23-235; *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050.

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's information. *Rodriques v. Grant County Board of Education and Berg*, Docket No. 2008-0960-GraED.

Grievant testified he mailed the Return to Work slip prior to his receipt of Respondent's February 4th letter. He testified that he had mailed all of his other medical documentation except for one, and that one he gave to a fellow employee whom he ran into at the grocery store. Grievant testified that upon receipt of Respondent's letter, he attempted to contact his doctor for a new Return to Work slip. However, his doctor was out of the country and he could not obtain one.

Grievant's testimony is not credible. Upon receiving the February 4th letter, Grievant was placed on notice that Respondent did not have his Return to Work slip. Grievant did not attempt to contact Respondent to explain that his doctor was out of town and he could return to work on February 18th. He did nothing until the effective date of termination, and then he filed a grievance attaching his Return to Work slip.

Grievant argued the February 4th letter clearly denied him a personal leave of absence without pay even before he requested one. Therefore, he did not even attempt to request one.

While the undersigned does agree the letter indicates Respondent would not grant personal leave of absence without pay because of the needs of the agency, she cannot help but believe if Grievant had explained that his need was merely for two working days, Respondent would have and should have accommodated him.

Since Grievant made no effort to contact Respondent and discuss his situation in an attempt to return to work, but instead rested on his rights until his termination became effective, Respondent has met its burden of proving Grievant abandoned his position. Therefore, this grievance is DENIED.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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."

Black's Law Dictionary (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

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). "*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).

3. It is well established that job abandonment is a valid ground for termination, even when the employee expresses a desire to eventually return to his position. *See Chapman v. Dep't of Health and Human Res.*, Docket No. 06-HHR-277(2006).

4. 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; *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066. An Administrative Law Judge is charged with assessing the credibility of the witnesses. *Lanehart v. Logan County Board of Education*, Docket No. 95-23-235; *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050.

5. 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's information. *Rodriques v. Grant County Board of Education and Berg*, Docket No. 2008-0960-GraED.

6. Grievant's testimony concerning whether he mailed his final Return to Work Slip is not credible.

7. Respondent met its burden of proof that Grievant abandoned his job.

Accordingly, this grievance is **DENIED**.

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: March 4, 2010

_____

Wendy A. Elswick
Administrative Law Judge