THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CINDY K. BOGARD,
Grievant,

v. **DOCKET NO. 2011-0562-MAPS**

DIVISION OF VETERAN'S AFFAIRS,
Respondent.

DECISION

This grievance was first filed at level three of the grievance procedure by Grievant, Cindy K. Bogard, on October 15, 2010, after she was dismissed from her employment by Respondent, Division of Veteran's Affairs, for failure to promptly return to work at the conclusion of an approved six month medical leave of absence without pay. The statement of grievance reads:

> I had been dismissed without due notice, I had been on medical leave and a letter was sent to my post office box, however due to my injuries I could not collect my mail.[1] I am under doctors care and can provide proof of such.

The relief sought by Grievant is "relief from dismissal due to the reason stated, and wish to start to work as soon as I am medically released."

A level three hearing was held before the undersigned Administrative Law Judge on March 1, 2011, at the Grievance Board's Westover, West Virginia office. Grievant was represented by Pamela L. Ray, Acting Executive Director, American Federation of State,

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[1] Grievant did not argue that the notice was sent to an improper address, and she did not pursue an argument regarding the delay in notice.

County and Municipal Employees, AFL-CIO, and Respondent was represented by Mary M. Downey, Assistant Attorney General. This matter became mature for decision on April 4, 2011, upon receipt of the last of the parties' written arguments.

Synopsis

Grievant was dismissed from her employment by Respondent when she failed to return to work at the conclusion of a six month approved medical leave of absence without pay. As her medical leave was nearing its end, Grievant requested a personal leave of absence without pay for an undetermined amount of time, which request was not approved. Grievant did not return to work, and Respondent acted in accordance with applicable rules in terminating Grievant's employment. It was within Respondent's discretion to deny the request for a personal leave of absence, and Respondent did not act in an arbitrary and capricious manner in denying Grievant's open-ended personal leave request.

The following Findings of Fact are made based upon the record developed at the level three hearing.

Findings of Fact

1. Grievant was employed by the Division of Veteran's Affairs ("DVA" or "Respondent"), as an Office Assistant 2 at the VA Nursing Facility in Clarksburg, West Virginia. Grievant had been a state employee for over 27 years.

2. Grievant was having medical issues, and in March, 2010, Grievant ran out of sick leave and annual leave.[2] Katherine Hess, Administrative Services Manager at the

[2] The record does not reflect how Grievant came to the position of not having any sick leave despite the fact that she had earned 6 hours a pay period during her entire 27

Nursing Facility, discussed with Grievant the availability of 12 weeks of unpaid leave under the Family Medical Leave Act ("FMLA").

3. Grievant was absent from work due to her medical condition from March 5 through 26, 2010, and began her first leave without pay under the FMLA on March 15, 2010. Grievant returned to work for a few days, but was absent again on April 2, 5, and 9, 2010. She was off work from April 26 through October 1, 2010, having also been granted a medical leave of absence without pay, as allowed by the Division of Personnel Rules, after her FMLA leave of absence time expired.

4. By letter dated September 13, 2010, Grievant was notified by DVA that the maximum six months allowed for a medical leave of absence without pay was about to end, and that she was required to return to work no later than October 1, 2010. The letter further noted that failure to report to work at the conclusion of the leave of absence "is cause for dismissal." This letter was sent to Grievant's post office box, which was her proper mailing address, and she picked it up on September 15, 2010.

5. On September 29, 2010, Grievant requested a discretionary personal leave of absence without pay for an undetermined amount of time. She noted in her request that she was scheduled for surgery on October 4, 2010, and would require therapy after the surgery, and that her approximate return date was December 1, 2010. Her doctor's excuse describes the surgery as carpal tunnel release, trigger finger release, and a "thumb CMC." Grievant actually was not released by her doctor to return to work until February 1, 2011, four months later, due to a delay in her physical therapy.

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years of employment.

6. In September 2010, DVA denied Grievant's request for this personal leave of absence without pay, because Grievant did not request a specific amount of leave time, and DVA needed to fill Grievant's position.

7. On September 30, 2010, Grievant used the last of the allowed six months of medical leave without pay.[3] Grievant did not return to work on October 1, 2010.

8. By letter dated October 1, 2010, DVA dismissed Grievant from her employment effective October 16, 2010, for "failure to report promptly from a leave of absence without pay." This letter was sent to Grievant's post office box, and was picked up by Grievant on October 12, 2010.

9. Grievant's position was filled temporarily during her absence by another employee, Susie Dorrer, and was posted in October, 2010, and filled permanently by Ms. Dorrer. It was important to have someone in this position, because the employee in this position assists veterans in obtaining benefits, and also, benefits applications must be submitted in a timely manner.

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. *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."

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[3] Grievant did not contest Respondent's calculation of the end of the six months of medical leave. While it is unclear whether the six months technically ended on September 30, 2010, it is clear it would have ended by the time her employment was terminated.

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*.

"Here, Respondent must prove its charge that Grievant abandoned her job by failing to return after the expiration of her approved leave of absence." *Kitchen v. Dep't of Health and Human Res.*, Docket No. 05-HHR-175 (Oct. 18, 2005). "Failure of an employee to report to work at the end of such a leave of absence or to provide, in advance, justification for continued leave is grounds for dismissal." *Hayden v. Dep't of Health and Human Res.*, Docket No. 98-HHR-133 (1999).

After exhausting all of her sick and annual leave, Grievant was first granted a 12 week medical leave of absence without pay as allowed by the FMLA. Grievant was then granted a medical leave of absence without pay as allowed by the Administrative Rules of the Division of Personnel ("DOP"). The DOP Rules on such a leave of absence allow the employee a total of 6 months of unpaid leave during a 12 month period, including the 12 weeks allowed by the FMLA. 143 C.S.R. 1 § 14.8(c). Once an employee has exhausted the allotted 6 months of medical leave, the employee may then apply for a personal leave of absence without pay, normally not to exceed one year. The agency is not required to grant a personal leave of absence. "Approval of personal leave is discretionary with the appointing authority." 143 C.S.R 1 § 14.8(a).

Respondent demonstrated that Grievant failed to return to work after an approved medical leave of absence, which is grounds for dismissal. While Grievant applied for a personal leave of absence without pay, it was within Respondent's discretion whether to grant this request. Respondent declined to grant Grievant a personal leave of absence

without pay. The only remaining question is whether Respondent acted in an arbitrary and capricious manner in exercising its discretion in this matter.

Generally, an action is arbitrary and capricious if factors intended to be considered were not relied upon, important aspects of the problem were entirely ignored, the decision was explained in a manner contrary to the evidence before the decision maker, or the decision reached was so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil,* 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)).

While it is unfortunate that an employee with 27 years of service was not retained by Respondent, at the time Grievant asked for a personal leave of absence, DVA had already held Grievant's job for her for 6 months, and Grievant still had not had the surgery she needed, and could not tell Respondent when she would be able to return to work. It is somewhat difficult to understand the delay in Grievant's surgery and physical therapy. Grievant's position was important and had to be filled by another employee during her absence. "Personal leave is granted at the discretion of the employer, and extensions of leave given for a specific amount of time may be given, at the discretion of the employer based on the needs of the agency. DOP Administrative Rule § 14.8(a)." *Harbert v. Dep't of Revenue*, Docket No. 05-TD-027 (May 24, 2005). The undersigned cannot find it was unreasonable for Respondent to decline to grant Grievant the open-ended personal leave

of absence she requested. Indeed, it seems like this was the responsible thing to do given that Respondent needed to have someone in Grievant's position who knew how to help veterans apply for benefits.

Finally, Grievant argued she should be returned to her position because it had not been filled by DVA. This is inaccurate. In her position, Grievant assisted veterans in obtaining benefits. After serving in this position as an Office Assistant 2 for the requisite period of time, Grievant was eligible for a reallocation to a Veteran's Office Service Assistant 1, and the reallocation was approved by the Division of Personnel. When Grievant's position was posted, however, it was posted as an Office Assistant 2, just as it was when Grievant began working in this position. When the person who was placed in Grievant's position acquires the requisite amount of experience, she too may apply for the same reallocation for which Grievant applied. Grievant's position has been filled.

The following Conclusions of Law support the Decision reached.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Failure of an employee to report to work at the end of an approved medical leave of absence without pay is grounds for dismissal. *Hayden v. Dep't of Health and Human Res.*, Docket No. 98-HHR-133 (1999).

3. "Personal leave is granted at the discretion of the employer, and extensions of leave given for a specific amount of time may be given, at the discretion of the employer

based on the needs of the agency. DOP Administrative Rule § 14.8(a)." *Harbert v. Dep't of Revenue*, Docket No. 05-TD-027 (May 24, 2005).

4. Generally, an action is arbitrary and capricious if factors intended to be considered were not relied upon, important aspects of the problem were entirely ignored, the decision was explained in a manner contrary to the evidence before the decision maker, or the decision reached was so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil,* 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)).

5. Respondent did not act in an arbitrary and capricious manner in denying Grievant a personal leave of absence for an undetermined amount of time.

6. Respondent met its burden of proving it justifiably dismissed Grievant when she failed to return to work after a leave of absence.

Accordingly, this grievance is **DENIED.**

Any party or the Division of Personnel 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: June 7, 2011