THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANGELA ADKINS,
Grievant,

v. **Docket No. 2011-1392-DHHR**

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,
Respondent.

DECISION

Grievant, Angela Adkins, filed a grievance against Respondent on March 29, 2011. The statement of grievance reads, "Terminated without good cause." For relief, Grievant seeks: "To be made whole, including back pay with interest and restored benefits." Grievant elected to proceed directly to a level three hearing as authorized by W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on October 18, 2011, before the undersigned at the Grievance Board's office in Charleston, West Virginia. Grievant was represented by Gordon Simmons, UE Local 170 West Virginia Public Workers Union. Respondent was represented by Harry C. Bruner, Jr., Assistant Attorney General. This matter became mature for decision upon final receipt of the parties' proposed findings of fact and conclusions of law on November 22, 2011.

Synopsis

Grievant was terminated from employment with Respondent based upon

Respondent's assertion that she abandoned her job when she did not return to work on March 22, 2011. Under the DOP Administrative Rule 143 C.S.R. 1 § 14.8(c), Medical Leave, an injured or ill permanent employee shall be granted a medical leave of absence without pay not to exceed six months within a twelve month period. Grievant had been on approved MLA from September 21, 2010, through March 21, 2011.

Respondent contends that Grievant not returning to work on March 22, 2011 constituted job abandonment under 143 C.S.R. 1 § 12.2(c). Grievant had provided a physican's statement that stated she needed to be off work until April 6, 2011. Grievant provided physician's statements and contacted Respondent the day after receiving an inquiry into her intention of returning to work. Grievant continued to contact Respondent and provide updates on her test results, treatments and anticipated physican's release to return to work. Grievant's actions were not those of an individual who intended to abandon her job. Given the totality of the circumstances, Respondent did not prove that it had good cause for the termination of Grievant's employment. Accordingly, this grievance is GRANTED.[1]

Findings of Fact

1. Grievant was employed for five years as a Child Protective Services Worker (CPSW) in the Boone County office for Respondent.

2. Prior to her termination, Grievant had never received a disciplinary action or counseling for leave use.

3. In September 2010, Grievant was hospitalized and requested a medical leave

[1]An award of backpay would be too speculative to grant because Grievant failed to demonstrate a specific date she would have returned to work.

of absence without pay (MLA).

4. Grievant submitted a physician's statement from Charleston Area Medical Center (CAMC) stating that Grievant was a patient at CAMC from September 13, 2010 through October 3, 2010.[2]

5. By letter dated September 22, 2010, Gary Barker, Community Services Manager for Respondent, approved Grievant's request. Grievant's MLA began on September 21, 2010. The letter notified Grievant that her estimated return to work date was October 4, 2010.[3]

6. On October 1, 2010, Grievant submitted a request for extension of her MLA from October 5, 2010 through November 1, 2010. Grievant submitted a physician's statement dated September 29, 2010, from the Robert C. Byrd Health Services Center of West Virginia University - Charleston Division. The physician's statement certified that Grievant had an outpatient appointment on September 29, 2010 and could return to work on November 1, 2010.[4]

7. By letter dated October 7, 2010, Mr. Barker notified Grievant that her MLA had been extended from October 4, 2010 through November 1, 2010. The letter informed Grievant that her eligibility for six months of leave began on September 21, 2010 and would expire on September 20, 2011.[5]

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[2]Respondent's Exhibit No. 1, compiled 2010 correspondence.

[3]*Id.*

[4]*Id.*

[5]*Id.*

8. Every letter, from October 7, 2010 through March 9, 2011, that granted an extension of Grievant's MLA quoted Section 14.8C and 14.8D of the Division of Personnel's Administrative Rule. The letters contained the following language:

> A Medical Leave entitled eligible employees to take up to six months of unpaid, job protected leave in a twelve month period for specified medical reasons.
> ...
>
> **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 **cause for dismissal**.
> ...
> **It is imperative that you contact Linda Barker, ext # 78314 for procedures to follow regarding your current health, life insurance, and/or Mountaineer Flexible Benefits, if applicable**. (Emphasis in the original)[6]

9. On November 1, 2010, Grievant requested an extension of her MLA from November 1, 2010 through November 4, 2010. Grievant submitted a physician's statement from the West Virginia University Physicians of Charleston, Department of Behavioral Medicine & Psychiatry, dated October 22, 2010. It read, "Pt is booked off work till next appointment. Return to work 11/4/10." Grievant also submitted a physician's statement from Charleston Obstetrics and Gynecology Associates, PLLC, dated October 28, 2010. It read, "Ms. Adkins was seen & evaluated... She will be off for one week due to d/o until I see [illegible handwritten word]."[7]

10. By letter dated November 1, 2010, Mr. Barker notified Grievant that her extension for MLA had been approved from November 1, 2010 through November 4,

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[6]Respondent's Exhibits No. 1 and 2, compiled correspondence for years 2010 and 2011.

[7]Respondent's Exhibit No. 1, compiled 2010 correspondence.

2010.[8]

11. On November 5, 2010, Grievant requested an extension of her MLA from November 4, 2010 through January 12, 2011. Grievant submitted a physician's statement from Charleston Obstetrics and Gynecology Associates, PLLC, dated November 4, 2010. The physician's statement read, "Ms. Adkins is scheduled for a hysterectomy on 12/1/10. She will need to be off for 6 weeks for her recovery."[9]

12. By letter dated November 5, 2010, Mr. Barker notified Grievant that her MLA was extended through January 12, 2011.[10]

13. Grievant submitted a physician's statement from Charleston Obstetrics and Gynecology Associates, PLLC, that read, "Ms. Adkins had surgery 12/1/10. I will reevaluate her on 1/18/11. She will be off at least until then. Thanks."[11]

14. By letter dated January 10, 2011, Mr. Barker notified Grievant that her MLA was extended through January 18, 2011 and that her tentative return was on January 19, 2011.[12]

15. On January 19, 2011, Grievant submitted a request for an extension of her MLA from January 19, 2011 through February 10, 2011. Grievant submitted a physician's statement from the West Virginia University Physicians of Charleston, Department of

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] Respondent's Exhibit No. 2, compiled 2011 correspondence.

[12] *Id.*

Behavioral Medicine & Psychiatry, dated January 12, 2011, stating that Grievant "is booked off from work till 2/9/11." Grievant also submitted a physician's statement from Charleston Obstetrics and Gynecology Associates, PLLC, dated January 18, 2011, that read, "Ms. Adkins is having a prolonged recovery after her hysterectomy. She will be off for 2 more weeks at which time I will re-evaluate her. Thanks."[13]

16. By letter dated January 19, 2011, Mr. Barker notified Grievant that her MLA was extended from January 19, 2011 through February 10, 2011.[14]

17. Grievant submitted a physician's statement from the West Virginia University Physicians of Charleston, Department of Behavioral Medicine & Psychiatry, dated February 9, 2011, that stated Grievant would be off work until March 9, 2011, due to illness. Grievant submitted a second physician's statement from the West Virginia University Physicians of Charleston, Department of Behavioral Medicine & Psychiatry, that stated Grievant would be off work until April 6, 2011.[15]

18. On February 26, 2011, Grievant emailed Gary Barker and carbon copied Linda Barker, Operations Supervisor/CSM Secretary for Respondent. The email inquired as to whether a physician's statement was fulfilling the requirements outlined in the letters granting extensions of her MLA. The email also stated that Grievant was to be tested on March 25, 2011 for narcolepsy.[16]

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Grievant's Exhibit No. 1, email sent from Grievant on February 26, 2011.

19. In a revised letter dated February 28, 2011, Mr. Barker informed Grievant that her MLA was extended from February 9, 2011 through March 9, 2011.[17]

20. On February 28, 2011, Grievant emailed Linda Barker and carbon copied Mr. Barker. It stated, in part:

> Linda,
> The Item in #4 says that an employee will be terminated after 6 months, UNLESS the doctor provides paperwork to the employer before the end of the 6 months saying that the employee is still not released to go to work. That's why I don't understand. My doctor HAS been supplying whatever paperwork Gary has asked for and I have been sending my dr notes after every appt.
> ...
> I thought that after 6 months, you would have the right to fill my position, and then when I get released, I would just have to take whatever is available. I am still not understanding how I can be fired if I am on medical leave. I have never seen in policy that I could be fired if my medical leave of absence extends longer than 6 months.[18]

21. By letter dated March 9, 2011, Mr. Barker informed Grievant that her MLA was extended from March 10, 2011 through March 21, 2011, with her returning on March 22, 2011.[19]

22. James E. Kimbler, Regional Director for Respondent, sent Grievant a letter dated March 4, 2011. The letter stated, in part:

> The purpose of this letter is to determine your intentions relative to your employment with the West Virginia Department of Health and Human Resources. According to our records, you have been on Medical Leave of Absence September 21, 2010. Your MLOA is set to expire March 21, 2011. Review of your leave eligibility situation with our agency indicates that at the expiration of your MLOA, your employment status options are to either return

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[17] *Id.*

[18] Grievant's Exhibit No. 2, email from Grievant dated February 28, 2011.

[19] *Id.*

> to work March 21, 2011 at full duty or return to work March 22, 2011 with a doctor's excuse with restrictions.
>
> If you fail to return to work by March 21, 2011, I will conclude that you have abandoned your position. In such case this letter will serve as a fifteen (15) day notification of your dismissal from the WV Department of Health and Human Resources, effective March 21, 2011.
>
> ...
>
> You have the opportunity to either meet with me in person or present me with a written explanation indication 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 of the date of this letter.[20]

23. U.S. Postal Service Certified Mail Receipt shows that Mr. Kimbler's March 4, 2011 letter was postmarked on March 14, 2011. The letter was signed for and delivered on March 15, 2011.[21]

24. On March 14, 2011, Mr. Barker called Grievant at home to inform her of his decision to terminate her from her job. During the telephone call, Grievant requested a five-week extension in order to determine the results of her yet-to-be performed sleep disorder study.[22]

25. Mr. Kimbler sent Grievant an amended letter dated March 16, 2011. The letter stated, in part:

> The purpose of this letter is to determine your intentions relative to your employment with the West Virginia Department of Health and Human Resources. According to our records, you have been on Medical Leave of Absence since September 21, 2010. Your MLOA is set to expire March 21, 2011. Review of your leave eligibility situation with our agency indicates that at the expiration of your MLOA, your employment status options are to either return to work on **March 22, 2011** at full duty or return to work on **March 22,**

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[20] *Id.*

[21] *Id.*

[22] Testimony of Grievant at level three hearing.

> **2011** with a doctor's excuse with restrictions.
>
> If you fail to return to work by **March 22, 2011**, I will conclude that you have abandoned your position.
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> ...
>
> You have the opportunity to either meet with me in person or present me with a written explanation indication 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 of the date of this letter. (Emphasis in the original)[23]

26. On March 16, 2011, Grievant emailed Mr. Kimbler. The email[24] stated, in part:

> I am writing in response to the letter that you sent to me, via Gary Barker, about the termination of my employment. I have attached the letters that I received yesterday, 3/15/2011, for reference purposes.
>
> In document 1, page 1, paragraph 3, it states, "You have the opportunity to either meet with me in person or present me with a written explanation indicati(ng) 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 with(in) fifteen (15) days of the date of this letter." First, let me say, that I would have rather have met with you in person. However, as you can see, the letter is dated 3/4/2011, so the 15 days will end on 3/19/11, 3 days from now. I did not receive these letters until 3/15/11. This can be verified, as the letters were sent certified. Since there is no time to set up a meeting with you, I have no choice but to write to you via e-mail.
>
> Now, I will explain why I believe the facts and grounds contained in the letter are in error, and why I think this action is inappropriate:
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> ...

27. The email described in detail in 6.5 single spaced document pages the treatments Grievant had been receiving from multiple doctors. The email gave specific dates and doctors' names. In closing the Grievant stated,

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[23] *Id.*

[24] Grievant's Exhibit No. 5, email from Grievant. The contents of the email were printed out and presented into evidence in document form, instead of an actual copy of the email. Grievant testified that the email was sent on March 16, 2011. The document form of the email is 6.5 single spaced pages in length.

> All of my doctors have said that they fully believe that I will be able to return to work soon. In fact, as soon as I have my test done on the 25th, and then see the neurologist, I should be able to return to work by the end of April.
>
> This is why I believe this action is inappropriate, as I will be released to go back to work so soon.
>
> Thank you for taking the time to review this. If you need to talk with me personally, please feel free to call me at home at 304-XXX-XXXX.[25] Whenever I am gone, I have the house phone transferred to my cell phone.[26]

28. Mr. Barker sent Grievant an amended letter dated March 17, 2011. The letter stated, in part:

> The purpose of this letter is to inform you that we have received your request for the need to extend your Medical Leave of Absence. Your Medical Leave of Absence Without Pay (MLOA) has been extended beginning March 10, 2011 through March 21, 2011. A Medical Leave entitles eligible employees to take up to six months of unpaid, job protected leave in a twelve month period, for specified medical reasons.
>
> ...
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> At the expiration of a leave of absence without pay, the employee shall be returned to duty to either his/her former position, or one of comparable pay and duties, without loss of rights, unless the position is no longer available due to a reduction-in-force.
>
> ...
>
> 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 cause for dismissal.[27] (Emphasis in the original)

29. U.S. Postal Service Certified Mail Receipt shows that Mr. Barker's March 17, 2011 letter was postmarked on March 17, 2011. The letter was signed for and delivered on March 18, 2011.[28]

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[25]Phone number censored by the undersigned in this decision. Grievant's phone number was provided in the email and in the document admitted into evidence.

[26]Grievant's Exhibit No. 5, email sent from Grievant on March 16, 2011.

[27]*Id.*

[28]Respondent's Exhibit No. 2, compiled 2011 correspondence.

30. Grievant requested a meeting to discuss her request for an extension of her MLA with Mr. Kimbler prior to her termination and received no response.[29]

31. Grievant informed Mr. Barker and Mr. Kimbler that she could not obtain a physician's release to return to work on March 22, 2011.[30]

32. Mr. Kimbler sent Grievant a letter dated March 22, 2011. The letter stated, in part:

> The purpose of this letter is to notify you that your employment with the West Virginia Department of Health and Human Resources has been terminated effective March 22, 2011 pursuant to the reasons outlined in the letter dated March 4, 2011 and amended on March 16, 2011 for failure to return from a Medical Leave of Absence March 22, 2011.

33. At the time of Grievant's termination, Respondent had two CPS workers. The normal quota of CPS workers in the Boone County office was nine. At the time of the October 18, 2011, level three hearing, the Boone County office still had vacancies for CPS workers.[31]

34. On March 28, 2011, Grievant emailed Mr. Kimbler and Mr. Barker. In the email Grievant gave an update on a sleep study she had participated in on March 25 & 26, 2011. Grievant stated that she had a doctor's appointment scheduled for April 11, 2011 to get the results of the test. Grievant stated, "I will give you an update after I see the doctor."

35. On April 1, 2011, Grievant emailed Mr. Kimbler and Mr. Barker. The subject

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[29]Grievant's testimony at level three hearing.

[30]*Id.*

[31]Testimony of Mr. Barker at level three hearing.

line of the email[32] read "test results" and the email described test results the Grievant had received that morning. The email stated, "This doctor stated that there is no reason that I cannot work, because of this disorder. I will see my other doctor next Wednesday, 4/6/11, at 1:45 pm. I will let you know the outcome of that visit."

36. Grievant has Acquired Immune Deficiency Syndrome (AIDS).

Discussion

Grievant was terminated from employment with Respondent based upon Respondent's assertion that she abandoned her job when she did not return to work on March 22, 2011. West Virginia Division of Personnel (DOP) Administrative Rule 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). Grievant had been on approved MLA from September 21, 2010, through March 21, 2011. Under the DOP Administrative Rule 143 C.S.R. 1 § 14.8(c) Medical Leave, an injured or ill permanent employee shall be granted a medical leave of absence without pay not to exceed six months within a twelve month period.

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). Specifically, the Grievance Board has held that the

[32]Grievant's Exhibit No. 4, email sent from Grievant on April 1, 2011.

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). "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 &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.*

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 not contested that Grievant did not return to work on March 22, 2011, at the end

of her 6 month MLA. Respondent contends that this constitutes a violation of 143 C.S.R. 1 § 12.2(c). That is the only reason cited by Respondent for dismissing Grievant from her job. Grievant submitted physicians' statements for her entire six months on MLA, including a physician's statement from the West Virginia University Physicians of Charleston, Department of Behavioral Medicine & Psychiatry, that stated Grievant would be off work until April 6, 2011.[33]

A technical violation of DOP policy, 143 C.S.R. 1 § 12.2, 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 a 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 physican's 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

[33]Respondent's Exhibit No. 2, compiled 2011 correspondence.

> 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 cause for dismissal. 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 the original) *Id.*

143 C.S.R. 1 § 12.2(c) provides that an appointing authority may dismiss an employee who is absent from work for 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 employee's 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 has AIDS. AIDS is one of the most serious diseases in human history. Grievant provided physicians' statements for her six month MLA, and then some. Grievant submitted a physican's statement that stated she needed to be off work until April 6, 2011. This is merely 16 calendar days past March 22, 2011. Respondent knew that Grievant had AIDS. Grievant provided physician's statements and emailed Mr. Kimbler 6.5 single spaced document pages the day after receiving a letter from Mr. Barker inquiring into her intention of returning to work. Grievant continued to contact Respondent and provide

updates on her test results, treatments and anticipated physican's release to return to work. Clearly, Grievant's actions are not those of an individual who intends to abandon her job.

No evidence was presented to indicate that Grievant's job performance during her five years as a CPSW for Respondent was anything less than competent. Grievant testified at the level three hearing that she loved her job as a CPSW because "I want to make a difference in children's lives and sometimes it doesn't seem like we do but then you always have just that one that you know you rescued from a horrible position..." No unsatisfactory Employee Performance Appraisals were mentioned or submitted into evidence at the level three hearing. Grievant had never received a disciplinary action or counseling for leave use. Her years of successful employment must be considered with the conditions surrounding the incidents that led to her dismissal. 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.[34]

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer and the

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[34]Grievant asserts a violation of the West Virginia Human Rights Act, W.VA. CODE § 5-11-9. The West Virginia Supreme Court has held that the Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, W.VA. CODE § 5-11-1, *et seq*. However, a civil action filed under the West Virginia Human Rights Act is not precluded by a prior grievance decided by the Grievance Board arising out of the same facts and circumstances. Therefore, this decision does not hinder Grievant's rights to pursue claims of West Virginia Human Rights violations before other venues. *Vest v. Bd. of Educ. of the County of Nicholas,* 193 W.Va. 222, 455 S.E.2d 781 (1995).

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). 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). "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 & 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. 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. "*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).

4. Given the totality of the circumstances, Respondent did not prove that it had good cause 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.

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: December 22, 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge