THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BRIAN SCOTT LARGE,
Grievant,

v. **DOCKET NO. 2012-0632-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

This grievance was filed at level one of the grievance procedure by Grievant, Brian Scott Large, on December 16, 2011, challenging his dismissal by Respondent, the Department of Health and Human Resources. The statement of grievance reads:

> I was lead [sic] to believe I qualified for a Leave of Absence. I filled out the paperwork and signed it with the Director of HR. I was then fired because I did not meet a dead line [sic] that I was never informed of. Sharpe Hospital also stopped communicating important information with me, which lead to my insurance being cancelled.

The relief sought by Grievant is: "I want the leave of absence the director of HR told me I qualified for, I want paid for the 100 hours of sick time I had accrued, my PEIA health insurance restored, and I want my job back."

On December 22, 2011, the parties agreed to waive levels one and two of the grievance procedure. A level three hearing was held before the undersigned Administrative Law Judge on July 31, 2012, at the Grievance Board's Westover, West Virginia office. Grievant appeared *pro se*, and Respondent was represented by Michael E. Bevers, Esquire, Assistant Attorney General. This matter became mature for decision

on September 4, 2012, on receipt of Respondent's Proposed Findings of Fact and Conclusions of Law. Grievant declined to submit written argument.

Synopsis

Grievant was a good employee who was dismissed from his employment by Respondent for job abandonment. Grievant was stressed and his daughter was ill, and he requested a personal leave of absence. He was referred to the Director of Human Resources who completed the forms for Grievant to request a medical leave of absence instead. These forms stated that Grievant would be on leave from September 11 through December 4, 2011, but a physician's statement must be provided by October 7, 2011. Grievant told the Director of Human Resources he was not under a doctor's care. The Director of Human Resources then, before October 7, sent Grievant a letter saying he was on unauthorized leave until November 1, 2011, and reprimanding him. Shortly after October 7, Grievant told the Director of Human Resources he had not seen a doctor due to his daughter's serious illness, but his doctor had told him he would not provide a physician's statement for a period when he had not been under his care. Grievant requested a medical leave of absence for his daughter's illness. The Director of Human Resources did not make clear to Grievant what was needed from him at that point, or that his job was in jeopardy. Grievant was in contact with the Director of Human Resources throughout September and October 2011, except for the period at the beginning of October when his daughter was hospitalized. Respondent then sent a letter to Grievant, at his old address, dated October 25, 2011, terminating his employment effective November 10, 2011, noting he had not been in contact with HHR since October 14, 2011. Grievant did not receive this letter until late November or early December 2011, and did not have a pre-

termination conference or hearing. Respondent did not prove that, under these circumstances, Grievant abandoned his job. Further, Respondent violated Grievant's due process rights. Finally, Grievant's claims regarding the cancellation of his medical insurance are not grievable.

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 Department of Health and Human Resources ("HHR" or "Respondent"), as a permanent employee in the classified service as a Health Service Worker at William R. Sharpe, Jr. Hospital ("Sharpe Hospital") in Weston, West Virginia. He had been employed by HHR on a full-time basis since September 1, 2010.

2. Sharpe Hospital houses patients who are suffering from mental illness. Some of the patients may become violent at times. Grievant was often called on to control violent patients because of his size.

3. Grievant was a good employee, had received good evaluations, and had earned the privilege of being allowed to work 16-hour shifts. This allowed him to have more days off work each week.

4. On August 29, 2011, Grievant's supervisor, Mary Stalnaker, Nurse Manager at Sharpe Hospital, spoke with Grievant about calling off work during August of 2011, and told him that if he called off work one more time, he would lose his 16-hour shift privileges.

5. While at work on September 10, 2011, Grievant was keeping an eye on a large male patient who was verbally violent, bordering on becoming physically violent, and he was kicked by another patient. Grievant was at this time going through a divorce, and

his daughter was experiencing medical issues. This was the last day Grievant reported to work at Sharpe Hospital.

6. On September 16, 2011, Grievant told Ms. Stalnaker that he would not be at work for his next shift because of mental stress he was experiencing, stating that if he reported to work, he was afraid he might hit someone. He requested a personal leave of absence. Ms. Stalnaker told Grievant she did not have the authority to grant such a request, and referred him to Parker Haddix, Chief Executive Officer at Sharpe Hospital, as the person with authority to grant a leave of absence, to employee assistance, and to Cyndi Drury, Director of Human Resources at Sharpe Hospital. Ms. Stalnaker told Grievant that she was removing his 16-hour shift privileges.

7. On September 16, 2011, Ms. Stalnaker sent an email to Janice Woofter, Kimberly Tucker, Ms. Drury, and Mr. Haddix advising them of the information contained in the preceding finding of fact, and asking what she should do next. Ms. Stalnaker stated in the email, "I certainly don't want him around patient[s] if he feels like hitting someone." Ms. Stalnaker believed Grievant followed the appropriate course of action in not reporting to work if he was concerned that he might hit someone.

8. On September 20, 2011, Grievant sent Mr. Haddix an email requesting a personal leave of absence, citing a "confluence of several personal issues coupled with the stress of dealing with our patient population."

9. Mr. Haddix forwarded Grievant's September 20, 2011 email to Ms. Drury, Ms. Stalnaker, and Ms. Woofter, and asked how they wanted him to reply. Ms. Drury responded in an email that Grievant needed to apply for Family Medical Leave. She stated further, apparently in regard to a request by Grievant for sick leave, that, "[t]he request was

denied because he has not produced a doctor[']s slip."[1] The record does not reflect that Mr. Haddix ever advised Grievant as to whether he was granting or denying the request for a leave of absence.

10. Grievant did not report to work his scheduled shift on September 20, 2011, and he did not call in to report off work. Ms. Stalnaker spoke with Grievant about this on September 21, 2011, and Grievant told her he was waiting for Mr. Haddix to respond to his request for a leave of absence. Grievant thought he should be allowed to use his accumulated sick leave when he was absent, but Ms. Stalnaker advised Grievant that in order to use sick leave to cover his absences for the prior week, he would need to provide a physician's statement because he had been absent from work for more than three days.

11. On September 21, 2011, at 1:16 p.m., Ms. Drury sent an email to Mr. Haddix, Ms. Woofter, and Ms. Stalnaker advising them that Grievant would be coming in the following day to request Family Medical Leave. Ms. Drury asked that Grievant's issues and his daughter's issues not be discussed "with any non-senior manager." The email continues, stating:

> The information should be that Mr. Large is on leave of absence - his leave may be continual-or intermittent and may continu[e] through October and possibly through November. He will exhaust his sick leave, then any annual and then be off pay if necessary.
>
> Should Mr. large [sic] be released to return earlier he should inform you three days prior to his return.
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> I will inform Mr. Large of the responsibilities of providing physician statements monthly in order to utilize his paid leave. I will also inform Mr.

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[1] Ms. Drury is no longer employed by Respondent, effective February 2012, and she was not called as a witness in this proceeding.

> Large that **we are unable to pay him his leave until he provides a physician's statement.**

(Emphasis added.)

12. Grievant met with Ms. Drury on September 22, 2011. Ms. Drury told Grievant that the quickest and easiest way for him to be placed on leave was to apply for Family Medical Leave based on his own stress level. Grievant told Ms. Drury he was not under a doctor's care, and asked if there was any other way to obtain a leave of absence.

13. On September 22, 2011, Ms. Drury completed an "Application for Leave for Federal Family and Medical Leave, State Parental Leave, and/or Medical Leave of Absence without pay." The period of the leave was September 11, 2011, through December 4, 2011. One section of this form states, "I am making application for parental, family, and/or medical leave without pay for the following reason." The box for "personal illness" was checked on this form. The applicant may also check a box for "illness of family member." This box was not checked. Grievant signed this form and it is dated September 22, 2011. Ms. Drury also signed the form, and the box beside her signature is checked as "approved." Ms. Drury wrote on the form in the box for specification of dates and times of intermittent leave, "need physician slip before **paid** leave is available - time currently [unauthorized leave] until receipt of certification and physician slip." (Emphasis added.)

14. On September 22, 2011, Ms. Drury also completed a "State of West Virginia Federal Family and Medical Leave Act (FMLA) and/or State Parental Leave ACT (PLA) form, which is a Notice of Eligibility, Rights, and Responsibilities. It states that on September 22, 2011, Grievant informed HHR that he needed leave beginning on September 11, 2011, for the following reason." The box is checked in front of the

statement "[y]our own serious health condition." The form states that Grievant is eligible for FMLA, and that Grievant "must return the following information to us by Oct 7, 2011." The box is then checked in front of the statement "[s]ufficient certification to support your request for PLA and/or FMLA leave. A certification form that sets forth the information necessary to support your request is enclosed." The letters "PLA" are crossed out in this statement and the letters "FMLA" are circled. This form was signed by Ms. Drury.

15. On September 22, 2011, Ms. Stalnaker disapproved an application for sick leave for Grievant for the period from September 11, 2011, through September 17, 2011, noting at the bottom of the form "no physician's statement." Grievant did not complete any part of this form except the employee name and signature.

16. Despite the fact that Grievant had on September 22, 2011, submitted a request for a medical leave of absence beginning September 11, 2011, and had been given until October 7, 2011, to supply a physician's statement, Grievant was still on the work schedule to work September 27, 2011, and when Grievant obviously did not call in to report off work that day, his absence was recorded as a "no call, no show."

17. On September 27, 2011, five days after completion of the FMLA forms which gave Grievant until October 7, 2011, to provide a physician's statement, Ms. Drury sent Grievant a letter which stated that his absence from "September 11, 2011 through November 1, 2011 is being charged as unauthorized leave. This action is being taken because you did not follow policy, procedure and guidelines for calling off and have not supplied the proper paperwork as required. You will remain off payroll until you return to work on November 1, 2011." This letter also stated that it would serve "as a written reprimand for failing to appropriately request and receive approval for paid leave, and for

failing to follow the established procedure for calling in to report an unscheduled absence." Grievant did not receive this letter. The record does not reflect the origin of the November 2, 2011 date.

18. Ms. Stalnaker did not schedule Grievant to work during the month of October 2011, because she thought he would be on approved leave.

19. Grievant's daughter was hospitalized for a week or more near the beginning of October, 2011. Because of his daughter's age and the seriousness of the medical condition, Grievant believed that either he or his wife needed to be with his daughter at the hospital at all times, and he spent many hours at the hospital with her during the period of her hospitalization.

20. On October 17, 2011, Ms. Drury sent an email to Ms. Stalnaker and Ms. Woofter stating that she was having some issues with Grievant, and that he had not sought medical treatment for himself because of a medical emergency with his daughter. She stated that Grievant was seeking Family Medical Leave for his daughter's condition. She stated, "[h]e is to return no later than November 1, I think. Will double check. He is out of compliance with the leave requirements and is off pay, which will UL [unauthorized leave] until such time as he can present a DOPL3/4." Ms. Drury stated in an email later that same day, "He says he never wanted a medical leave and has not sought medical treatment (10/4/2011)."

21. Later in the day on October 17, 2011, Ms. Drury sent an email to Andy C. Garretson, Donald Raynes, and Kerri L. Nice, all of whom apparently work for HHR in Charleston, West Virginia, copying Ms. Woofter and Ginny L. Fitzwater, in which she stated, among other things, that Grievant had told her that his doctor was not willing to

complete a physician's statement for the time he had been off work, and that "[n]ow he wants to seek FMLA for his daughter which he declined the first time because he said he wasn't her primary care giver and that she was doing really well at the moment." Ms. Drury further stated that she had told Grievant she needed a "DOPL3 to pay him and to authorize his leave within a week."

22. Grievant did not submit a physician's statement to HHR.

23. Grievant was dismissed from his employment by HHR effective November 10, 2011, for job abandonment. The dismissal letter is dated October 25, 2011, and states that HHR "not had any contact from [Grievant] concerning your work intentions since October 14, 2011. As a consequence of your failure to contact our office since October 14, 2011 you are being dismissed from employment." (Emphasis in original.)

24. Grievant had moved sometime during 2011, and had provided Ms. Drury with his new address and telephone number. The dismissal letter was sent to Grievant's old address, and he did not receive it until late November or early December 2011. Grievant was unable to request a conference or hearing prior to his dismissal to present his side, and was not afforded a pre-termination hearing.

25. Except for the period when Grievant's daughter was hospitalized, Grievant was in contact with Ms. Drury throughout September and October 2011. Ms. Drury never told Grievant that his job was in jeopardy. Ms. Drury told Grievant that his job was protected by the Family Medical Leave Act.

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." *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 employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir./W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

Grievant was dismissed for job abandonment, and more specifically, for failing to contact HHR between the period of October 14, 2011, and October 25, 2011. The West Virginia Division of Personnel's Legislative Rule states:

> (c) 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). "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 Wolfe v. Dep't of Health & Human Ser.,* Docket No. 2008-1863-CONS (Mar. 4, 2010); *Bachman v. Potomac State Coll. of W. Va. Univ*., docket no. 07-HE-198 (Jan. 17, 2008); *Chapman v. Dep't of Health and Human Res.*, Docket No. 06-HHR-277 ([Oct. 31,]2006)." *Conley v. W. Va. Div. of Highways*, Docket No. 2010-1123-DOT (Dec. 27, 2010). However,

> 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).

Adkins v. W. Va. Dep't of Health and Human Res., Docket No. 2011-1392-DHHR (Dec. 22, 2011).

It is clear that Grievant believed he needed to be off work in order to deal with his personal issues, including his daughter's illness, and that he thought the appropriate route

was to request a personal leave of absence. He made the request to Mr. Haddix, as he was directed by Ms. Stalnaker to do. The Division of Personnel's Legislative Rules state at 14.8(a) that:

> Personal Leave - An appointing authority may grant a permanent, probationary, or provisional employee a leave of absence without pay for a specific period of time which normally should not exceed one year. The employee shall apply for the leave of absence in writing to the appointing authority. If the appointing authority approves the request, the approval shall be in writing. A leave of absence without pay may exceed the normal one year limitation and the appointing authority may grant the leave of absence at his or her discretion based on the agency's personnel needs. Time spent by provisional employees for leaves of absence does not extend the provisional period limitation. Written approval of the appointing authority is required in all cases. Approval of personal leave is discretionary with the appointing authority.[2]

This type of leave is discretionary, dependent on the needs of the agency. In this case, Mr. Haddix neither approved nor denied the personal leave of absence, referring Grievant instead to Ms. Drury, which began the confusion. No testimony was offered as to the needs of the agency in this instance.

The Division of Personnel's Rules also set forth the requirements for an employee to obtain a medical leave of absence, stating as follows:

> 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 and makes

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[2] The record does not reflect whether the appointing authority had delegated the duty of approving or denying requests for personal leaves of absence, but it does not appear that Mr. Haddix passed this request on to any higher authority.

> 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.

143 C.S.R. 1 § 14.8(c).

It will be noted at this point that Ms. Drury did not testify at the hearing. The only evidence supporting Respondent's arguments about what Grievant was told by Ms. Drury are the emails which Ms. Drury sent to persons other than Grievant reporting her version of her conversations with Grievant. These emails are hearsay, and the undersigned has not been presented with any way to evaluate the credibility of Ms. Drury, although the emails do support Grievant's statements about what he told Ms. Drury, and the emails support the undersigned's conclusion that Ms. Drury did not take appropriate action in this case.

> Hearsay evidence is admissible in the grievance procedures for state and education employees, but there is no requirement, statutory or otherwise, that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them. *See, Seddon v. W.Va. Dept. of Health,* Docket No. 90-H-115 (Dec. 14, 1997).

Cook v. W. Va. Division of Corrections, Docket No. 96-CORR-037 (Oct. 31, 1997), Conclusion of Law No. 2. To the extent Respondent seeks to have the undersigned draw conclusions about what Ms. Drury actually told Grievant, absent some other corroborating evidence, these emails will not be considered by the undersigned in this proceeding. *See, Warner v. Dep't of Health and Human Res.*, Docket No. 07-HHR-409 (Nov. 18, 2008). In particular, there is no corroboration in the record to support Respondent's assertion that Ms. Drury told Grievant on October 14, 2011, that he needed to provide a physician's statement within one week.

Further, no testimony was offered by anyone that Grievant did not contact anyone at HHR between October 14, 2011, and the date of the dismissal letter, October 25, 2011, as is stated in the dismissal letter in support of the decision to dismiss Grievant. Respondent did not prove that Grievant did not make contact during this period of time.

While Respondent questioned Grievant's credibility, it is crystal clear from the documents placed into the record by Respondent that Respondent took inconsistent actions in this matter from the beginning, and that Ms. Drury, in particular, took contradictory actions and seemed to pull dates out of thin air. The emails support Grievant's claim that he made it clear to Ms. Drury from the beginning that he was not under a doctor's care, and that he needed some time off work due to his stress and his daughter's illness. Nonetheless, Ms. Drury completed the forms for a medical leave of absence for Grievant's illness. Ms. Drury noted that a physician's statement was needed before *paid* leave was available, which is itself confusing, even though it should have been clear that no physician's statement could be forthcoming.

However, a few days after completing the forms for a leave of absence, Ms. Drury apparently sent Grievant a letter telling him he was on unauthorized leave, and that he would be off the payroll until November 1, 2011, and reprimanding him for failure to follow procedure. Had Grievant received this letter he would have thought that he was on leave until November 1, 2011, even though the leave was labeled as unauthorized, and the application for leave was through December 4, 2011. None of the witnesses who were called to testify could explain this letter. Nothing in the documentation explains the origin of the November 1 date.

It will also be noted at this point that Ms. Stalnaker testified at the level three hearing that Grievant did not report to work for his scheduled shift on September 27, 2011, and his absence was recorded as a "no call, no show." The undersigned finds it difficult to understand how Grievant could have been scheduled for work on September 27, 2011, when forms had been completed five days prior to this for him to take a medical leave of absence beginning September 11, 2011, and the physician's statement he was to supply was not due until October 7, 2011. This supports the conclusion that Respondent's personnel were completely confused regarding Grievant's status, and remained so even at the level three hearing. How could Grievant be expected to understand the situation?

Ms. Drury's October 17, 2011 email again makes clear that she had been made aware that Grievant had had a medical emergency with his daughter, and that, because of that, he had not sought any treatment for himself, and that he was seeking Family Medical Leave for his daughter's condition. She again stated that Grievant was to return to work by November 1, 2011. Ms. Drury's email does not indicate that she made clear to Grievant what steps he needed to take to obtain this leave, and it appears from the emails

that Ms. Drury did not know what to do at this point. If she did not know what to do, and if she had no contact with Grievant after October 14, 2011, as is stated in the dismissal letter, then she could not have told him what he needed to do to obtain approved leave for his daughter's medical condition. It is clear that Ms. Drury did not tell Grievant that his job was in jeopardy.

While Grievant certainly had an obligation to make sure that his leave was approved before he quit coming to work, the rules applicable to leaves of absence are complicated, and it does not appear that Ms. Drury or Mr. Haddix listened to Grievant, and it does not appear that Ms. Drury knew what she was doing, or that she made the situation clear to Grievant. Grievant had to rely on the Human Resources Professional at Sharpe Hospital to guide him through the proper process. Obviously, this reliance was misplaced.

Grievant did not intend to abandon his position. He took steps to request a personal leave of absence, and was led down the wrong path by the person whose job it was to handle this type of employee issue. While Grievant is not entirely blameless, he was a good employee who should not have lost his job because of Ms. Drury's incompetence.

Grievant, who appeared *pro se*, also pointed out that he did not receive the termination letter until after the effective date of his termination, because it had been sent to his old address. He testified that he had provided Ms. Drury with his new address. While Grievant did not articulate a legal argument applicable to this set of facts, he obviously pointed this out because he thought this was legally incorrect. It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Waite*, *supra*;

Clark, *supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Because of Respondent's error, Grievant was given no real opportunity to a hearing before his termination, but, he was afforded a hearing at level three after the termination. It has been found by the Grievance Board that the proper remedy when an employee was not provided a pre-termination hearing, but received a prompt post-deprivation hearing, would be to award backpay and benefits from the date of termination to the date of the hearing, and $1.00 in nominal damages. *Scragg v. W. Va. Bd. of Directors*, Docket No. 93-BOD-436R (Jan. 29, 1996)(*aff'd Cir. Ct. of Kanawha County*, Civil Action No. 95-AA-22 (Dec. 9, 1996), *refused* Sept. 10, 1997, *citing Fraley v. Civil Serv. Comm'n*, 356 S.E.2d 488 (W. Va. 1987), and *Loudermill, supra.) See also, Wines v. Jefferson County Bd. of Educ.*, 213 W. Va. 379, 582 S.E.2d 826 (2003). However, in a *per curiam* opinion in *White v. Barill*, 210 W. Va. 320, 557 S.E.2d 374 (2001), the Supreme Court of Appeals of West Virginia remanded the case to the Circuit Court, to remand to the administrative body to conduct a substitute pre-termination hearing to determine whether the employee would have been dismissed had he been given a "full and timely" hearing, and for an award of nominal damages upon a finding that the employee would have still been terminated, even if he had been given a pre-termination hearing. Given that a full evidentiary hearing was held at level three, and Respondent is being ordered to return Grievant to his employment and pay him backpay and benefits, the

undersigned finds it unnecessary to return this matter to Respondent for a hearing. Because Grievant did not request nominal damages, none will be awarded.

Finally, Grievant testified that he had suffered financial loss when his health insurance was canceled without notice. The term "grievance" is defined in W. VA. CODE § 6C-2-2, and "does not mean any pension matter or other issue relating to public employees insurance . . . retirement, or any other matter in which the authority to act is not vested with the employer." Grievant's issues with the cancellation of his health insurance cannot, by statute, be addressed by the undersigned.

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. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332

S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir./W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

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 Wolfe v. Dep't of Health & Human Ser.,* Docket No. 2008-1863-CONS (Mar. 4, 2010); *Bachman v. Potomac State Coll. of W. Va. Univ.*, docket no. 07-HE-198 (Jan. 17, 2008); *Chapman v. Dep't of Health and Human Res.*, Docket No. 06-HHR-277(2006)." *Conley v. W. Va. Div. of Highways*, Docket No. 2010-1123-DOT (Dec. 27, 2010).

4. The Division of Personnel's Legislative Rules provide at 143 Code of State Regulations 1 § 12.2(c) "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)." *Adkins v. W. Va. Dep't of Health and Human Res.*, Docket No. 2011-1392-DHHR (Dec. 22, 2011).

5. Respondent failed to prove that Grievant did not contact anyone at HHR between October 14, 2011, and October 25, 2011, regarding his absence.

6. The actions of Respondent's agents were contradictory and confusing, and were not supported by the information supplied to them by Grievant. Respondent did not demonstrate that its agents made clear to Grievant what actions were required of him in order to remain employed.

7. Respondent did not demonstrate good cause for Grievant's dismissal under the circumstances presented here.

8. The term "grievance" is defined in W. VA. CODE § 6C-2-2, and "does not mean any pension matter or other issue relating to public employees insurance . . . retirement, or any other matter in which the authority to act is not vested with the employer." Grievant's issues with the cancellation of his health insurance cannot, by statute, be addressed by the undersigned.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to reinstate Grievant to his position as a Health Service Worker at Sharpe Hospital effective November 10, 2011, and to pay him back pay to that date, and reinstate all other benefits to which he would have otherwise been entitled, effective that date.

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).

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BRENDA L. GOULD
Acting Deputy Chief
Administrative Law Judge

Date: October 11, 2012