# WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**PEGGY WALLACE,**
**Grievant,**

**v.** **Docket No. 2011-1868-DHHR**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR PUBLIC HEALTH,**
**Respondent.**

## DECISION

Grievant, Peggy Wallace, was employed by the Department of Health and Human Resources ("DHHR") as an Office Assistant 3 for the Office of Health Facility Licensure and Certification ("OHFLAC"). She filed a level three grievance form[1] dated June 28. 2011, alleging that she had been, "Terminated without good cause." As relief, Grievant Wallace seeks, "To be made whole, including back pay with interest & benefits."

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on January 19, 2012. Grievant personally appeared at the hearing with her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent DHHR was represented by Michael E. Bevers, Esquire, Assistant Attorney General. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, the last of which was received at the West Virginia Public Employees Grievance Board on February 28, 2012. This grievance became mature for decision on that date.

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[1] Grievant elected to file her grievance directly at level three pursuant to W. VA. CODE § 6C-2-4(a)(4) because she was contesting the termination of her employment.

## Synopsis

Grievant was dismissed for insubordination after she took annual leave when she had no leave accrued and was directed not to. Grievant notes that she has never been disciplined previously and believes that termination of her employment is too harsh. Respondent points out that Grievant was made aware of the fact that she did not have accumulated leave to cover her vacation days and was told that her leave was not approved. Grievant's supervisor told her that she would be disciplined if she took the days and Grievant took the vacation days anyway. Grievant willfully violated a lawful directive. Under these circumstances she left her employer with little choice but to terminate her employment.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

## Findings of Fact

1. Grievant, Peggy Wallace, was employed by the Respondent DHHR as an Office Assistant 3 at the Office of Health Facilities Licensure and Certification. She started her employment in that position in August 2007.

2. In February 2011, OHFLAC was reorganized and merged into the Office of the Inspector General. Jolynn Marra became the OHFLAC Director around that time.

3. Ronald A. Stricker is the Life Safety Code Program Manager for OHFLAC. Grievant was originally responsible for the clerical work for that program and Manager Stricker was her direct supervisor. In 2011, Grievant was also performing receptionist duties but remained under Mr. Stricker's direct supervision.

4. Grievant underwent surgery in early May of 2011, and because of the recovery time, she exhausted all of her accrued sick and annual leave requiring her to go off the payroll. After briefly returning to work, Grievant again experienced health problems and again exhausted all of her leave and was taken from the payroll.

5. Earlier in the year, Grievant had scheduled a family trip and had requested annual leave for June 22, 23, and 24, 2011. Grievant had made a three hundred dollar deposit to reserve lodging for the trip.

6. At the beginning of June 2011, Grievant requested that she be allowed to work an additional hour each day and on June 20, (West Virginia Day Holiday) to accrue those hours to exchange for the three days she had scheduled for annual leave in late June. Otherwise, Grievant would not have accumulated annual leave to cover those days. Mr. Stricker forwarded that request to Director Marra by e-mail on June 7, 2011. Respondent's Exhibit 1.

7. By e-mail dated June 9, 2011, Director Marra informed Mr. Stricker that Grievant's request could not be granted. She specifically noted:

> Work weeks are 40 hours and must be worked within the same week. Time cannot be banked from prior weeks.

Respondent's Exhibit 1.

8. On June 9, 2011, Grievant sent an e-mail to Director Marra siting WVDHHR Policy 2101 as authority for her to be able to accumulate compensatory leave up to 24 hours and to bank Holiday hours to be used on a subsequent date. Grievant also indicated that she believed that some employees in the office had been allowed to bank time to use later. Based upon this information, Grievant asked Director Marra to reconsider her

decision. Respondent's Exhibit 2.

9. Shortly after receiving this request, Director Marra advised Manager Stricker that the form of overtime described by Grievant was not permitted and the request was denied. She indicated that she would respond to Grievant at a later time. Respondent's Exhibit 3.

10. After receiving Director Marra's reply, Mr. Stricker requested Grievant to come to his office and she complied. Respondent's Exhibit 5. Manager Stricker explained to Grievant that he felt that the labor laws require the agency to pay for all hours worked over forty hours in a given week and they could not bank time as she requested. Mr. Stricker then sent an e-mail to Director Marra outlining his discussion with Grievant. Respondent's Exhibit 6. Director Marra responded and also noted that she was not aware of any other occasions where employees were allowed to bank time over forty hours for compensation, but the practice would not be permitted. Respondent Exhibit 7.

11. By letter dated June 10, 2011, Grievant was placed on restricted leave status. Manager Stricker listed the reasons for this action as follows:

> Specifically, you have incurred 13 scheduled and 10 unscheduled absences from April 1, 2011 through May 31, 2011. You have exhausted a total of 51.65 hours sick leave and 44.49 hours annual leave, including emergency usage, for this time period. It has also been noted that you have been absent without sufficient accrued leave to cover the absences on two occasions in the month of May 2011 for a total of 53.11 hours.[2]

12. Two of the leave restrictions related to annual leave were:

- Any planned annual leave must be requested 48 hours in advance to your supervisor and approved in writing.

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[2] Respondent's Exhibit 8. It is undisputed that the vast majority of this leave was used as a result of a serious health problem suffered by Grievant.

- Any annual leave taken without prior approval from your supervisor will be documented as unauthorized leave.

Respondent's Exhibit 8.

13. Between June 9 and June 21, 2011, Grievant and Manager Stricker had conversations about Grievant struggling with the decision of whether to cancel her vacation. Mr. Stricker consistently advised Grievant that if she took the annual leave days there would be disciplinary consequences. He did not specify what the discipline would be.

14. On the morning of June 21, 2011, Grievant had a conversation with her supervisor, Mr Stricker, about whether he wanted to know what she was going to do about her annual leave. Mr. Stricker said that he did not want to know, but made it clear that she would be disciplined if she went on the leave. Grievant indicated to Mr. Stricker that she had talked to her husband about it and they would just have to deal with it.[3] As Grievant was leaving Mr. Stricker's office, he told Grievant, "Don't make me have to do that."[4] Respondent's Exhibit 9.

15. Grievant called the OHFLAC office at 7:25 a.m. on June 22, 2011, and left a message saying that she was in North Carolina taking a mental health day.[5] Grievant called the OHFLAC office again, at 7:40 a.m. the same morning, and said that she was on

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[3] Respondent's Exhibit 9. E-mail from Mr. Stricker to Director Marra relaying his discussion with Grievant. It appeared that Grievant meant that she and her husband would deal with whatever discipline resulted from her taking unauthorized annual leave.

[4] Grievant testified that she believed Mr. Stricker was saying not to make him take disciplinary action against her.

[5] Respondent's Exhibit 10. E-mail from Mr. Stricker to Director Marra.

vacation and would call in each morning. In the telephone message, Grievant said she didn't want to lie about why she was off and that she would deal with it when she got back.[6] Grievant left messages about the same time each of the next two mornings indicating that she would not be at work.

16. Grievant decided to take the three days of unauthorized leave, even though she had been specifically warned that there would be disciplinary consequences, because she did not want to lose her three hundred dollar deposit and because she had reviewed the DHHR progressive discipline policy and did not believe she would be dismissed.[7]

17. When Grievant returned to work on June 27, 2011, she was given a letter from Director Marra informing her that her pay was being docked for the period of three days she was absent because the leave was unauthorized. The letter cited the Division of Personnel Legislative Rule, 143 C.S.R. 1 § 14.6 related to unauthorized leave.[8]

18. Grievant met with Director Marra and Manager Stricker in the Director's office on June 27, 2011, for a predetermination conference. They discussed Grievant's actions regarding the unauthorized leave. After some time, Director Marra left the office, returned approximately one half hour later and gave Grievant a letter terminating her employment. The reason for the dismissal was insubordination. Specifically, Grievant was charged with willfully disregarding a directive by taking unauthorized leave after being told not to do so.

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[6] Respondent's Exhibit 11. E-mail from Mr. Stricker to Director Marra regarding Grievant's telephonic messages.

[7] Level three testimony of Grievant Wallace.

[8] Grievant's Exhibit 1. Grievant characterized this letter as a written reprimand. However, the letter does not mention any specific discipline and is more accurately described as a notice of a payroll action.

Respondent's Exhibit 16.

19. Grievant had not been previously disciplined. Director Marra took Grievant's prior successful work history and performance into consideration, but felt that Grievant's action merited termination of her employment even in light of these factors.

**Discussion**

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No.96-20-380 (Mar. 18, 1997); *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*.

Grievant was a tenured employee in the state's classified service; therefore, her employer must also demonstrate that misconduct which forms the basis for the dismissal was 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 is charged with insubordination for willfully disregarding the directive of her supervisor. It is undisputed that Grievant's request for annual leave was denied. It is equally clear that Manager Stricker informed her that if she took the leave there would be disciplinary consequences. Grievant even acknowledged that she understood that she would have to deal with the consequences of her actions upon her return, but did not believe she would be fired.

The West Virginia Supreme Court of Appeals has held that, for there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The disobedience must be wilful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted).

Grievant's actions meet this definition perfectly. Her request for leave was denied because she did not have any annual leave accrued. She knew that her request had been

denied and had even looked at the progressive discipline policy in an attempt to divine what penalty she would receive by defying the directive. Her actions were clearly defiant. Respondent proved insubordination by a preponderance of the evidence.

Grievant raises a number of defenses, none of which have merit. First, she argues that she received a letter of reprimand and her pay was docked for her actions. She opines that these actions preclude her receiving additional discipline for the same act. The letter Grievant received informed her that her pay had been docked for the three days she had taken unauthorized leave. It did not state that it was disciplinary action, rather it was an explanation as to why her paycheck would be altered. Such a notice did not preclude Respondent from taking disciplinary action for Grievant's insubordination.

Next, Grievant argues that she did not receive a predetermination conference before her employment was terminated. It is uncontested that Grievat met with Director Marra and Mr. Stricker prior to Director Marra leaving the room and having the termination letter typed. It is likely, under the circumstances, that Director Marra was seriously contemplating firing Grievant before the meeting. However, she gave Grievant an opportunity to explain her actions before giving her the disciplinary letter. The termination letter specified the reasons for the disciplinary action and stated that the action would not become effective until July 12, 2011. The letter further stated that Grievant had fifteen days to respond to the charges in person or in writing. These actions meet the predetermination requirements set out in the Division of Personnel legislative rule, and the basic requirements of due process. 143 C.S.R. 1 § 12.2; *see*, *Hudson v. Dep't of Health & Human Resources/Welch Community Hospital,* Docket No. 07-HHR-311 (Mar. 21, 2008); *see generally, Board of Educ. v. Wirt*, 192 W. Va. 568, 575 (W. Va. 1994), (*citing,*

*Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)).

Grievant consulted the DHHR policy on progressive discipline prior to taking her unauthorized leave and opines that she should not be dismissed for a single act of insubordination. DHHR Policy Memorandum 2104, "Guide to Progressive Discipline," has been construed as a permissive, discretionary policy that does not create a mandatory duty to follow a progressive disciplinary approach in every instance. *Oiler v. Dep't of Health & Human* Res., Docket No. 02-HHR-074 (Aug. 28, 2002); *Ferrell v. W. Va. Dep't of Health & Human Res.*, Docket No. 97-HHR-526 (Apr. 30, 1998); *Artrip v. W. Va. Dep't of Health and Human Serv.*, Docket No. 94-HHR-146 (Sept. 13, 1994). That policy states, in part:

> Determined by the severity of the violation, progressive discipline is the concept of increasingly severe actions taken . . . to correct or prevent an employee's initial or continuing unacceptable work behavior or performance. It is important to remember, however, that the level of discipline will be determined by the severity of the violation.

Further, the policy provides separation from employment may be justified "if an employee commits a singular offense of such severity warranting dismissal." *Hudson, supra; Brown v. Dep't of Health & Human Res./Bureau for Children & Families*, Docket No. 2008-1299-DHHR (Nov. 24, 2008).

Respondent took into consideration that Grievant's work history was successful prior to this incident. However, Grievant made a conscious decision to flagrantly disregard a directive knowing full well that she would be disciplined. She left the management little choice but to severely punish her actions. Director Marra did not violate the progressive policy by exercising her discretion to dismiss Grievant for this blatant act of insubordination.

Grievant similarly argues that the punishment was out of proportion to her offense and should be reduced. "Whether to mitigate the punishment imposed by the employer, depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

Grievant placed the management in an untenable situation. Any discipline short of dismissal would have sent a poor message to the rest of the employees. Respondent could have given Grievant a suspension. However, given the totality of the circumstances, termination of Grievant's employment was not disproportionate to Grievant's flagrantly insubordinate decision to disregard a legal directive. Accordingly, the grievance is DENIED.

**Conclusions of Law**

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against Grievant by a preponderance of the evidence.

Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it . . ." *Petry v. Kanawha County Bd. of Educ.*, Docket No.96-20-380 (Mar. 18, 1997); *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*.

2. Since Grievant was a tenured employee in the State's classified service, the employer must also demonstrate that misconduct which forms the basis for the dismissal was 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).

3. The West Virginia Supreme Court of Appeals has held that, for there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The disobedience must be wilful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id*., 212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted).

4. Respondent proved that Grievant was guilty of insubordination by a preponderance of the evidence.

5. The actions taken by Grievant's supervisors prior to termination met the predetermination requirements set out in the Division of Personnel legislative rule and basic requirements of due process. 143 C.S.R. 1 § 12.2; see, *Hudson v. Dep't of Health & Human Resources/Welch Community Hospital,* Docket No. 07-HHR-311 (Mar. 21, 2008);see *generally, Board of Educ. v. Wirt*, 192 W. Va. 568, 575 (W. Va. 1994), (*citing, Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)).

6. DHHR Policy Memorandum 2104, "Guide to Progressive Discipline" states, in part:

> Determined by the severity of the violation, progressive discipline is the concept of increasingly severe actions taken . . . to correct or prevent an employee's initial or continuing unacceptable work behavior or performance. It is important to remember, however, that the level of discipline will be determined by the severity of the violation.

Further, the policy provides separation from employment may be justified "if an employee commits a singular offense of such severity warranting dismissal." *Hudson v. Dep't of Health & Human Resources/Welch Community Hospital,* Docket No. 07-HHR-311 (Mar. 21, 2008); *Brown v. Dep't of Health & Human Res./Bureau for Children & Families*, Docket No. 2008-1299-DHHR (Nov. 24, 2008).

7. Respondent DHHR did not violate the progressive policy by exercising its discretion to dismiss Grievant for a single, egregious act of insubordination.

8. "[M]itigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of

discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

9. Given the totality of the circumstances, termination of Grievant's employment was not disproportionate to Grievant's flagrantly insubordinate decision to disregard a legal directive. Mitigation is not appropriate.

Accordingly the 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: MAY 24 , 2012.**

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**WILLIAM B. MCGINLEY**
**ADMINISTRATIVE LAW JUDGE**