WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SANDRA G. ERVIN,
Grievant,

v. **Docket No. 2011-1794-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/OFFICE OF INSPECTOR GENERAL,
Respondents.

DECISION

Grievant, Sandra Ervin, was employed by the Respondent, Department of Health and Human Resources ("DHHR"), as an Office Assistant 2. She was assigned to the Office of Inspector General as a receptionist for the Office of Health Facilities Licensure and Certification ("OHFLAC"). Ms. Ervin filed a level three grievance form dated February 2, 2011, alleging that she had been suspended for three working days without good cause. Ms. Ervin filed a second level three grievance form dated June 2, 2011, alleging that her employment had been terminated without good cause. As relief in both grievances, Ms. Ervin seeks "To be made whole, including back pay with interest and benefits restored." Pursuant to a request from the parties, an Order was entered on June 17, 2011, consolidating the two grievances for hearing at level three.[1]

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on February 6, 2012. Grievant appeared at the hearing and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Anne B. Ellison, Assistant Attorney

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[1] Because these grievances contest a suspension without pay and dismissal from employment, Grievant exercised her rights pursuant to W. VA. CODE § 6C-2-4(a)(4) to proceed directly to level three of the Public Employees Grievance Procedure.

General. The last of the parties' Proposed Findings of Fact and Conclusions of Law was received by the West Virginia Public Employees Grievance Board on March 12, 2012. This matter became mature for decision on that date.

Synopsis

Grievant's employment was terminated for insubordination and excessive absences. Respondent demonstrated that Grievant had been placed on an Improvement Plan with specific restrictions related to leave and leave notice. Grievant failed to follow the clear directives from her employer after being warned orally and in writing that she needed to do so. Grievant alleged that Respondent violated the Family Medical Leave Act ("FMLA") by interfering with her attempts to take leave under the Act. Barring unusual circumstances, an employer is entitled to require an employee to follow the usual and customary leave notice requirements in seeking FMLA leave. Grievant failed to follow Respondent's notice requirements. Consequently, the grievance is DENIED.

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, Sandra Ervin, was employed by the Respondent, DHHR, as a regular full-time Office Assistant 2 on July 2, 2009, and assigned to OHFLAC as a receptionist.

2. DHHR and OHFLAC are public agencies which employ more than fifty employees within a seventy-five mile area in and around Charleston, West Virginia.

3. As the receptionist, Grievant was often the first contact person for the office.

She was required to answer telephone calls and transfer messages by telephone and e-mail to seventy-eight employees throughout OHFLAC. She was also required to open, sort, date-stamp, log, and distribute mail and various reports twice each day. Among other duties, Grievant was charged with greeting and referring visitors to appropriate units, logging and distributing facsimiles, and typing business cards for thirty-seven out-stationed surveyors.[2]

4. Grievant's initial EPA-1 specified that her work schedule was from 9:00 a.m. until 5:00 p.m. each day. Grievant was not allowed to work beyond 5:00 p.m. without specific permission from her supervisor.

5. At all times relevant to this grievance, Shannon Wallace was the Administrative Secretary for the OHFLAC Office Director. In that role, she was Grievant's direct supervisor and she maintained the human resource functions for the office.[3]

6. Grievant received an e-mail from Shannon Wallace dated October 30, 2009, which was a review of a performance improvement plan commenced on October 9, 2009. The review noted that Grievant had made significant progress since the introduction of the plan, but included a reminder that Grievant was to complete all her assignments within the regular work schedule, and leave the office at 5:00 p.m. Respondent's Exhibit 2.[4]

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[2] Respondent's Exhibit 1, EPA-1. An EPA is an Employment Performance Appraisal. The EPA-1 is the first step in an appraisal process for each year. The EPA-1 sets out the responsibilities, standards and expectations for the employee. This was Grievant's initial EPA-1 and it was signed by her on July 28, 2012.

[3] At the time of the level three hearing, Ms. Wallace had been promoted to the position of OHFLAC Director of Operations.

[4] Grievant's supervisor did not want Grievant to incur unauthorized overtime which would have to be compensated pursuant to the Fair Labor Standards Act.

7. During 2010, Grievant often exhausted her sick leave and was forced to utilize Emergency Annual Leave ("EAL") when she was absent instead of sick leave.[5] Without the EAL, Grievant would not have been paid for these absences. Ms. Wallace kept a spread sheet of Grievant's absences to insure that they were correctly documented. Respondent's Exhibit 3.

8. After noticing a pattern of leave usage by Grievant, Ms. Wallace developed a chart documenting that pattern from January 1, 2010 through August 31, 2010. Respondent's Exhibit 4. The chart indicated that during this eight-month period, Grievant called in sick on six Mondays, three Fridays, and on five days that were adjacent to scheduled holidays. Additionally, Grievant arrived late for work seventeen unscheduled times during this period. On three of those occasions, Grievant was charged fifteen minutes of leave time. The remainder averaged two and one half hours in length, including four which were four hours or more. Respondent's Exhibit 4.

9. By letter dated October 12, 2010, Grievant was placed on restricted leave status.[6] The requirements of the restricted leave status included the following:

- Provide verification of illness for any leave on the prescribed Physician's/Practitioner's Statement Form ("DOP-L3") within two days of returning to work.
- Failure to provide a DOP-L3 will result in all of the leave being considered unauthorized leave.
- Planned annual leave must be requested from the supervisor at least 48 hours in advance and is subject to written approval. Annual leave

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[5] EAL is the use of annual leave without the usual notice requirement, to cover for absence due to illness when an employee has exhausted her sick leave.

[6] Respondent's Exhibit 5. The same letter was sent to Grievant on October 6, but was mailed to an incorrect address. On October 12, 2010, it was mailed to her proper address.

taken without prior written approval will be considered unauthorized leave.

- Emergency Annual Leave will be approved on a case-by-case basis.

In this document, it was noted that during the previous eight-month period, Grievant Ervin had incurred forty-three absences of which thirty-one had been unscheduled.

10. On October 8, 2010, Grievant was placed on a Performance Improvement Plan. As part of the plan, she was reminded of her normal work schedule and that she could not stay after 5:00 p.m. without prior approval from her supervisor. Grievant Ervin signed the plan indicating her receipt on that day. Respondent's Exhibit 6.

11. Grievant Ervin was provided an EPA-3 on October 13, 2010, which was the final evaluation for the period of September 1, 2009 through August 3, 2010. She received an overall rating of "Needs Improvement." In the area of "Availability for Work" Grievant was rated as "Needs Improvement" on all three performance indicators. It was also noted in the EPA-3 that Grievant continued to stay at work beyond her regular work hours notwithstanding her supervisor's prior admonishments.

12. Grievant was issued a written reprimand dated January 24, 2011, for failing to meet acceptable attendance standards. The reprimand specifically noted that for the period of September 1, 2010, through January 18, 2011, Grievant was late or absent on twenty-four out of eighty work days. Grievant had taken 41.74 hours of annual leave without properly requesting that leave in advance, and had been taken off the payroll for being absent without any accumulated leave seven times since September 1, 2010. Grievant was once again reminded to not work beyond her regular hours and was instructed to report in on days she was going to be absent within forty-five minutes of the start of the workday. Grievant was instructed to speak directly to Ms. Wallace or the next

level supervisor, and not to leave a voice-mail message.[7] Respondent's Exhibit 9.

13. Because Grievant was the receptionist for the entire OHFLAC office, when she was absent or tardy other employees had to be assigned to cover her position which caused them to fall behind on their work. Grievant's regular absence and tardiness resulted in a strain on the productivity of other office employees.

14. OHFLAC Director Jolynn Marra issued Grievant a three-day suspension without pay dated February 10, 2011. The reason for the suspension was that Grievant continued to stay at work after 5:00 p.m. after numerous verbal and written directives to the contrary. The most recent event had occurred on the day before the suspension. Respondent's Exhibit 10.

15. Grievant called in sick on February 28, 2011, and the next day gave her supervisor written notice that she would be absent from work for at least two weeks due to a serious illness. She provided a notice from her doctor confirming that assessment and stating that Grievant's medical condition would need to be reevaluated in two weeks to determine whether she would be able to return to work at that time. Respondent's Exhibit 11.

16. Ms. Wallace sent Grievant a letter dated March 4, 2011. The letter explained Grievant's rights related to taking an unpaid leave of absence for up to twelve weeks

[7] The reason for this instruction was to allow Ms. Wallace or another supervisor to arrange coverage for the receptionist position as quickly as possible. Voice-mails are not always checked immediately which could result in a significant delay in notice to the supervisor that coverage was needed.

pursuant to the Family Medical Leave Act[8]. The letter noted that Grievant's eligibility tentatively started February 28, 2011, and that she could take twelve weeks of leave between that date and February 28, 2012. Finally, the letter notified Grievant that she would have to fill out an DOP-L4[9] and her health care provider would need to complete and submit a DOP-L5,[10] no later than March 18, 2011, in order for Grievant to qualify for leave under the FMLA. Respondent's Exhibit 12.

17. Grievant submitted the completed forms on March 16, 2011, indicating that she would be returning to work no sooner than April 4, 2011. The FMLA leave was to be taken continuously rather than intermittently, during that period. Respondent's Exhibit 13.

18. On March 31, 2011, Grievant informed her supervisor that she would need more time to recover. She and her physician filled out and submitted a second set of FMLA forms indicating that Grievant would not be able to return to work before April 18, 2011. In response to the question regarding when Grievant would be able to return to work, the physician wrote "to be determined." Respondent's Exhibit 14. These forms were submitted to OHFLAC on April 12, 2011.

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[8] The Family Medical Leave Act of 1993, 29 USC 2601 *et seq*, provides an unpaid leave program for new parents, seriously ill employees and employees with seriously ill family members. The Department of Labor promulgated regulations as to the implementation of FMLA. 29 CFR 825.

[9] The DOP-L4 is an application completed by the employee for unpaid leave pursuant to the FMLA.

[10] The DOP-L5 is subtitled as "Certification of Health Care Provider for Employees Serious Health Condition." The purpose of this document is to provide proof to the employer, from a medical practioner, that the employee suffers from a serious medical condition that entitles her to coverage under the FMLA. *See,* 29 CFR 825 § 305(b).

19. Grievant returned to work on April 18, 2011, but left a voice-mail on April 19, 2011 that she would be off sick. She called in sick on April 20, and missed work on April 21 and 22, 2011, without giving any notice to her employer that she would be absent.

20. On April 28, 2011, Grievant left a voice-mail, five minutes before her shift was to start, indicating that she had a medical appointment and would be late. This notice was in violation of her continuing leave restrictions and she provided no confirmation of the appointment within two days following this absence. Consequently, this time period was considered unauthorized leave.

21. On May 4 and 5, 2011, Grievant left a voice-mail that she would be off work sick on each day. Grievant missed work on Friday, May 6, without notifying her employer in any way. Grievant left a voice-mail on Monday, May 9, 2011, that she would be absent that day as well.[11]

22. By letter dated May 9, 2011, OHFLAC Director Marra informed Grievant that she remained on restricted leave status and the attendance improvement plan that was implemented in October 2010, and reiterated in a reprimand dated January 24, 2011.[12] Director Marra gave Grievant until May 12, 2011, to advise her whether Grievant intended to return to work or seek an additional medical leave of absence. Respondent's Exhibit 16.

23. Grievant called in on May 10 and 11, 2011, reporting that she was ill and would not be able to report to work.

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[11] Grievant gave reasons for some of her absences in April and May. Those reasons varied and did not appear to be related to the serious medical condition for which she had previously taken FMLA leave.

[12] *See,* Findings of Fact 9-12 *supra.*

24. On May 12, 2011, Grievant turned in two sets of DOP-L4s and DOP-L5s related to her prior absences. The first set was dated as signed by Grievant on April 29, 2011, indicating that Grievant had been treated at St. Francis Hospital for a blood clot in her leg on April 19. The DOP-L5 indicated that condition would keep Grievant from work through April 25, 2011. The second set was dated as signed by Grievant May 11, 2011, and indicated that Grievant had been treated for nausea and weakness at Charleston Memorial Hospital. On the DOP-L5 form, the doctor released Grievant to return to work on May 16, 2011.[13] Respondent's Exhibit 17.

25. A predetermination conference was scheduled for Grievant with Director Marra and Ms. Wallace for 3:35 p.m. on Monday, May 16, 2011. The e-mail giving Grievant notice of this conference was sent to Grievant at 2:37 p.m. that day. Respondent's Exhibit 19. Grievant was unable to attend that meeting and the predetermination conference was rescheduled for 9:00 a.m. the following morning.

26. On the morning of May 17, 2011, Grievant left a voice-mail that she was sick and would not report to work. Once again, she did not speak with her supervisor as required by the leave restriction plan requirements.

27. OHFLAC Director Marra drafted and mailed a letter to Grievant On May 17, 2011, terminating Grievant's employment with the agency. The reasons cited for the termination were: her repeated failure to comply with instructions that Grievant not work

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[13] The reasons for Grievant's medical treatment were distinctly different in each of these instances and both were different from the reasons for her approved FMLA leave. Her medical issues were revealed in hearing testimony and documents; they are only discussed herein in sufficient detail to address the issues.

past 5:00 p.m. without written authorization from her supervisor, her long history of absences, and her consistent failure to follow the requirements of her leave restrictions, especially the requirement that she call in and speak with her supervisor or the next level supervisor on days that she was going to be absent, so that appropriate coverage could be arranged for the receptionist duties. Director Marra cited several instances where Grievant failed to follow the specific directions related to leave reporting and regular work hours. None of the instances cited as justification for Grievant's termination occurred during Grievant's FMLA leave of absence. Grievant was not required to give specific leave notice for that period beyond the medical certification she provided for the leave. Respondent's Exhibit 18.

28. Grievant offered into evidence a note from her doctor dated February 3, 2012, indicating that the doctor had signed a new FMLA leave request certification for Grievant on May 19, 2011. Grievant's Exhibit 5. Grievant also offered a DOP-L5 form which indicated that she had seen her doctor on May 18, 2011,[14] and he certified that she was suffering from a serious medical condition which would require her to be off work until July 2011.[15]

Discussion

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

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[14] *See,* Grievant's Exhibit 4, DOP-L5 form page 2 of 4.

[15] Grievant testified that she gave the DOP-L5 form along with a DOP-L4 to Ms. Wallace on March 17, 2011, requesting another FMLA leave. However, the documents indicate that Grievant could not have received these forms before May 18, 2011, and Ms. Wallace testified that she had not seen the forms prior to the level three hearing.

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*.

Since Grievant was a tenured employee in the state's classified service, the Respondent must also demonstrate that the 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).

Respondent contends that Grievant's record of poor attendance not only affects her

ability to perform her job, but the efficiency of other employees as well. Because Grievant was the receptionist for the OHFLAC office, she was the initial point of contact for people visiting or contacting the office by telephone, mail or by electronic communications such as e-mail and facsimile. When Grievant was absent, it was necessary to immediately assign other employees to her position so that these tasks could be attended to, which caused those employees to get behind on their assignments. To address Grievant's absentee issues, Respondent placed Grievant on a performance improvement plan and leave restrictions. Included in the restriction was the requirement that Grievant actually speak to her supervisor or next level supervisor when she called in, so that immediate coverage could be assigned to the receptionist position. Respondent argues that Grievant's repeated failure to follow those restrictions, as well as working outside of her regular work hours, constituted insubordination. All of these issues led to Respondent's decision to terminate Grievant's employment.

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).

Respondent gave Grievant specific instructions regarding two separate issues. First she was not to work beyond her normal work hours without specific approval of her

supervisor. The reason for this rule was so that the Respondent would not incur overtime expenses. Grievant did not deny that she disobeyed this directive on a regular basis. She maintained that she had to work additional hours to get her duties finished. Second, as part of the leave restrictions to address Grievant's absences, Respondent required Grievant to speak with her supervisor or a higher supervisor, when she was going to be absent rather than leave a voice-mail. Respondent noted that this was important because it allowed the supervisor to quickly arrange coverage for the Receptionist position before visitors and messages began to arrive. Respondent was able to prove that Grievant regularly ignored both of these directives even after Grievant had been warned both orally and in writing. Accordingly, Respondent proved that Grievant was insubordinate.

Grievant argues that she was on approved FMLA leave during many of her absences and continuing to require the leave restrictions during these periods improperly interfered with her right to utilize that leave. Because Respondent is a public employer which employees at least fifty employees at its work site, it is an employer covered under the FMLA and Grievant was an employee entitled to benefits under the Act. *See,* 29 U.S.C. § 2611(4)(A)(3); 29 C.F.R. § 825.108(d); *Fain v. Wayne County Auditor's Office*, 388 F.3d 257, 259 (7th Cir. 2004).

The FMLA permits an eligible employee to take up to 12 weeks of leave per year if the employee has a serious health condition that renders the employee unable to perform one or more of the essential functions of his or her job. 29 U.S.C. § 2612(a); 29 CFR 825.112(a). The Act further provides that employers may not "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the Act]." *Id.* §

2615(a)(1).

To prevail on a claim for FMLA interference, the employee must prove that: (1) he was eligible for FMLA protections; (2) her employer was covered by the FMLA; (3) she was entitled to leave under the FMLA; (4) she provided sufficient notice of his intent to take FMLA leave; and (5) her employer denied her FMLA benefits to which she was entitled. *Brown v. Auto. Components Holdings*, *LLC,* 622 F.3d 685, 689 (7th Cir. 2010); *Ridings*, 537 F.3d at 761. The first three elements are not in dispute. In fact, Grievant was granted continuous FMLA leave for the period of February 28, 20101 through April 18, 2011. Grievant gave her employer appropriate notice that she would be continuously absent during that period and Respondent required no further notification from her during that entire period.

Upon Grievant's return from that leave in April 2011, she was expected to continue to resume giving Respondent notice of her absences pursuant to her prior leave restrictions. These restrictions were the usual and customary notice requirements for employees who are subjected to a Performance Improvement Plan to address poor attendance issues. Grievant did not comply with those notice provisions even though she had been made aware of the expectations orally and in writing. Grievant submitted new DOP-L4 forms and DOP-L5 forms for the absences after April 18, 2011, and argues that she was applying for additional FMLA leave and that precluded Respondent from requiring that she comply with the notice requirements of her leave restrictions. On that point, Grievant is mistaken.

Employers can enforce call-off rules that require the reporting of absences prior to the start of shifts, or even two hours prior to the start of shifts, or that require the calling of a specific designated call-off number, absent unusual circumstances that prevent the

employee from complying. 29 CFR 825.303(c); 825.304(3). If an employee does not comply with the employer's usual notice and procedural requirements for reporting and requesting unforeseeable leave, and if no unusual circumstances justify the failure to comply, "FMLA-protected leave may be delayed or denied." 29 CFR 825.303(c). The Seventh Circuit Federal Court of Appeals noted:

> . . . the regulations explicitly provide that employers may require their employees to comply with their "usual and customary notice and procedural requirements" when requesting FMLA leave. *Id.* § 825.302(d). . . . We have previously held that an employee's failure to comply with his employer's internal leave policies and procedures is a sufficient ground for termination and forecloses an FMLA claim. *Righi v. SMC Corporation of America*, 632 F.3d 404 (7th Cir. 2011); (citing: *Brown*, 622 F.3d at 689-90; *Ridings*, 537 F.3d at 769 n.3, 771; *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706, 710 (7th Cir. 2002); *Gilliam*, 233 F.3d at 971).

Respondent proved by a preponderance of the evidence that Grievant failed to comply with the notice procedures that it had put in place to address her attendance issues. 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 the 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).

2. Since Grievant was a tenured employee in the state's classified service, the Respondent must also demonstrate that the 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 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).

4. 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.

5. Respondent proved by a preponderance of the evidence that Grievant repeatedly violated specific instructions related to her regular work hours and failed to follow the specific leave notice requirements set out in her leave restrictions, even though she had been reminded of these requirements orally and in writing. Accordingly, Respondent proved the charge of insubordination.

6. The Act further provides that employers may not "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the Act]." *Id.* § 2615(a)(1). To prevail on a claim for FMLA interference, the employee must prove that: (1) she was eligible for FMLA protections; (2) her employer was covered by the FMLA; (3) she was entitled to leave under the FMLA; (4) she provided sufficient notice of her intent to take FMLA leave; and (5) her employer denied her FMLA benefits to which she was entitled. *Brown v. Auto. Components Holdings*, *LLC,* 622 F.3d 685, 689 (7th Cir. 2010); *Ridings*, 537 F.3d at 761.

7. The federal regulations adopted to implement the FMLA provide that employers may require their employees to comply with their "usual and customary notice and procedural requirements" when requesting FMLA leave. *Id.* § 825.302(d). An employee's failure to comply with her employer's internal leave policies and procedures is a sufficient ground for termination and forecloses an FMLA claim. *Righi v. SMC Corporation of America*, 632 F.3d 404 (7th Cir. 2011); citing: *Brown*, 622 F.3d at 689-90; *Ridings*, 537 F.3d at 769 n.3, 771; *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706, 710 (7th Cir. 2002); *Gilliam*, 233 F.3d at 971.

8. Respondent proved by a preponderance of the evidence that Grievant failed to comply with the notice procedures that it had put in place to address her absentee issues and these notice requirements did not improperly interfere with Grievant's ability to receive leave under the FMLA .

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: JULY 24, 2012

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE