THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KANDI R. TOLER,
Grievant,

v. **DOCKET NO. 2012-0189-DHHR**

DEPARTMENT OF HEALTH & HUMAN RESOURCES,
WELCH COMMUNITY HOSPITAL,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Kandi R. Toler, on August 22, 2011, challenging her dismissal by Respondent, the Department of Health and Human Resources, from her position as a Nurse II at Welch Community Hospital. Grievant submitted a detailed statement of grievance which states the following:

> As of May 18, 2011 I was placed on medical leave of absence due to a medical illness. Due to this illness it was necessary for surgery in June. Since this I've had a total of 3 surgeries. I was placed on medical sick leave from May 18 – August 15, 2011. I was released to return back to work with no restrictions.
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> On August 4, 2011 I received a certified letter from the Department of Health and Human Resources. This letter informed me that I had not requested a medical leave of absence. I had submitted a physician's statement in support of my absence, but that was insufficient. I was informed that I had 15 days to respond to this matter. I was also directed to either return to work with a physician's statement certifying my period of incapacity. At this time I was under the care of Dr. Eells, and was unable to return to work due to the open procedure I had on July 27, 2011.
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> The evening of August 8, 2011 I received a certified letter that the decision had been made to dismiss me from my employment as a Nurse II at Welch Community Hospital due to job abandonment. This letter

> started (sic.) this would be effective August 24, 2011. I contacted the human resources on August 9, 2011, I was informed that it (sic.) "too late" that my letter of termination had been mailed this morning.
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> I feel that I have been singled out due to my absence at work. I was always instructed that if I had a current physician's statement that my job would be protected. I was unable to return to work on the 8th of August due to the open incision and Pen Rose Drain. I attempted to call Nursing Administration on the evening of the 8th, everyone had already left for the evening. The certified letters that I received simply stated that I had 15 days to dismissal from my position. The letters started (sic.) that they had taken extraordinary lengths to assist me. I feel that a simple phone call could've been placed to correct this situation. I've been employed at Welch Community for the past 5½ years, in this time I have been [a] dependable and reliable nurse for the emergency department. Their (sic.) advertising for available nursing positions. I need a job and they need dependable experienced nurses.

The relief sought by Grievant is "full time Nurse II employment."

An evidentiary hearing was held at level three before the undersigned Administrative Law Judge on June 12, 2012, in Beckley, West Virginia. Grievant appeared *pro se* and Respondent was represented by Assistant Attorney General Harry C. Bruner, Jr. This matter became mature for decision on July 5, 2012, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant began working as a Nurse II at Welch Community Hospital in December 2005. Her employment was essentially routine and uneventful until she developed a serious health condition in 2010 that involved two hospital stays and another period of time under a doctor's care. On three separate occasions, upon returning to work, Grievant, with assistance from her supervisor or co-workers, completed the required paperwork, and was granted a medical leave of absence for these three absences

covering May 28 through June 25, 2010, August 23 through September 9, 2010, and December 7 through December 8, 2010. *See* R Ex 1 at 3-18.

Grievant experienced further serious illness in 2011 which again caused her to exhaust all of her available leave by April 7, 2011. Consequently, on April 14, 2011, Traci Lester, Payroll Assistant for Welch Community Hospital, wrote to Grievant, and stated the following:

> The purpose of this letter is to inform you as of April 7, 2011 you have exhausted your annual, sick, and holiday leave. We will need a physician statement and leave without pay form filled out and returned to us. You will have 15 days from the date that you receive this notice to get the information needed, or you will be placed on unauthorized leave. If I may be of further assistance, please do not hesitate to call me . . . .

R Ex 2 at 1.

Thereafter, on April 28, 2011, Walter Garrett, Chief Executive Officer for Welch Community Hospital, notified Grievant of her situation as follows:

> For Payroll purposes, this letter is to notify you that you have been placed on *unauthorized leave status* from your position as a Nurse II in our Emergency Department beginning April 7, 2011 (after 5.76 hours) through April 11, 2011. You have been absent from work and have not requested either a Medical or Personal Leave Without Pay.
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> * * *

R Ex 2 at 5 (emphasis in original). Mr. Garrett sent similar letters on May 19, 2011, and July 29, 2011, advising Grievant that she had been placed in unauthorized leave status. R Ex 2 at 7 & 9. Each of these four letters were sent via certified mail and signed for by one of Grievant's family members. *See* R Ex 2 at 4, 6, 8 & 10.

For a substantial portion of the period of Grievant's unexcused absence between May 18, 2011, and her termination on August 8, 2011, Grievant was a patient in her

place of employment, Welch Community Hospital. Indeed, Grievant's immediate supervisor, Calvin Lucas, Emergency Room Manager, visited her in the hospital on multiple occasions during this time. However, Grievant never sought Mr. Lucas' assistance in completing her Leave of Absence Request, nor communicating with her superiors that she intended to return to work. Moreover, Mr. Lucas was never copied on the correspondence sent to Grievant by Ms. Lester and Mr. Garrett, so he was not cognizant of her situation in regard to actions of the hospital's administrators.[1]

In May 2011, after Grievant's leave had been exhausted, Ms. Lester also spoke with Grievant by telephone, requesting the required leave of absence documentation. Grievant told Ms. Lester that she had submitted the required forms to Mr. Lucas. However, when Ms. Lester followed up with Mr. Lucas, he advised her that he had not received any documents from Grievant. In his testimony at the Level 3 hearing, Mr. Lucas confirmed that he had not received any documentation from Grievant.

On August 4, 2011, CEO Garrett wrote to Grievant advising her that he intended to terminate her employment unless she provided a proper physician's statement covering the period of her absence not later than August 8, 2011. When Grievant did not timely respond to CEO Garrett's correspondence of August 4, 2011, Mr. Garrett concluded that Grievant had not complied with the agency's requirements for documenting her status, and issued a decision dated August 8, 2011, terminating her employment.

[1] Grievant called Mr. Lucas on his cell phone on August 9, 2011, to ask about the termination. Mr. Lucas was on vacation at that time and had no knowledge of the termination notice. In fact, there was no evidence that Mr. Lucas had any involvement in the Respondent's efforts to obtain Grievant's compliance with the employer's leave accounting policies.

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 West Virginia Department of Health and Human Resources as a Nurse II at Welch Community Hospital in Welch, West Virginia.

2. Grievant began her employment at Welch Community Hospital in December 2005. As a new employee, she received training regarding the Hospital's policies and procedures for taking leave, including how to obtain a medical leave of absence.

3. On three occasions in June, September, and December, 2010, Grievant requested and obtained a medical leave of absence due to illness. In two of these instances, Grievant was hospitalized, and in the third she was under a doctor's care. In all three instances, the required paperwork was completed after Grievant returned to work. *See* R Ex 1 at 3-18.

4. On April 14, 2011, Payroll Assistant Traci Lester wrote to Grievant to advise that she had exhausted her annual, sick and holiday leave, and that Grievant needed to provide a physician's statement and leave without pay form to avoid being placed in unauthorized leave status. Grievant was given fifteen (15) days from receipt of this correspondence to comply.

5. Grievant received the correspondence described in Finding of Fact Number 4 on or about April 15, 2011, via certified mail. Grievant did not provide the documentation Ms. Lester requested.

6. On April 28, 2011, CEO Walter Garrett wrote to Grievant advising her that she had been placed in unauthorized leave status, and reminding her that she had not requested Medical or Personal Leave Without Pay.

7. Grievant received the correspondence described in Finding of Fact Number 6 on or about May 3, 2011, via certified mail. Grievant did not respond to CEO Garrett's correspondence.

8. Grievant had temporarily returned to work at the time she received the correspondence described in Findings of Fact Numbers 4 and 6.

9. On May 19, 2011, CEO Garrett again notified Grievant that she had been placed on unauthorized leave status, and had not requested a leave of absence.

10. Grievant received the correspondence described in Finding of Fact Number 9 on or about May 26, 2011, via certified mail. Grievant did not respond to this correspondence.

11. On July 29, 2011, CEO Garrett wrote to Grievant yet again notifying her that she was on unauthorized leave, and had not requested a medical or personal leave of absence without pay.

12. Grievant received the correspondence described in Finding of Fact Number 11 on or about August 2, 2011, via certified mail. Grievant did not respond to this correspondence.

13. While Grievant was off work in 2011, Emergency Room Manager Calvin Lucas often worked in Grievant's place, sometimes had another employee work an

extra shift, or occasionally operated the Emergency Room short-handed on nursing staff, because there was no qualified employee to fill in for Grievant's shift.

14. On August 4, 2011, CEO Garrett sent a letter to Grievant via certified mail, notifying her of her potential termination, in pertinent part, as follows:

> This letter is to address your continuous absence since May 18, 2011. According to our records, you have been notified three times by certified mail, that you have been placed on unauthorized leave. You have exhausted all of your annual leave and sick leave and have <u>not requested a medical leave of absence</u>. You have submitted physician's statements in support of your absence; however it is insufficient for the purpose of granting continued leave of absence.
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> I believe we have been very tolerant of your situation and have gone to extraordinary lengths to assist you; however, I cannot tolerate your failure to report for work as scheduled or in the alternative adhere to the procedures for requesting a medical leave of absence without pay. You are, therefore, directed to either (*sic*) return to work with the position statement certifying your period of incapacity and any limitations/ restrictions on your ability to work according to the *Administrative Rule* no later than August 8, 2011.
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> Should you fail to follow this directive, I will conclude you have abandoned your position and in such case, this letter will serve as a 15 calendar day notice of your dismissal from your position effective, August 23, 2011. According to the provisions of W. Va. Code § 5-16-13(c), you may be eligible to continue insurance coverage for up to three months following your dismissal should you fail to return to work as directed. Additionally, after expiring any coverage granted by State law, the Federal Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 USC Sec. 1162, may provide for an additional period of coverage. You should contact the Public Employees Insurance Agency at (304) 558-7850 for specific information concerning eligibility, coverage, and premium payment.
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> You may respond to the matters of this letter in writing or in person, provided you do so within fifteen (15) calendar days of the date of this letter. For any appeal rights you may have, please refer to West Virginia Code, Chapter 6C-2-1 *et seq*., West Virginia Public Employees Grievance Procedure. Your appeal must be filed within 15 working days (Monday through Friday excluding official holidays and other days in which the

> office is legally closed by the Chief Administrator as outlined by the statute) from the effective date of this action. . . . .

R Ex. 2, at 11-12 (emphasis in original).

15. The United States Postal Service delivered notice of certified mail for the correspondence described in Finding of Fact Number 14 at 9:38 AM on August 5, 2011. Grievant was released from Welch Community Hospital on August 8, 2011, and picked up the correspondence described in Finding of Fact Number 14 at 4:02 PM on August 8, 2011.

16. After receiving the proposed termination notice on August 8, 2011, Grievant contacted personnel in the Emergency Room at Welch Community Hospital after normal working hours. None of the employees she spoke with had any knowledge of the termination letter, nor did these employees have any authority to respond to her concerns.

17. Based upon Grievant's failure to return to work or provide the required documentation, CEO Garrett concluded that Grievant no longer wished to work at Welch Community Hospital and decided to terminate her employment, dispatching a letter dated August 8, 2011, mailed via certified mail on August 9, 2011, advising grievant of his decision, in pertinent part, as follows:

> The purpose of this letter is to inform you of my decision to dismiss you from your employment as a Nurse 2 with the West Virginia Department of Health and Human Resources, Welch Community Hospital. According to our records, you have been off payroll since May 18, 2011, after using 2.95 hours of annual leave and have not requested a medical or personal leave of absence. As a consequence of your failure to contact our office since May 18, 2011 you are being dismissed from employment with the Department of Health and Human Resources due to job abandonment, effective August 24, 2011. You were mailed a certified

> letter August 4, 2011 explaining that you were to report to work on August 8, 2011. As of this date we have not heard from you.
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> This action is in compliance with section 12.2 (c) of the Division of Personnel Administrative Rule and provides for the required fifteen (15) calendar day notice period. You will be paid for any accrued and unused annual leave available as of your last work day. You are not eligible for severance pay. Your final paycheck will be available for you to pick up and sign for within 72 hours of the date of your dismissal letter.
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> The West Virginia Division of Personnel Administrative Rule states:
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> *Section 12.2 (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. Under circumstances in which the term job abandonment becomes synonymous with the term resignation, an employee dismissed for job abandonment is not eligible for severance pay.*
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> * * *

R Ex 2 at 14-15 (emphasis in original).

18. On August 9, 2011, Grievant called Diana Blankenship, Welch Community Hospital Human Resources Director, in response to the termination letter dated August 4, 2011. Ms. Blankenship advised Grievant that Mr. Garrett had already issued his decision based upon Grievant's failure to respond by August 8.

19. Grievant's doctor gave her permission to return to work on August 15, 2011. Grievant did not provide this documentation to her employer by August 8, 2011.

20. Grievant's performance as a Nurse II was consistently rated as meets or exceeds expectations, and she was recognized as Employee of the Month on one occasion.

Discussion

Because this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *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 & Human Resources*, 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, 51, 380 S.E.2d 216, 218 (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 the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965).

The Administrative Rule of the West Virginia Division of Personnel, 143 C.S.R. 1 § 12.2(c), provides:

> 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. Under circumstances in which the term job abandonment becomes synonymous with the term resignation, an employee dismissed for job abandonment is not eligible for severance pay.

The West Virginia Department of Health and Human Resources Employee Handbook contains the following provision governing medical leaves of absence:

> Upon written application, an ill or injured permanent employee is eligible for a medical leave of absence without pay for a maximum of six months in a 12-month period. The employee, <u>unless injured on the job</u>, must make the request no later than 15 days from the day on which he or she exhausts all sick leave and must provide a completed physician's certification on the prescribed form. The request must be made for a specific period of time. If your doctor releases you, you may return to work before your medical leave of absence expires, or you may request an extension if your doctor determines it necessary.

R Ex 1 at 2 (emphasis in original).

The Respondent presented evidence that Grievant failed to request a medical leave of absence in compliance with established agency policy. Respondent also demonstrated that Grievant had received training on these procedures as part of her new employee orientation. *See* R Ex 1 at 1. Indeed, Grievant was given at least three notices that she was in unauthorized leave status. As an emergency room nurse, Grievant's regular on-site attendance was obviously a critical and essential job function. *See Samper v. Providence St. Vincent Med. Ctr*., 675 F.3d 1233, 1237-38 (9th Cir. 2012). Moreover, a

leave of absence provides the proper mechanism for maintaining a position for an employee who is unable to work for medical reasons, and has exhausted all available leave. *See* W. Va. Division of Personnel Administrative Rule, 143 C.S.R. 1 § 14.8(c). If the Respondent failed to properly account for Grievant's status, leaving her indefinitely in unauthorized leave status, it would be derelict in its responsibility to manage its workforce.

The Respondent did not contend that Grievant was not seriously ill or hospitalized. Grievant was fully aware of the procedure for obtaining medical leave without pay because, not only did she receive training on her employer's personnel policies, she obtained this status on three occasions in the previous year, and on each occasion, received a letter from Mr. Garrett approving her leave of absence which included a reminder stating her responsibility concerning obtaining a leave of absence without pay.

Grievant explained that she was traumatized by her medical problems, which deteriorated in a relatively short period of time, converting a healthy and productive nurse into a patient with life-threatening conditions that required a series of surgeries and procedures to resolve. It is not difficult to understand that on any given day, her employment status was not her primary concern. Nonetheless, given the extended time frame which her employer provided to obtain compliance, and the multiple certified letters sent to her residence, her failure to respond until she was notified of her impending dismissal is inexplicable. Indeed, there was no evidence that Grievant

sought assistance from her supervisor or anyone else at the hospital, until she received notice of her proposed termination.

Although Grievant became seriously ill and experienced various complications requiring surgeries and hospitalization, she did not assert or demonstrate that she was incapacitated to the point where it was physically impossible to comply with her employer's requirements. Indeed, she was in communication with her immediate supervisor who visited her in the hospital and was able to return to work intermittently until late July 2011.

The circumstances presented by this grievance are analogous to the situations in *Cook v. W. Va. Dep't of Health & Human Resources*, Docket No. 99-HHR-298 (No. 30, 1999), where the employee failed to provide evidence regarding if or when she could return to her previous job duties following an extended leave of absence, and *Hayden v. Dep't of Health & Human Resources*, Docket No. 98-HHR-133 (Nov. 30, 1999), where the employee failed to communicate with his employer following the expiration of a six-month medical leave of absence for a job-related injury. In each of these cases this Grievance Board concluded that the employer had established proper cause for dismissing a state civil servant. Further, the Grievant's failure to make any meaningful effort to comply with her employer's requirements to document her status over such an extended period of time, following multiple notifications, represents more than a trivial or inconsequential failure to comply with a technical requirement. *Cf. Adkins v. Dep't of Health & Human Resources*, Docket No. 2011-1392-DHHR (Dec. 22, 2011).

Grievant contends that her termination violated the Family and Medical Leave Act ("FMLA"), 20 U.S.C. § 2601-2654 (2012). However, at no time prior to her termination did Grievant properly notify her employer that she was requesting a leave of absence due to a serious health condition. The Respondent properly notified Grievant of the procedures to be followed for requesting leave under FMLA in each letter sent by Mr. Garrett approving her requests for a medical leave of absence in 2010. *See* R Ex 1 at 5-7, 10-12 & 16-18. In these circumstances, Grievant's reliance on the FMLA as a defense is misplaced. Respondent's requests to Grievant to resolve her absence without leave status were fully compliant with the FMLA.

In summary, although her employer could have decided to ignore Grievant's failure to comply with established directives due to extenuating circumstances, it was not obligated to do so. The Division of Personnel Administrative Rule gives the employer authority to verify that an employee's absence is due to *bona fide* medical reasons. Grievant was not terminated because she was not legitimately ill and unable to report to work, but because she failed to comply with her employer's reasonable requests, consistent with established written procedures, to properly obtain medical leave of absence status, despite being given multiple opportunities to do so. Indeed, she made no genuine effort to comply, until she was notified that her termination was imminent. Even then, she responded too late.

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. Non-probationary state employees in the classified service may only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965).

3. The West Virginia Division of Personnel Administrative Rule, 143 C.S.R. 1 § 12.2(c), authorizes an agency to terminate an employee who fails to follow established agency policy for accounting for an absence from employment.

4. Respondent proved by a preponderance of the evidence that Grievant engaged in job abandonment as that term is used in 143 C.S.R. 1 § 12.2(c). Thus, Respondent established a valid basis for terminating Grievant's employment.

Accordingly, this 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 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).

DATE: August 1, 2012

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LEWIS G. BREWER
Administrative Law Judge