# WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**PAMELA SCARBRO,**
**Grievant,**

**v.** **Docket No. 2012-0440-DHHR**

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

## DECISION

Pamela Scarbro, Grievant, was an Economic Service Worker employed by the Respondent, Department of Health and Human Resources ("DHHR") in the Bureau for Children and Families ("Bureau"). Ms. Scarbro filed a level three grievance form dated October 17, 2011, contesting the termination of her employment.[1] Grievant's basic allegation is that she has been discriminated against because of her medical condition and her service in the National Guard. Grievant seeks:

> To be reinstated as an employee in another location of the agency as I fear retaliation from not only managers and supervisors, but peers as well.

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on January 30, 2012. Grievant Scarbro appeared *pro se*, and Respondent DHHR was represented by Michael E. Bevers, Assistant Attorney General. At the conclusion of the hearing, the parties agreed to submit written Proposed Findings of Fact and Conclusions of Law, the last of which was received at the West

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[1] Because Grievant was contesting a dismissal, she was authorized to file directly at level three by W. VA. CODE § 6C-2-4(a) (4). A complete and detailed statement of the grievance statement was attached to the level three grievance form and is incorporated herein by reference.

Virginia Public Employees Grievance Board on February 27, 2012. Ths matter became mature for decision on that date.

## Synopsis

Grievant was dismissed from employment after a long history of absenteeism. Grievant argues that she had medical issues that caused her absences. She also argues that she was penalized for missing work due to her service in the Army National Guard. Respondent demonstrated that for the nine years that Grievant was employed, she was off for sick leave nearly thirty-five percent of the time and off the payroll because her leave had expired approximately seventeen percent of the time. Grievant's continued absences made it impossible for Respondent to rely upon her to perform her job on a consistent basis. Respondent proved the grounds for Grievant's dismissal by a preponderance of the evidence.

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, Pamela Scarbro, was employed by Respondent DHHR as an Economic Service Worker in the Bureau for Children and Families Office, in Kanawha County, West Virginia. She began working for the Respondent in August 2002.

2. Grievant has had a history of attendance problems during the course of her employment.

3. On her annual Employee Performance Appraisal ("EPA-3") for the period of September 1, 2006, through August 31, 2007, Grievant received an overall rating of "meets

expectations." However, Grievant was rated as "needs improvement" for the indicator "Employee is a dependable team member." Her supervisor included the following comment:

> Pam uses almost all of her leave time at all times and runs very close to going off payroll at times. Due to these things she is not a dependable member of the unit.[2]

4. Grievant received a second EPA-3 for the period of September 1, 2007 through August 31, 2008. On that performance evaluation, Grievant received an overall rating of "needs improvement." There are three performance indicators in the area of "Availability for Work" and Grievant was rated as "Needs Improvement" for all of these indicators. This EPA-3 was completed by a different supervisor than the prior evaluation and this supervisor made the following comment:

> Pam cannot be depended upon for planning purposes. Pam was off the payroll[3] multiple times during this rating period and has worked excess hours during the work week, then taking off sick in the later part of the week. Pam's monthly timesheet is reflective of this practice.[4]

5. Grievant was suspended for five working days by a letter dated February 24, 2009. Respondent's Exhibit 6. The letter was sent by James E. Kimbler, Regional Director for DHHR Region II. One of the reasons for this suspension was her "attendance problems dating back to March 2003." Respondent's Exhibit 6. Director Kimbler cited the following

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[2] Respondent's Exhibit 1, EPA-3 for September 2006 through August 2007.

[3] The term "off the payroll" is used to describe a situation where an employee is absent from work but does not have accumulated sick or annual leave to cover the absence.

[4] Respondent's Exhibit 2, EPA-3 signed by Grievant and her immediate supervisor on January 30, 2009.

actions related to Grievance attendance problems:

- Corrective Action Plan was instituted in March 2003;
- Written Reprimand issued March 10, 2004;
- Leave abuse/restricted leave letter issued April 5, 2005;
- Verbal reprimand dated June 6, 2007;
- Attendance problems noted in five probationary employment evaluations between March 5, 2003, and July 22, 2003;
- Commented upon in EPA-3s signed October 18, 2005 and January 30, 2009;
- Going off the payroll eight times for unauthorized leave and five times for medical leaves of absence since December 2002.

Director Kimbler appropriately noted that these issues did not include any absences due to Grievant's military service. Respondent's Exhibit 6.

6. In May 16, 2011, Economic Service Supervisor, Patricia Landers, sent an e-mail to Anita Adkins, who is the Community Services Manager ("CSM") for the Kanawha District where Grievant was employed. Ms. Landers had been Grievant's immediate supervisor since 2009. Ms. Landers noted the following statistics regarding Grievant's attendance since her employment in August 2002:

- There had been 12,050 hours of work available for Grievant;
- Grievant has worked 5,362 of those hours;
- Grievant has been absent 2,968 hours due to military leave;
- Grievant has used 4,166.35 hours of sick leave, of which 2,053.44 have been off the payroll because Grievant did not have accumulated leave;
- As of May 16, 2011, Grievant had been off the payroll 14 times.[5]

7. Grievant's absenteeism caused breakdowns in the unit team work and a lot of time for her supervisor monitoring her time. Respondent's Exhibit 13.

8. Grievant was granted Military Leave from April 25, 2011 until May 6, 2011. Grievant received pay for this leave. However, Grievant became ill and did not report for

[5] Respondent's Exhibit 13.

military duty during this time and did not inform the DHHR. CSM Atkins was informed of Grievant's failure to perform her military duty by Sergeant First Class ("SFC") Teresa Westfall, with the West Virginia Army National Guard.

9. Grievant's failure to report to military duty resulted in her being overpaid for three days of Military Leave she did not take and further medical leave she did not have. Grievant had been previously counseled about failing to call in when she would miss work.

10. Following this incident, CSM Adkins recommended to Director Kimbler that Grievant's employment be terminated because of her chronic failure to attend work.[6]

11. CSM Atkins held a predetermination conference with Grievant Scarbro on May 18, 2011. At that conference, CSM Atkins discussed Grievant's long history of absences and her failure to properly report to her employer when she was going to miss work. Grievant indicated that she had attempted to report to work but was unable to do so during her most recent illness. However, Grievant had notified the National Guard that she would not be able to report to duty during the same time period.

12. By letter dated June 15, 2011, CSM Adkins notified Grievant that her accrued sick and annual leave had been exhausted on May 19, 2011, and that her Medical Leave of Absence expired on May 24, 2011. CSM Adkins also informed Grievant that she had been off payroll since May 19, 2011, and would not be receiving a paycheck. With the letter, CSM Adkins included forms for Grievant and her physician to complete for Grievant to apply for a leave under the Federal Family, for a Medical Leave Act Medical Leave of Absence and an Application to Receive Donated Leave. She instructed Grievant that the

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[6] Respondent's Exhibit 10, e-mail from CSM Adkins to Director Kimbler with a series of additional e-mails attached.

forms must be returned on or before June 30, 2011, to be considered.[7] Respondent's Exhibit 19.

13. Grievant requested a Medical Leave of Absence on August 2, 2011. She anticipated that she would be released to return to work on September 1, 2011. Respondent's Exhibit 22.

14. CSM Adkins informed Grievant by letter dated August 11, 2011, advising her that the application and verification from the doctor had to be submitted no later than August 26, 2011. Grievant's application was received within the time period but no verification was received from the doctor prior to the deadline.[8]

15. By letter dated August 31, 2011, Grievant was notified by Director Kimbler that her employment would be terminated effective September 16, 2011. Director Kimbler cited Grievant's failure to provide verification for her Medical Leave of Absence in addition to her overall failure to report to work as scheduled as the basis for this action. Respondent's Exhibit 25.

**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. 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.*

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[7] The record is unclear as to whether Grievant submitted these forms.

[8] A form signed by the doctor was faxed to the DHHR on August 31, 2011, the same date the dismissal letter was sent to Grievant. The form was signed by the doctor on August 29, 2011, three days after the deadline for submitting the verification for the Leave of Absence.

*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 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 demonstrated that Grievant had a long history of attendance problems. These problems were noted when Grievant was a probationary employee and continued over her nine-year career. Grievant was placed on a corrective action plan and leave

restrictions in an effort to deal with these issues. Additionally, Grievant received a written reprimand and a five-day suspension for excessive absences. Ultimately, Grievant only worked slightly more than forty-four percent of the hours that were available to her over nine years.[9] During that period she went off the payroll at least fourteen times. Respondent could not rely upon Grievant to be a regular and productive member of her unit.

No evidence was presented indicating that Grievant was not ill when she missed work. However, past Grievance Board decisions have recognized that the fact an employee produces a physician's excuse is not, in and of itself, dispositive of the issue of whether an employee abused his leave. *Parker v. W. Va. Dep't of Health & Human Res.,* Docket No. 97-HHR-042B (Sept. 30, 1997); *Lynge v. Dep't of Health & Human Res.,* Docket No. 00-HHR-258 (Dec. 15, 2000). In this case, Grievant was absent for sick leave nearly thirty-five percent of the entire time she was employed[10] and she regularly went off the payroll because she did have sufficient leave to cover her absences. Respondent proved the charge of leave abuse by a preponderance of the evidence.

Grievant alleges that Respondent's real motive for disciplining her was that she was a female soldier in the West Virginia National Guard. At one point, CSM Adkins noted to Grievant that people at the Department were frustrated because Grievant would miss work due to illness but as soon as she was able to return to work Grievant would go to Military duty.[11] However, Director Kimbler made it clear that the corrective actions that were taken

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[9] This percentage is calculated from the figures provided in Respondent's Exhibit 10. *See* Finding of Fact 6, *supra.*

[10] *See* Footnote 9*, supra*.

[11] Respondent's Exhibit 8.

to deal with Grievant's absence issues had nothing to do with her military service.[12] Sufficient cause existed for the the termination of Grievant's employment and it was not proven that Grievant's military service contributed to that action. 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 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*,

[12] Respondent's Exhibit 6 and Finding of Fact 5, *supra.*

Docket No. 93-BOD-436 (Dec. 30, 1994).

3. The fact an employee produces a physician's excuse is not, in and of itself, dispositive of the issue of whether an employee abused his leave. *Parker v. W. Va. Dep't of Health & Human Res.,* Docket No. 97-HHR-042B (Sept. 30, 1997); *Lynge v. Dep't of Health & Human Res.,* Docket No. 00-HHR-258 (Dec. 15, 2000).

4. Respondent proved by a preponderance of the evidence that Grievant abused her leave to the extent that termination of her employment was justified.

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: JUNE 18, 2012**

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