THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KRISTIE MILLER,
Grievant,

v. **Docket No. 2020-1569-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WELCH COMMUNITY HOSPITAL,
Respondent.

DECISION

Grievant, Kristie Miller, filed two separate grievances against her employer, Respondent, Department of Health and Human Resources (DHHR), Welch Community Hospital (WCH). The first grievance is dated May 15, 2020, and states as follows: "[t]he Grievant was issued a disciplinary suspension without Just Cause." As relief sought, Grievant seeks "[t]o be made whole in every way, including, but not limited to, removal of disciplinary suspension from the (sic) any personnel or administrative files, as well as pay for lost time, including any applicable tenure and benefits accrual." This grievance was originally assigned docket number 2020-1446-DHHR. The second grievance is dated September 21, 2021, and states as follows: "[w]rongful termination." As relief sought, Grievant seeks "[e]mployment reinstated and mad[e] whole in every way." This grievance was assigned docket number 2022-0222-DHHR.

The two grievances were consolidated by Order entered December 2, 2021. A level three hearing was conducted via Zoom video conferencing on January 31, 2022, before the undersigned administrative law judge, who appeared from the Grievance Board's Charleston, West Virginia, office. All parties appeared via Zoom from separate locations. Grievant appeared telephonically via Zoom, and by her representative, Michael Hansen, UE Local 170, West Virginia Public Workers Union. Respondent appeared by

counsel, Steven R. Compton, Esquire, Deputy Attorney General. This matter became mature for decision on March 16, 2022, upon receipt of the last of the parties' post-hearing submissions.

Synopsis

Grievant was employed by Respondent as a Health Service Worker at Welch Community Hospital. Respondent dismissed Grievant for excessive absenteeism and unauthorized leave in September 2021. Grievant had a history of attendance issues and had received two disciplinary suspensions, but only grieved the one issued in May 2020, which is part of this consolidated grievance. Grievant does not deny her history of absenteeism, but asserts that her chronic medical condition caused her attendance issues. Grievant also alleges that Respondent violated her due process. Respondent proved its claims by a preponderance of the evidence and proved that the disciplinary actions taken were justified. Grievant's due process rights were not violated. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. At the times relevant herein, Grievant was employed by Respondent as a Health Service Worker at Welch Community Hospital. Grievant had been so employed since in or about April 2013. During the process of this grievance, Grievant has both personally, and through her representative, disclosed that she has a chronic medical condition, and raised the same as a defense to Respondent's disciplinary actions.[1]

[1] There is no need to identify Grievant's specific medication condition herein.

2. At the times relevant herein, Mark Simpson was the CEO of Welch Community Hospital. Crystal Waddell was its COO and Traci Hoback was its Director of Human Resources. Paula Horne served as the Long Term Care Manager. Ms. Horne supervised the health service workers and the nursing staff.

3. By letter dated December 11, 2019, Ms. Horne notified Grievant that she was issuing Grievant a written reprimand for poor attendance, in compliance with DHHR Policy Memorandum 2104, *Progressive Correction and Disciplinary Action*, stating that Grievant had eleven call-ins in the last four months, and cited the dates for each occurrence.[2] Ms. Horne further stated that "[Grievant] [is] reminded that there have been repeated attempts to correct your attendance. Prior to this, corrective action has included counseling by your supervisor[,] Rita Dameron[,] on numerous occasions and a meeting held on 4/30/19 with Mark Simpson, Crystal Waddell, Traci Hoback and Rita Dameron. Despite management interventions, you have consistently failed to meet reasonable expectations."

4. Grievant did not grieve the written reprimand issued by Ms. Horne on December 11, 2019.

5. In a separate letter, also dated December 11, 2019, Ms. Horne placed Grievant on an Attendance Improvement Plan, stating that Grievant was "counseled on numerous occasions concerning [Grievant's] unacceptable attendance history." Ms. Horne further stated, "[f]rom May 1, 2019[,] through November 30, 2019, you have been absent from work without prior authorization on 12 occasions during this working day period. I believe this demonstrates your continued unwillingness to adhere to established

[2] *See*, Respondent's Exhibit 1, December 11, 2019, letter.

rules concerning prior request of leave. . . ." Grievant did not file a grievance challenging the plan of improvement.

6. By letter dated April 30, 2020, Grievant was informed that she was being suspended without pay for three working days for unsatisfactory attendance, specifically, because she "called in 12 times, [was] late one time and left early one time, from February 11, 2020, through March 31, 2020."[3]

7. Grievant served her suspension without pay on May 12, 2020, through and including May 14, 2020. Grievant was to return to work on May 15, 2020. Grievant grieved this suspension and the same is part of this grievance.

8. By letter dated January 12, 2021, Ms. Horne issued Grievant a written reprimand for her failure to disclose that she was experiencing symptoms of COVID-19 during the employee screening process required for entry to the building.[4] Grievant did not grieve this written reprimand.

9. It appears that sometime between January 12, 2021, and February 25, 2021, Grievant was approved for intermittent FMLA leave at the frequency of four times in twelve months and a duration of up to four days per episode.[5]

10. By letter dated February 26, 2021, Jeri L. Nelson, Medical Leave Administrator, OHRM-Employee Management, informed Grievant that she, "may be using or needing more Family Medical Leave Act (FMLA) leave than [her] current FMLA approval allows." The letter goes on to state, in part, as follows:

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[3] *See*, Respondent's Exhibit 3, Letter dated April 30, 2020, "Notice of Disciplinary Suspension."
[4] *See*, Respondent's Exhibit 12, January 12, 2021, "Notice of Written Reprimand."
[5] *See* Respondent's Exhibit 6, February 26, 2021, letter.

> [y]ou were approved for intermittent FMLA from November 27, 2020 to May 27, 2021 at a *frequency* of **4 times in 12 months** and a *duration* of **up to 4 days per episode.**
>
> A review of your timecard shows that you have only worked 9 days in the approximately 3 months since November 27, 2020. Multiple reasons are given for your absences; however, you have used 11 days if FMLA leave on 5 separate occasions, which is in excess of what your physician anticipated you would require. Because your need for intermittent FMLA leave appears to be higher than anticipated, it has become necessary for you to provide additional documentation of your FMLA needs. . .
>
> Based upon the reasons stated on your timecard, your absences may also be related to your care of a family member with a serious medical condition. You have not been approved for FMLA leave related to the serious medical condition of a family member at this time. . .
>
> Please note that frequent absences which are not supported by FMLA may be cause for disciplinary action. When using FMLA leave, remember to follow regular call-in procedures and inform your supervisor that you are using FMLA leave time. If your absence is not due to an FMLA-qualifying reason, submit any requested doctor's excuses to your supervisor immediately upon your return.
>
> *Please be advised: Once a leave of absence has been taken for a qualifying, approved, FMLA purpose, the leave will be "tracked" or "counted against" your entitlement of 480 hours within the approved 12-month period. Although supervisors may allow an employee to "make up" work hours missed and accrued leave that is taken, this action does not "credit" or "add" back time to the to the FMLA entitlement.* (emphasis in original).[6]

11. In the February 26, 2021, letter, Ms. Nelson also explained that additional information, documents, and completed forms were needed from Grievant, and Ms. Nelson set deadline dates for their submission. Ms. Nelson set March 7, 2021, as the deadline for Grievant to submit the DOP-L5 completed by her medical provider, along with supporting

[6] *See*, Respondent's Exhibit 6, February 26, 2021, letter. This is an exact quote from this letter. The original letter includes both bold typeface and italicized typeface as shown here.

medical documents, and a copy of Grievant's absence history. Ms. Nelson noted that "[u]pdated medical documentation will permit additional leave to be approved. Please note that taking leave in excess of your FMLA approval may not be protected from disciplinary action." Grievant's deadline to submit the required, completed forms to apply for FMLA for the care of a family member was March 15, 2021. Ms. Nelson enclosed with this letter, a blank DOP-L5 form, for Grievant's FMLA leave, and blank DOP-L4 and DOP-L6 forms if Grievant wanted to apply for FMLA leave to care for a family member.

12. On March 8, 2021, Ms. Horne met with Grievant about her attendance and placed her on another Attendance Improvement Plan. Ms. Horne informed Grievant by letter the same date, that her attendance history was unacceptable, noting that between November 1, 2020, through February 26, 2021, Grievant had been absent from work without prior authorization on fifteen occasions. Ms. Horne further stated that Grievant had been verbally counseled on "numerous occasions," and that despite management intervention, "[Grievant's] absences from work are occurring so frequently, [Grievant'] attendance cannot be relied on[,] and [Grievant's] services are of greatly reduced value." Again, Ms. Horne set out seven enumerated paragraphs in which she detailed the requirements of the improvement plan. Ms. Horne noted that, "[Grievant's] cooperation in this Attendance Improvement Plan is essential; a failure to comply with this request may result in disciplinary action.[7]

13. In March 2021, Grievant submitted new medical documentation and required forms requesting increases in intermittent FMLA and medical leave of absence (MLOA) leave for the period of November 27, 2020 through May 27, 2021. Respondent

[7] *See*, Respondent Exhibit 4, March 8, 2021, letter.

amended Grievant's earlier request and approved the same. Grievant's paid/unpaid FMLA and unpaid MLOA intermittent leave was approved for the period of January 8, 2021, and March 4, 2021, at the duration of eight hours per episode, and the frequency of three times per week. Also, Grievant's request for intermittent leave for "flair ups" was approved from March 5, 2021, until May 27, 2021, two days per episode, two times per week. Grievant was informed of this by letter dated March 19, 2021.[8]

14. Respondent informed Grievant that MLOA leave would be counted concurrently with FMLA leave when Grievant's paid leave is exhausted and Grievant goes off payroll, and that it was Grievant's responsibility to re-submit a doctor's excuse or a new DOP L-5 to extend her FMLA/MLOA leave beyond May 27, 2021.[9]

15. Grievant failed to provide the proper documentation to extend her leave beyond May 27, 2021. Therefore, it expired.

16. Ms. Hoback sent Grievant a letter dated June 7, 2021, informing Grievant that her paid/unpaid FMLA and her unpaid MLOA intermittent leave for flareups ended on May 27, 2021. Ms. Hoback enclosed a DOP L-5 for Grievant's doctor to complete and submit to Human Resources. Despite this, Grievant failed to submit the required forms and documentation as directed.

17. Grievant called-in sick eleven times from March 15, 2021, to June 1, 2021. Many of Grievant's call-ins to work were for "unspecified illnesses," illnesses unrelated to her recognized medical condition, sick family members, and for at least one medical appointment.[10] Several of these call-ins occurred either before or after a date on which

[8] *See*, Respondent's Exhibit 7, March 19, 2021, letter.
[9] *See*, Respondent's Exhibit 7, March 19, 2021, letter.
[10] *See*, Respondent's Exhibit 5, June 16, 2021, letter.

Grievant was already scheduled to be off work, thereby increasing Grievant's number of consecutive days-off.

18. By letter dated June 16, 2021, Grievant was suspended without pay for five working days for poor attendance, in violation of DHHR Policy Memorandum 2107: "Absenteeism and Leave Abuse." Grievant served his suspension from July 12, 2021, through and including July 16, 2021. Grievant did not grieve this suspension.

19. From June 2021 through August 2021, Grievant continued to frequently call-in sick to work. Again, Grievant cited her recognized medical condition for FMLA/MLOA leave, as well as various unrelated illnesses and family illnesses. However, FMLA/MLOA leave had not been approved for that time period because Grievant failed to provide Respondent with the required paperwork and documentation. As before, several call-ins occurred either before or after a date on which Grievant was already scheduled to be off, thereby increasing Grievant's number of consecutive days-off. Grievant had doctor's excuses for a few of these absences, but the excuses stated no reasons for the absences.

20. In August 2021, Respondent sent Grievant notice of a predetermination conference scheduled for September 2, 2021.

21. The day before the predetermination conference, Grievant submitted completed FMLA forms that had been signed by her doctor on August 30, 2021. At that point, Grievant was seeking FMLA/MLOA leave retroactive to May 1, 2021, and through December 31, 2021. The duration and frequency of her incapacity was listed as two days per episode, two days per week.

22. Respondent did not approve Grievant's August 30, 2021, leave request. However, even if Respondent had, the duration of two days per episode, two days per week would not cover all of Grievant's absences between May and August 2021.

23. By letter dated September 7, 2021, Respondent informed Grievant that she was being dismissed from employment, effective September 22, 2021, for "unapproved absenteeism." This letter documented Grievant's absences from February 2021 to August 29, 2021, and noted that of the fifty-seven shifts Grievant had been scheduled to work, she worked only nineteen.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Respondent asserts that it properly suspended, and subsequently terminated, Grievant's employment for excessive absenteeism and unauthorized leave usage which rendered Grievant's service unreliable and caused her coworkers and the facility hardship. Grievant does not dispute her absences, as documented by Respondent. Grievant instead argues that she did the best she could to manage her medical condition and that she deserved a second chance after the September 2, 2021, predetermination conference. Grievant also asserts that dismissal was an excessive penalty and violated

"her codified right of liberty/property interest out of a constitutional entitlement to continued, uninterrupted employment, and that [Respondent] has failed to show good cause for dismissal."

Permanent state employees who are in the classified service can only be dismissed "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. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

The evidence presented establishes that Grievant had serious attendance problems for about two years before Respondent dismissed her from employment. Grievant does not dispute Respondent's attendance records. Throughout this time, Grievant called-in sick multiple times each month. A "call-in" is an unscheduled absence, meaning it was not considered when management scheduled employees' work shifts. When an employee habitually calls-in sick, another employee, or other employees, have to cover the work originally scheduled for the sick employee. Call-ins act as last-minute changes in the schedule. This is burdensome on employees and management, and it has the potential to disrupt patient care. Respondent counseled Grievant about

absenteeism many times, but her excessive absenteeism continued. Respondent placed Grievant on improvement plans, but she never successfully completed any of them. Respondent implemented progressive discipline in an effort to improve Grievant's attendance, but it failed as well. Respondent issued Grievant a verbal warning, more than one written reprimand, and two separate disciplinary suspensions for excessive absenteeism, but nothing stopped Grievant's excessive absenteeism.

Grievant has a recognized medical condition for which she requested and was approved for intermittent FMLA and MLOA leave. Respondent assisted Grievant in applying for the same. However, many of Grievant's absences had nothing to do with her FMLA medical condition. Grievant called-in sick citing family members' illnesses, as well as her own specified and unspecified illnesses, which were unrelated to her recognized medical condition. Grievant even called-in sick for a scheduled medical appointment. On one occasion, Grievant failed to show up for work entirely without notifying Respondent at all. Grievant consistently failed to submit the required FMLA/MLOA documentation to Respondent when it was due, despite Respondent notifying Grievant in writing of the documentation needed and due dates. Grievant chose to ignore Respondent. Grievant's failure to submit the necessary documentation resulted in her approved FMLA/MLOA leave expiring in May 2021. From June 2021 through August 2021, Grievant continued to call-in sick for various reasons. On several occasions, Grievant called-in citing FMLA/MLOA, but she had no such leave available because she had not submitted any of the required documents.

West Virginia DHHR Policy Memorandum 2107, "Absenteeism and Leave Abuse," defines "absenteeism," as the "repeated failure to be present at work as scheduled."

"Leave Abuse" is defined as the "improper use of leave, whether paid or unpaid, regardless of the nature of the impropriety, such as the reasons given for leave use, the manner in which leave is requested, the frequency with which leave is taken, etc. . . ."[11] The Division of Personnel Administrative Rule 14.5, "Suspected Misuse of Leave" states, in part, as follows: "[m]isuse of leave may include, but is not limited to, frequent use of sick leave rendering the employee's services undependable, requesting sick leave for days when annual leave was previously denied, and requesting unplanned leave in connection with scheduled days off. The appointing authority shall give the employee prior written notice of the requirement for appropriate substantiation. *See* W.VA. CODE ST. R. § 143-1-4.5 (2016). DHHR Policy Memorandum 2107 also identifies "leave patterns" that may signal misuse of leave such as, when absences appear to be tied, or hooked, to scheduled days off, holidays, weekends, periods of annual leave, and/or similar planned absences. Misuse of leave can result in disciplinary action. *Id.*

Respondent has proved by a preponderance of the evidence that given Grievant's habitual absenteeism, Respondent could no longer rely on Grievant's service at Welch Community Hospital. While Grievant was approved for and used FMLA and/or MLOA leave to cover some of her absences, most of her absences were not related to FMLA or MLOA at all. Also, many of Grievant's call-ins were tied to her already-scheduled time off, which resulted in Grievant having additional, consecutive days off work. This behavior suggests leave abuse pursuant to the Administrative Rule. Further, FMLA leave is not free time off, and FMLA does not grant an employee more paid time off than he or she has earned. Grievant knew that her FMLA leave expired on May 27, 2021. Nonetheless,

[11] *See*, Respondent's Exhibit 10, DHHR Policy Memorandum 2107.

she continued to assert FMLA leave when she called-in sick in June, July, and August 2021. It was only after Grievant was notified about the predetermination conference on September 2, 2021, and that Respondent was considering her dismissal, that Grievant submitted the required documents. Those documents were signed by her doctor on August 30, 2021, and therein, Grievant was attempting to request retroactive FMLA/MLOA leave from May 1, 2021, through December 31, 2021. Given the circumstances, Respondent did not approve this request, nor was approval required.

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts

is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

"The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977), *overruled in part on other grounds by W. Va. Dep't of Educ. v. McGraw,* 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). "A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment." *Id*. at Syl. Pt. 4. "'The constitutional guarantee of procedural due process requires "'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). "The pretermination hearing does not need to be elaborate or constitute a full evidentiary hearing. The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Id. at 732,* 356 S.E.2d at 486.

Respondent has tried for years to stop Grievant's chronic absenteeism to no avail. Respondent has tried verbal counseling, or coaching, verbal reprimands, plans of improvement, written reprimands, and disciplinary suspensions, but Grievant's absenteeism continued. Grievant grieved one of the suspensions, but grieved nothing else until her dismissal. "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff'd*, Monongalia Cnty. Cir. Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), *appeal refused*, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000).

Respondent has proved by a preponderance of the evidence that Grievant's excessive absenteeism, excluding her absences related to her approved FMLA/MLOA leave, violated provisions of the Administrative Rule and DHHR policy and rendered Grievant unreliable to perform her duties. Grievant's absenteeism caused her coworkers, Respondent, and the facility undue hardship that had the potential to disrupt patient care. Respondent proved by a preponderance of the evidence that Grievant's excessive absenteeism constituted good cause, thereby justifying Grievant's May 2020 suspension and her dismissal. As Grievant points out, Respondent was not required to dismiss her from employment. However, Respondent's decision to dismiss Grievant from

employment was not unreasonable, especially as progressive discipline up to, and including, two unpaid suspensions did not curtail Grievant's excessive absenteeism. Lastly, Respondent followed the proper procedure in dismissing Grievant from employment and gave Grievant notice and an opportunity to be heard. Accordingly, Respondent did not violate Grievant's due process. Therefore, this grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. Permanent state employees who are in the classified service can only be dismissed "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. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or

the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

3. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

4. "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd*

Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

5. "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff'd*, Monongalia Cnty. Cir. Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), *appeal refused*, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000).

6. Respondent proved by a preponderance of the evidence that Grievant's excessive absenteeism constituted good cause, thereby justifying Grievant's May 2020 suspension and, ultimately, her dismissal.

7. Respondent's decision to dismiss Grievant from employment did not violate Grievant's due process.

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 civil action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: May 4, 2022.

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Carrie H. LeFevre
Administrative Law Judge