BEFORE THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RUSSELL THIRION,
Grievant,

v. **DOCKET NO. 2023-0097-DHHR**

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

DECISION

Grievant, Russell Thirion was employed as a Morgue Technician with Respondent, Department of Health and Human Resources ("DHHR"), Bureau for Public Health ("BPH"), Office of Chief Medical Examiner ("OCME"). On August 3, 2022, Grievant filed a grievance against Respondent, stating: "I was dismissed for violation of WV Code R. 143-1-14.6, unauthorized leave; with a notice for job abandonment. Specifically for the dates of July 12th, 2022, thru July 15th, 2022, for failure to report or notify supervisor of absence." As relief, Grievant requested to "[r]eturn to full employment, with full benefits with back pay for any lost wages."

Grievant filed directly to level three of the grievance process.[1] On October 11, 2022, a level three hearing was held before the West Virginia Public Employees Grievance Board's Administrative Law Judge Carrie H. LeFevre at the Grievance Board's Charleston, West Virginia office.[2] Grievant appeared in person and *pro se*[3], but his father,

[1] West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.
[2] The grievance was reassigned to the undersigned following Judge LeFevre's resignation.
[3] For one's own behalf. Black's Law Dictionary 1221 (6th ed. 1990).

Tim Thirion, appeared as “moral support.” Respondent appeared by Annette Brown, and by counsel, Heather Olcott, Assistant Attorney General.

On October 21, 2022, Respondent filed a *Motion to Reopen the Record* to obtain discovery for the matter of mitigation of damages regarding Grievant’s current employment status. On November 10, 2022, a hearing was held at which Grievant admitted he was employed by Coastal Wealth Management at the time of the level three hearing. On January 9, 2023, Respondent’s motion was granted and set for an additional level three hearing for February 22, 2023. Per the order to reopen, Respondent was given leave to subpoena Grievant’s payroll records from Coastal Wealth Management to determine the date Grievant became employed. On February 22, 2023, a tele-conference hearing was convened, but Grievant failed to appear. On February 22, 2023, an order to show cause was entered ordering Grievant to show cause for his absence. On March 2, 2023, Grievant properly showed a series of unfortunate events occurred on February 21-22, 2023, and cause was found. On June 9, 2023, a final hearing on the motion was held before the undersigned at the Charleston Grievance Board office. Grievant appeared in person and *pro se*. Respondent appeared by Anette Brown and by counsel, Heather Olcott, Assistant Attorney General. This matter became mature for decision on July 17, 2023, upon the receipt of the Respondent’s proposed findings of fact and conclusions of law. Grievant elected not to file proposed findings of fact and conclusions of law.

Synopsis

Grievant was dismissed from employment as a Morgue Technician for job abandonment. Grievant was aware missing three consecutive days without approval or a valid doctor’s note was in violation of DHHR’s absenteeism policy and could result in his

termination. By knowingly failing to follow DHHR's leave policy by failing to report to work for more than three consecutive days without approval or a doctor's excuse demonstrates Grievant abandoned his job. Respondent established good cause for Grievant's dismissal for job abandonment. Accordingly, the grievance is denied.

The following Findings of Fact are based on the record of this case.

Findings of Fact

1. Grievant was employed as a Morgue Technician with the DHHR/BPH/OCME, Kanawha County office.

2. On July 6, 7, and 8, 2022, Grievant failed to report to work and failed to contact his supervisor at the OCME to request leave for his absences.

3. Annette Brown, Personnel and Customer Service Supervisor, counseled Grievant on July 11, 2022, for Grievant's failure to report to work and failure to contact his supervisor, Matt Izzo, Chief Administrator for the Office of the Chief Medical Examiner, to request leave for his absences. Ms. Brown warned Grievant that missing three or more days in a row was grounds for termination, to which Grievant responded, "I won't let y'all do that to me." (Respondent's Ex. 1).

4. Grievant had previously been counseled regarding who to contact if Grievant needed to be absent from work before the July 11, 2022, meeting with Ms. Brown. Due to being counseled on multiple occasions, Grievant was aware of DHHR's policy on absenteeism. Grievant was aware that being absent three or more days in a row without notice, approval, or a doctor's excuse was grounds for termination for job abandonment.

5. On July 11, 2022, Ms. Brown provided Grievant a letter stating his absences on July 6, 7, and 8, 2022, were being charged as unauthorized leave due to being absent without authorization pursuant to DHHR's policy on absenteeism. (Joint Ex. 2).

6. DHHR Policy 2107 concerning absenteeism and leave abuse explains taking unauthorized leave is misconduct. (Joint Ex. 3 at 5). DHHR's policy states any sick leave from work must be requested in advance for any medical appointments. (Joint Ex. 3 at 3). DHHR's policy states that if an employee misses three consecutive days, the employee must submit a doctor's excuse in support of the entire absence immediately upon his return to work. (Joint Ex. 3 at 4). DHHR's policy states a doctor's excuse does not support an absence unless it covers the dates the employee was absent. (Joint Ex. 3 at 4). DHHR's policy states that when sick leave is used for a medical appointment, the leave request is limited to the time required for the appointment itself, plus reasonable travel time. (Joint Ex. 3 at 4).

7. On July 12, 13, 14, and 15, 2022, Grievant failed to report to work, failed to communicate with his supervisor to request leave to be absent, and subsequently failed to produce a doctor's note for each day Grievant was absent from work.

8. Grievant's supervisor, Mr. Izzo, did not receive any kind of communication from Grievant requesting to be absent on July 12, 13, 14, or 15, 2022. It was typical that employees at the OCME contacted Mr. Izzo to give him notice of unexpected absences and Grievant was expected to follow the leave policy as all other employees. Mr. Izzo's usual work routine is to plan job duties for employees a week or two in advance for employees working in the morgue. Grievant's unplanned absences made planning in advance for morgue employees difficult and caused tension for other morgue employees.

9. Grievant's prior supervisor addressed attendance issues with Grievant. Grievant's Employee Performance Appraisals (EPAs) from 2019 through 2020 reveal Grievant had been given multiple warnings regarding being absent from his employment.

10. On July 15, 2022, Commissioner Ayne Amjad, MD, sent a letter to Grievant informing Grievant that he was being terminated for job abandonment due to Grievant's failure to report to work and failure to communicate with his supervisor to request leave to be absent for four consecutive unapproved absences on July 12-15, 2022.

11. At the level three hearing, Grievant produced copies of personal "Hotmail" emails he alleged he sent to Mr. Izzo on July 12, 2022, and July 13, 2022, stating he would not be at work. (Grievant's Exs. 3, 4). Grievant had never communicated with Mr. Izzo using his Hotmail email before and Grievant did not attempt to contact Mr. Izzo in any other way. Mr. Izzo had never seen Grievant's emails before the level three hearing. At the level three hearing, Mr. Izzo searched for the Grievant's emails and could not locate any emails from the Grievant. It is more likely than not, Grievant created false emails to give the appearance he had given notice of and intent to be absent to his supervisor, Mr. Izzo, as required per DHHR's leave policy.

12. At the level three hearing, Grievant produced a copy of an alleged email to Ms. Brown on July 14, 2022, with an attached copy of a doctor's excuse. The doctor's excuse revealed Grievant had an appointment on July 14, 2022, but could return to work the following day, July 15, 2022. (Grievant's Ex. 5). Ms. Brown had never seen the alleged email before the level three hearing and was unaware Grievant would be absent from work on June 14, 2022.

13. Grievant failed to appear for work on the morning of July 15, 2022, despite the doctor's excuse saying Grievant could return to work on June 15, 2022. Grievant failed to provide notice or a doctor's excuse to Matt Izzo or Ms. Brown for being absent from work on July 15, 2022.

14. Grievant previously declared he had no other employment since his termination from Respondent. Respondent's counsel discovered that Grievant was currently listed as the Operations Director at Coastal Wealth Management. Respondent presented Grievant's payroll documentation from Coastal Wealth Management which listed Grievant being employed since July 29, 2022. Grievant has continued to receive paychecks from his employer, Coastal Wealth Management, every two weeks through the end of December 2022. (Respondent's Ex. 1). Thus, Grievant has in fact been continuously employed since his termination from Respondent.

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*. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2022).

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. § 156-1-3 (2022).* "Although it is true that dismissal is inappropriate when the employee's violation is found to be merely a technical one, it is also true that seriously wrongful conduct can lead to dismissal even if it is not a technical violation of any statute. . . The test is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public." *W. Va. Dep't of Corr. v. Lemasters*, 173 W. Va. 159, 162, 313 S.E.2d 436, 439 (1984). "'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 term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. Parkways Econ. Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991) *(citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax &*

Revenue/Ins. Comm'n, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res*., Docket No. 2011-0890-DHHR (Jan. 24, 2012).

The Division of Personnels ("DOP") administrative rule allows an appointing authority to dismiss an employee for job abandonment who has an unexcused absence from work for more than three (3) consecutive days. W. VA. CODE ST. R. § 143-1-12.2.c. Rule 12.2.c particularly states:

> An appointing authority may dismiss an employee for job abandonment who is absent from work for more than three (3) consecutive workdays or scheduled shifts without notice to the appointing authority of the reason for the absence or approval for the absence as required by established agency policy…. job abandonment is synonymous with the term resignation, a predetermination conference is not required and an employee dismissed for job abandonment is not eligible for severance pay.

Respondent's Policy 2107 follows DOP's rule regarding absenteeism and states any sick leave from work must be requested in advance for any medical appointments. DHHR's absenteeism policy also states that if an employee misses three consecutive days, the employee must submit a doctor's excuse "in support of the entire absence" immediately upon his return to work. DHHR's absenteeism policy further states a doctor's excuse does not support an absence unless it covers the dates the employee was absent.

Grievant failed to report to work, failed to communicate with his supervisor to request leave to be absent for four consequent days, and failed to produce a doctor's excuse for each day missed. Particularly, Grievant failed to request time off or report to work July 12, 13, 14, and 15, 2022. Grievant argues he sent his supervisor, Mr. Izzo, a "Hotmail" email on July 12, 2022, and July 13, 2022, informing Mr. Izzo he was not going to be at work. Mr. Izzo strictly denies ever receiving any email from Grievant. As the

relevant facts of Grievant's ability to give proper notice for being absent for more than three consecutive days are in dispute, credibility determinations are necessary.

In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.,* Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id., Burchell v. Bd. of Trustees, Marshall Univ*., Docket No. 97-BOT-011 (Aug. 29, 1997).

Mr. Izzo and Ms. Brown's demeanors were genuine and calm for the most part. However, both Mr. Izzo and Ms. Brown looked legitimately shocked and appalled when Grievant presented his alleged emails. Mr. Izzo was sincere that he had never received any email from Grievant and even checked his email's spam folder in search of Grievant's alleged email. There was no evidence of bias or interest from Mr. Izzo or Ms. Brown. Mr. Izzo and Ms. Brown consistently testified that Grievant was aware of how to properly give notice of leave due to being counseled on how to give notice when he was going to be

absent. Neither Mr. Izzo nor Ms. Brown had a reputation for dishonesty, and both gave believable testimony at the level three hearing. Both Mr. Izzo and Ms. Brown's attitude toward the action were genuine when they expressed all employees are required to follow the same rules regarding the leave policy, including Grievant.

Grievant's demeanor was appropriate; however, it was calculated and manipulative. Grievant repeatedly attempted to manipulate the evidence regarding DHHR's absenteeism policy and his current employment. When questioned about his paystub showing his current employment, Grievant absolutely refused to state he was in fact employed. Grievant was aware of DHHR's absenteeism policy but attempted to argue that he personally did not have to follow the policy. Grievant was consistently manipulative and dishonest in his answers. Grievant filed his grievance seeking damages and was thus motivated in his attempt to manipulate the truth in his favor. It is more likely than not that Grievant's Hotmail emails were falsely created in an attempt to manipulate the evidence.

Grievant was repeatedly not credible throughout the grievance process. Grievant's statement that he was improperly terminated because he emailed notice of his absences to his employer on July 12, 13, and 14, 2022, is not credible. It is more likely that Grievant created false emails to manipulate evidence and was thus, untruthful. Grievant repeatedly demonstrated his lack of credibility by dodging questions, attempting to twist written policies to fit his needs, and making false statements about his current employment status.

Respondent presented sufficient credible evidence to establish that Grievant was absent from his job on July 12, 13, 14, and 15, 2022, without approval, without prior notice, and without sufficient doctor's excuse for the days absent. Mr. Izzo and Ms. Brown were

credible by showing Grievant had been counseled for work absenteeism. Grievant had been previously counseled, warned and evaluated for failing to comply with Respondent's attendance policy. Grievant was aware of how to properly request time off work. Grievant simply did not give prior notice and was absent for four more consecutive days without a doctor's excuse. Respondent met its burden to establish good cause for Grievant's dismissal for job abandonment pursuant to DOP's administrative rule. Accordingly, the grievance should be 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. § 156-1-3 (2022).*

3. "Although it is true that dismissal is inappropriate when the employee's violation is found to be merely a technical one, it is also true that seriously wrongful conduct can lead to dismissal even if it is not a technical violation of any statute. . . The test is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public." *W. Va. Dep't of Corr. v. Lemasters*, 173 W. Va. 159, 162, 313 S.E.2d 436, 439 (1984). "'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*).

4. The Division of Personnel (DOP) administrative rule 12.2.c allows an appointing authority to dismiss an employee for job abandonment who has an unexcused absence from work for more than three (3) consecutive days. (Division of Personnel (DOP) Administrative Rule, W. Va. Code R. §143-1-12.2.c.).

5. DOP rule 12.2.c particularly states:

> An appointing authority may dismiss an employee for job abandonment who is absent from work for more than three (3) consecutive workdays or scheduled shifts without notice to the appointing authority of the reason for the absence or approval for the absence as required by established agency policy…. job abandonment is synonymous with the term resignation, a predetermination conference is not required and an employee dismissed for job abandonment is not eligible for severance pay.

6. Respondent met its burden to show it had good cause to terminate Grievant's employment due to Grievant abandoning his job.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.[4] Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: August 28, 2023

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Wes White
Administrative Law Judge

[4]On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.