THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES TOMBLIN,
Grievant,

v. **Docket No. 2024-0500-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, James Tomblin, is employed by Respondent, Department of Transportation, as a Transportation Worker 1. On January 24, 2024, Grievant filed this grievance directly to Level Three stating:

> I was wrongfully terminated the letter 15th said nothing about returning Back to work there are no additional Documents to provide nor Documents/Jan 2 I responded to the email providade [*sic*]. I spoke with Stephane my superviser at Dry Branch we pesased [*sic*] when to give my badge [and] key Back also supervisor Mike Danl at sissonville said I was not alowed on the premeses. He would contact me.

For relief, Grievant seeks to be "reinstated and all looses [*sic*]."

A Level Three hearing was held on June 6, 2024, before the undersigned Administrative Law Judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and was self-represented. Respondent appeared by Kathryn Hill and was represented by counsel, Jack E. Clark. This matter became mature for decision on July 19, 2024, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was initially employed by Respondent as a Transportation Worker 1 Laborer. After Grievant filed a "Request for Reasonable Accommodation" of physical

limitations that prevented him from performing his duties in that position, Respondent offered Grievant a six-month trial accommodation as a Transportation Division Supply Specialist. Soon thereafter, however, Grievant began missing work without documentation and was eventually terminated for job abandonment.

At the Level Three hearing, Respondent met its burden of proof by a preponderance of the evidence that Grievant was absent from work for more than three consecutive workdays without notice or approval, thus abandoning his job. Respondent's actions in terminating Grievant were in keeping with agency policy. Accordingly, the 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]

1. Grievant was initially employed by Respondent as a Transportation Worker 1.

2. At some point, Grievant was off work on a Workers' Compensation claim, but when that absence came to an end, he was not able to return to full duty. Grievant indicated that he wished to return to work in some capacity; so, he was sent the information packet to apply for an accommodation under the Americans with Disabilities Act ("ADA").

3. On March 6, 2023, Grievant submitted a "Request for Reasonable Accommodation" due to physical impairments that prevented him from safely working on uneven surfaces. He provided medical documentation from his doctor, who

[1] The Grievance Board notes that Grievant has objected to the authenticity of Respondent's Exhibits and to Respondent's proposed findings of fact, which, in part, inform the undersigned's Findings of Fact.

recommended permanent accommodation of not standing/working on steep hillsides, cutting brush, and weed eating.

4. Respondent agreed to provide Grievant "a temporary transitional return to work option over a six-month period on a trial basis in the alternative position of a Transportation Division Supply Specialist with MCS&T [Materials Control, Soils & Testing] Division." That temporary position was to be evaluated on an ongoing basis to ensure both Grievant's safety and productivity.

5. Grievant signed the "Temporary Transitional Work Agreement—ADA" on June 21, 2023, pursuant to which Grievant agreed to perform Supply Specialist duties, including:

- Ordering supplies, parts, and equipment
- Receiving, storing, and dispensing supplies
- Reconciling physical inventory with documentation of supplies on hand
- Handling mail pick-ups and deliveries for in-house and outside mail twice daily
- Maintaining a mail log
- Entering purchasing and asset information into REMIS
- Making purchases from local vendors and making supply pick-ups as needed
- Operating a forklift
- Inventorying fuel on a daily basis
- Paying fuel records as required
- Keeping the copy room stocked with paper

- Keeping water coolers stocked and maintaining the water inventory
- Entering P-card payments and reconciling monthly card records

6. The term of the "Temporary Transitional Work Agreement—ADA" was June 21, 2023, through December 21, 2023, with the ability to terminate the agreement if it was determined that a safe and productive work environment could not be maintained. However, there was also potential for permanent placement in that position if the trial period showed that it was a good fit for both Grievant and Respondent.

7. During his tenure at MCS&T, Grievant demonstrated that he had few computer skills, lost documents, and was "spotty" with entering time sheets and leave forms.

8. In the afternoon of July 27, 2023, Grievant called his MCS&T supervisor, Stephanie Elliott, and left a voicemail reporting that he had tested positive for COVID. Ms. Elliott attempted to call Grievant back just a few minutes later to review the COVID policy with him, but he did not answer.

9. The following day, Ms. Elliott was able to speak to Grievant and told him that, per policy, he could return to work on August 1, 2023. Because Grievant would exhaust leave during his absence, he was requested to provide a doctor's excuse.

10. On July 31, 2023—the day Grievant exhausted his leave—Ms. Elliott spoke to Grievant, who informed her that his doctor had excused him from work through August 4, 2023; however, the documentation Grievant provided to support that contention showed a return-to-work date of July 31, 2023.

11. Grievant was continuously absent from July 27, 2023, through August 4, 2023.

12. He returned to work on August 7, 2023, and provided a doctor's excuse for July 27th through August 4th.

13. Grievant was absent again on August 9, 2023.

14. He called Ms. Elliott on August 10, 2023, and communicated that he was in too much pain to perform the duties of his job and would need further accommodation.

15. Grievant neither reported for work nor called in to report his absence again after August 10, 2023.

16. By letter dated August 17, 2023, Respondent terminated the "Temporary Transitional Work Agreement—ADA," citing Grievant's inability to perform the essential functions of his job; his concerns regarding his ability to safely perform the functions of his job; and his frequent absences, which impacted his ability to learn the essential functions of his job. Respondent indicated that it was willing to consider further requests for accommodation as identified by updated medical information. Respondent also provided Grievant paperwork to apply for FMLA leave.

17. That letter did not inform Grievant of where he should report to work after August 17, 2023.

18. Grievant did not submit paperwork for consideration of further accommodation or FMLA leave and, so, was taken off the payroll.

19. On September 1, 2023, Grievant applied for Social Security Disability benefits, asserting that he is not able to perform any gainful employment.

20. On November 26, 2023, Grievant applied for unemployment compensation benefits.

21. On November 27, 2023, Grievant sent an email to the medical accommodation committee via an address associated with an employee who was no longer part of the medical accommodation committee; so, it was not seen for some time.

22. On December 12, 2023, Grievant was denied unemployment benefits because he failed to demonstrate that he is able and available to work full-time, including medical documentation that he was able to return to full-time work.

23. Grievant failed to appear for his appeal hearing before the Board of Review for Workforce West Virginia; thus, the denial of his unemployment claim was affirmed.

24. On December 15, 2023, Respondent sent a letter to Grievant acknowledging that it had missed his November 27th email and once again inviting him to send an updated physician statement regarding his current condition and any reasonable accommodation for it. Grievant was asked to provide that information to the medical accommodation committee no later than January 5, 2024. After that time, if no further information was provided, the committee would review what options were available to it.

25. It would seem that this letter was the first communication since his temporary accommodation assignment was terminated that Grievant was informed that he was "placed back under District One (1) organization after your [Temporary Transitional Work Agreement—ADA] was terminated."

26. Grievant did not provide further information and was uncooperative when Ms. Hill attempted to explain what Respondent needed from him and asked him to sign a medical release.

27. On January 8, 2024, Respondent sent Grievant a letter stating that his employment was terminated, effective January 8th, due to job abandonment. The letter

noted that Grievant had not returned to work or contacted his supervisor to request a leave of absence since August 10, 2024. Grievant was given the opportunity to respond to the letter "for the purpose of communicating any reason why [he felt] this action is unwarranted" by January 23, 2024.

28. Grievant did not respond to the January 8, 2024, letter.

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*.

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." *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*); 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). "'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*).

Here, Respondent terminated Grievant for job abandonment, pursuant to W. VA. CODE ST. R. § 217-1-11.2.3 (2022), which states, in pertinent part:

> An agency may dismiss an employee for job abandonment who is absent from work for more than three consecutive workdays or scheduled shifts without notice to the agency of the reason for the absence or approval for the absence as required by established agency policy. . . . Whereas 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.

Per Department of Transportation Administrative Rule, any employee who requests leave for more than three consecutive scheduled working days must provide a practitioner's excuse covering the entire period of absence upon his or her return to work. W. VA. CODE ST. R. § 217-1-12.4.7.b (2022). If an employee requires a period of extended sick leave, he or she must provide a practitioner's statement confirming the need for the continued leave as well as an expected return-to-work date. W. VA. CODE ST. R. § 217-1-12.4.7.e (2022). While unpaid medical leave can be extended to an employee after he or she has exhausted his or her sick and annual leave, that employee must make written application for a leave of absence without pay, including documentation from a medical practitioner. W. Va. Code St. R. § 217-1-12.4.8.3.a (2022).

Respondent provided extensive testimony and documentation regarding Grievant's unauthorized leave for a period that far exceeded three consecutive days and that was not accounted for by a practitioner's excuse. Indeed, the evidence demonstrates that Grievant did not report for work and had no communication with Respondent regarding his absence from August 10, 2023, until November 27, 2023—a period of 109 days. Respondent attempted to make contact with Grievant multiple times, including an

August 17, 2023, letter in which the agency offered him guidance in submitting paperwork for further accommodation of physical limitations and FMLA leave.

For his part, Grievant does not dispute that he was absent from work without permission and without medical documentation for more than three days. Rather, he simply asserts that the letters and other documents presented by Respondent as exhibits are not accurate depictions of the communications he received and contain falsities. That is, he challenges the credibility of Respondent's exhibits and the witnesses who testified in conjunction with those exhibits. 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." *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); s*ee 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.; see also Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

While it is true that some of the witnesses remembered dates differently and some of the written documentation contained clerical errors, the undersigned finds that, by and

large, the testimony and documentary evidence produced by Respondent at the Level Three hearing are credible. The witnesses who testified were clear, confident, and competent in their testimony and gave no indication that they were being dishonest in any way. Overall, each witness's testimony was consistent with the documentary evidence and with the testimony of other witnesses. There was no indication that the witnesses had any bias or preconceived notion about the grievance. Thus, the undersigned finds that the witnesses and evidence presented at the hearing were wholly credible and persuasive.

Furthermore, the Grievant offered no evidence to rebut the testimony of the witnesses or to show that the documentation provided by Respondent had been altered or faked in any way.

Respondent has proven by a preponderance of the evidence that Grievant abandoned his job. Respondent's action in terminating Grievant for job abandonment is supported by Department of Transportation policy. Accordingly, the 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." *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*); 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). "'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. Respondent may dismiss an employee for job abandonment when he or she is absent from work for more than three consecutive workdays without notice to the agency of the reason for the absence or approval for the absence as required by established agency policy. Job abandonment is synonymous with resignation. W. VA. CODE ST. R. § 217-1-11.2.3 (2022).

4. 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." *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); s*ee also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981).

5. "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.; see also Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

6. Respondent has met its burden of proof and established by a preponderance of the evidence that Grievant abandoned his job, which was good cause for the termination of his employment.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals in accordance with W. VA. CODE § 51-11-4(b)(4) and the Rules of Appellate Procedure. W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

DATE: August 29, 2024

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Lara K. Bissett
Administrative Law Judge