THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ROBIN HALL,

Grievant,

v. **DOCKET NO. 2014-1760-CONS**

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

Respondent.

DECISION

On May 24, 2014, Robin Hall ("Grievant") filed a grievance at Level One against her Employer, the West Virginia Department of Health and Human Resources, Bureau for Children and Families ("Respondent" or "DHHR"), regarding a reprimand, coaching and charge of unauthorized leave, which she contends were not based on good cause. On July 11, 2014, Grievant filed a second grievance at Level One, this time challenging an additional reprimand she had been issued by her Employer. On October 15, 2014, Grievant filed a Level One grievance contesting an Employee Performance Appraisal she had received, asserting that her evaluation was improperly based upon her sick leave usage. These three grievances were consolidated as Docket Number 2014-1760-CONS. Following a Level One hearing on February 24, 2015, this consolidated grievance was denied by the Grievance Evaluator, Christina M. Bailey, on March 17, 2015. Grievant appealed to Level Two on March 18, 2015. Following mediation at Level Two on July 27, 2015, Grievant appealed to Level Three on July 30, 2015.

On September 8, 2015, Grievant filed a separate grievance directly at Level Three, challenging DHHR's decision to terminate her employment. This grievance was

assigned Docket Number 2016-0292-DHHR. Following a request by Grievant's representative that this grievance be consolidated with Grievant's other pending grievances, the undersigned Administrative Law Judge issued an Order of Consolidation and Notice of Hearing on September 14, 2015, granting Grievant's request to consolidate her termination grievance with her earlier grievances under Docket Number 2014-1760-CONS, and setting a Level Three hearing on these consolidated grievances for October 22, 2015.

A Level Three hearing was held before the undersigned Administrative Law Judge at the Grievance Board's Charleston, West Virginia office on October 22, 2015. Grievant was represented by Gordon Simmons with UE Local 170 of the West Virginia Public Employees Union. Respondent was represented by Assistant Attorney General Harry C. Bruner, Jr. Grievant elected to submit her three Level One grievances, each of which had previously been consolidated in Docket Number 2014-1760-CONS, on the record below, and the parties submitted documentary evidence and presented testimony pertaining primarily to Grievant's termination. Grievant testified under oath on her own behalf at the Level Three hearing. Respondent presented testimony by James Long, Carolyn Sansom and James Stephen Bragg, each of whom supervised Grievant during the time leading up to her termination. This matter became mature for decision on November 23, 2015, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

The record in this matter demonstrated preponderant evidence to support each of the reprimands issued to Grievant for failure to comply with established agency procedures for requesting, taking and reporting leave. Grievant failed to establish that her supervisors abused their discretion in issuing an employee performance appraisal which gave unsatisfactory ratings for Grievant's failure to comply with agency leave and attendance policies. Grievant failed to establish that Respondent violated any applicable provision of the Family and Medical Leave Act ("FMLA") by denying requested FMLA leave to Grievant, interfering with Grievant's right to take FMLA leave by placing unwarranted and unjustified restrictions on her use of otherwise approved FMLA leave, or retaliated against Grievant for either exercising her right to seek and obtain FMLA leave, or filing and pursuing grievances against her employer.

Respondent established by a preponderance of the evidence that Grievant failed to return to work following a medical leave of absence without pay, failed to provide required documentation for her continued absence from work, and failed to provide medical documentation to indicate when she would be able to return to work, or would be evaluated for being able to return to work, and that in the circumstances presented, Grievant engaged in job abandonment within the meaning of that term in the West Virginia Division of Personnel's Administrative Rule. Accordingly, Respondent established a factual and legal basis for Grievant's termination.

The following Findings of Fact are made based upon the record developed at the Level One and Level Three hearings.

Findings of Fact

1. Grievant was employed by Respondent Department Health and Human Resources as a Health and Human Service Aide in the Mingo County Office for Region IV of the Bureau for Children and Families. Grievant's employment began in August 2004.

2. Grievant's immediate supervisor was Linda Vinson, a Social Services Supervisor in the Mingo County DHHR Office. L I HT at 21.

3. Carolyn Sansom, Community Services Manager for the Mingo District, was Grievant's second-level supervisor from the time Grievant was hired in 2004 until Ms. Sansom retired in February 2015. James Long replaced Ms. Sansom on an interim basis as the Acting Community Services Manager until James Stephen Bragg became the Community Services Manager for the Mingo District on September 1, 2015.

4. Although Grievant generally performed her assigned work in a satisfactory manner, she began having attendance problems in 2006. L I HT at 21.

5. Grievant's attendance problems became worse in 2013. L I HT at 23-24.

6. When Grievant is unavailable to report to work and perform her duties, other employees have to be reassigned duties to accomplish the necessary work, including employees from other units. L I HT at 24.

7. At times, Grievant would call in and state that she did not want to see a doctor, so she would allow her supervisor to place her on unauthorized leave. L I HT at 25.

8. On April 2, 2014, Carolyn Sansom, Community Services Manager for Mingo District in Region IV of DHHR's Bureau for Children and Families, issued a written reprimand to Grievant stating the following:

> The purpose of this letter is to inform you of our decision to issue you a written reprimand. This action is the result of your repeated failure to present for work as scheduled, failure to follow established procedures regarding leave use, and comply with the directives provided in your attendance improvement plan.
>
> On February 20, 2014, you participated in a predetermination conference with Social Services Supervisor, Lisa Vinson, Community Services Manager, Carolyn Sansom and representative Gordon Simmons. The purpose of that conference was to provide you the opportunity to explain the circumstances involved and that disciplinary action was being considered for attendance plan and procedure violations. During that conference, you provided the following responses.
>
> > You stated that you are unable to call-in at work in a timely fashion due to your illness. You are disoriented at times, dizzy, and unable to make a phone call. You were placed on Intermittent FMLA during the month of August 2013 and calling in should not be held against you. You admit that on November 18, 2013 you arrived at work at 10:00 a.m. and reported that you failed to set your alarm clock. You reported that on January 24, 2014, you failed to call in until 11:00 a.m. because you were disoriented and unable to make a call but you did text a co-worker that was on annual leave and ask them to report your request for leave due to illness. You admitted that on February 03, 2014 you failed to call in and had to take your dog for walk (*sic*.) and clean your windshield on your car.
>
> Upon consideration of your response, you were advised the medical certification form currently being followed did not indicate the need for that type of accommodation. However, you were provided the opportunity to submit additional documentation to Andrew Garretson, Office of Human Resources Management. By mail dated March 6, 2014, Mr. Garretson supplied instruction and an enclosed Physicians Statement DOP-L5 to be returned to him no later than March 24, 2014.
>
> To date you have not supplied any medical documentation supporting the need for additional restrictions. As a result, we will proceed with the

decision to take disciplinary action for unauthorized absences not associated with your FMLA qualifying condition.

So that you may fully understand the reason this action is being taken, I will summarize what has transpired.

July 30, 2013, you were placed on an attendance improvement plan due to pattern of leave misuse. This plan provided what actions were necessary for obtaining approval for leave, unscheduled absences. (*sic*.)

August 22 & amended on August 23, 2013 you provided medical documentation indicating the need for intermittent Family Medical Leave due (*sic*.) your own health condition. Your practitioner indicated you would require leave or schedule modification for medical appointments approximately twice a week and could perform full duty activities the day of or after the appointment(s).

In accordance with the Family Medical Leave Act, the improvement plan restriction requiring you to provide a DOP-L3 for every absence was removed. However, all other requirements remained in effect. Your request acknowledgement letter dated July 17, 2013, also provided instruction that for each occurrence using FMLA a new DOP-L4 (Application for Leave of Absence) would still be required.

From December 26, 2013 thru February 7, 2014, you have failed to follow your agency procedures for; requesting leave, calling in for unscheduled absences and/or failed to provide the required DOP-L4 (Application for Leave of Absence) to your supervisor on seven occasions.

Prior to these recent events, you have been counseled regarding your violation of attendance policy and for failure to follow leave request and call-in procedures on numerous occasions. October 4, 2012 attendance improvement plan; October 9, October 23, November 20, 2012 unauthorized leave status; May 8, 2013 written reprimand for continual leave misuse; July 30, 2013 attendance improvement plan.

The Department of Health and Human Resources provides services, which are essential to the health and welfare of the public. The Department must allocate its limited human resources to effectuate the delivery of services. Unexpected absences of employees result in delay of services, additional expense of replacements, and personal inconvenience to replacements, and additional work for the entire staff. Therefore, it is the policy of the Department of Health and Human Resources to control leave abuse, without restricting employees from use of leave for bona fide purposes. I have considered all of the information

> that has been made available to me and determined that progressive discipline is warranted.
>
> * * *

R Ex 2 at L I.

9. On May 24, 2014, Grievant filed a grievance at Level One challenging the reprimand she received from Ms. Sansom.

10. On April 28, 2014, Grievant was placed on a Leave Improvement Plan by Ms. Sansom. That correspondence stated the following:

> Our records indicate that your pattern of leave use has become so frequent that your attendance and service to our agency is not sufficiently dependable to perform the essential elements of your job. As a result you are being placed on an improvement plan to assist you in bringing your attendance and performance to an expectable standard. This plan will outline actions you must perform to meet agency expectations.
>
> 1) Absences due to medical necessity must be reported to Lisa Vinson, Social Services Supervisor at Home: [phone number redacted] or on her cell: [phone number redacted] or Carolyn Sansom, Community Services Manager at Home: [phone number redacted] or on her cell: [phone number redacted], 45 minutes prior to the beginning of your scheduled shift. No other form of communication (i.e. (*sic*.) voice mail, text, email) will be accepted and failure to call within the designated time allotment will result in the absence being unapproved.
>
> 2) If your absence is due to a condition approved through a medical leave program, you will be required to abide by the above call in procedure and indicate that the absence is a program-covered absence.
>
> 3) Absences due to medical necessity that you do not specify at the time of call in as part of any covered medical program, will require you to submit immediately upon return, the prescribed physician's/practitioner's statement form (DOP-L3). This form must be completed in whole by your treating medical professional for each absence and will be the only verification accepted. If a completed DOP-L3 is not provided immediately upon your return, your absence will be counted as unauthorized and subject to disciplinary action.

> 4) Request for planned annual leave must be submitted to your supervisor in writing and approved in writing 48 hours in advance. Any annual leave taken without prior approval from your supervisor will be documented as unauthorized leave and is subject to disciplinary action. Requests for Emergency annual leave may be approved depending on the circumstances and documentation of its necessity is provided.
>
> 5) Any absence covered through a medical leave program will require immediately upon return, a prescribed Leave Request form, DOP-L4 for each occurrence of leave use or DOP-L1 for leave with pay. Additional documentation may also be required depending on leave program mandates. Failure to provide the required leave form is a violation of the Department of Health and Human Resources, Hours of Work/Overtime Policy 2102 and may result in disciplinary. (*sic*.)
>
> 6) You are expected to report for duty as scheduled. Work performed, rest and meal periods will be taken in accordance with the Department of Health and Human Resources, Hours of Work/Overtime Policy 2102.
>
> 7) You are responsible to meet all productivity goals & standards set forth in your EPA 2 Performance Job Standards without exception for your ability for work.
>
> 8) You must perform all essential functions of your position unless otherwise prescribed by a physician.
>
> * * *

R Ex 2 at L III.

11. The requirements for taking and reporting leave imposed on Grievant by her supervisor under the Leave Improvement Plan are the same as expected from other employees who have demonstrated attendance problems, and are consequently placed on an improvement plan.

12. On June 27, 2014, Ms. Sansom issued a written reprimand to Grievant for "repeated tardiness, failure to request leave timely and comply with the directives provided in your attendance improvement plan." *See* R Ex 2 at L III.

13. On July 11, 2014, Grievant filed a grievance at Level One challenging the written reprimand she received from Ms. Sansom in June 2014.

14. On July 24, 2014, Andrew C. Garretson, DHHR's Disability, Attendance and Safety and Loss Control Manager, provisionally granted Grievant's request to take an intermittent medical leave of absence, under the Division of Personnel's Administrative Rule, authorizing 547.82 hours of leave in a 12-month period, to run concurrently with the 480 hours of leave she was authorized under the FMLA. *See* R Ex 3 at L III.

15. On September 2, 2014, having received the required medical leave of absence forms from Grievant, Mr. Garretson approved an intermittent medical leave of absence from July 18, 2014 through July 18, 2015. R Ex 4 at L III.

16. On September 24, 2014, Ms. Vinson issued an annual performance appraisal in which Grievant was rated at a 1.43 overall score, which equates to "needs improvement." The rating for "availability for work" noted that Grievant "received an overall rating of does not meet expectations" on her EPA 2 which was issued on March 19, 2014. In addition, Grievant had been placed on an attendance improvement plan in May 2014 and reprimanded in June 2014 for failing to follow agency procedures for requesting leave. *See* R Ex 3 at L I.

17. On October 15, 2014, Grievant filed a grievance at Level One challenging the employee performance appraisal she received in September 2014.

18. By July 15, 2015, when Grievant's Medical Leave of Absence and intermittent FMLA leave expired, Grievant had exhausted her eligibility for any further Medical Leave of Absence or FMLA leave.

19. On July 24, 2015, James Long, the acting Customer Service Manager for the Mingo County office at the time, wrote to Grievant as follows:

> The purpose of this letter is to determine your intentions relative to your employment as a Health and Human Service Aide with the West Virginia Department of Health and Human Resources.
>
> According to our records, you were on approved intermittent leave of absence July 15, 2014, through July 14, 2015. As of today's date, WVDHHR - Mingo County 203 E. 3rd Ave. Williamson WV 25661 has not received any further communication or documentation requesting an extension of your leave or your intentions relative to employment with our agency. Your absence from work beginning May 22, 2015 has not been approved and is being charged as unauthorized.
>
> As a result, it is necessary you return to work at your regularly scheduled time by July 31, 2015. Upon return you are required to provide a Physician's/Practitioner's Statement (Form DOP-L3), releasing you to full or restricted duty. Your return to duty cannot be permitted absent documentation of your medical release. If due to medical necessity, you are unable to return to work on July 31, 2015, you must submit a completed DOP-L3 (If applicable - covering your absences since (date the last excuse ended) and indicating an estimated date of release[)], to James Long, CSM at 203 E. 3rd Ave., Williamson, WV 25661 no later than July 31, 2015 for our consideration.
>
> Unfortunately, if you are unable or do not return to work by August 10, 2015, the agency will have no other option but to consider termination of your employment in accordance with provisions set forth in section 14.8.d.3. If that becomes necessary, a predetermination conference will be held at 9:00 am on August 3, 2015 to provide you with the opportunity to provide input in the decision process. You may participate in the conference telephonically by calling [phone number redacted]. Should you choose not to participate in any predetermination process; a decision will be made absent your input.

> You may respond to this letter either in writing or in person, provided you do so within three calendar days of the date of this letter. Please contact my office if you wish to schedule an appointment.
>
> * * *

R Ex 5 at L III.

20. Grievant did not report for work from May 22, 2015 through September 10, 2015. *See* R Ex 1 at L III. Grievant did not contact her employer during this same time period, except as hereinafter described in Finding of Fact No. 22.

21. Grievant called Mr. Long prior to August 10, 2015, stating that she was still having medical issues, and she would be seeking additional medical assistance. Grievant did not request any additional leave, nor did she ask that the predetermination hearing be rescheduled. Grievant did not participate in the scheduled predetermination conference.

22. During May through early September, Grievant was physically unable to return to work, suffering from anxiety, depression and heart problems. At the time of the Level Three hearing, Grievant was awaiting open heart surgery on some future date.

23. Grievant was dismissed from employment by letter from Joe Bullington, Regional Director for Region IV, dated September 10, 2015, which stated:

> The purpose of this letter is to inform you of my decision to dismiss you from your employment as a Health and Human Service Aide with the West Virginia Department of Health and Human Resources, Mingo County office, located at 203 E. 3rd Ave., Williamson, WV.
>
> According to our records, you were on approved Family Medical Leave Act (FMLA) intermittent leave of absence [from] July 15, 2014, through July 15, 2015. As of today's date, the Mingo County DHHR has not received any further communication or documentation requesting an extension of your leave or your intentions relative to your employment with our agency.

> Your absence from work beginning May 22, 2015 has not been approved and is being charged as unauthorized. You have failed to contact your supervisor regarding the reason for your absence or request annual or sick leave since June 20, 2015. You also failed to attend a predetermination conference at 9 a.m. on August 3, 2015.
>
> As a consequence, you are being dismissed from employment due to failure to return to work after the expiration of your approved intermittent leave of absence, effective September 26, 2015. Your pay will be docked and your paid leave prorated to reflect the time spent in an unpaid status.
>
> This personnel action is being taken in accordance with subsection 12.2.c. of the Administrative Rule of the West Virginia Division of Personnel, W. VA CODE R. §143-1-1 et seq., and provides for a fifteen (15) calendar day notice period. Whereas you are being dismissed for job abandonment you are ineligible for severance pay. You will be paid any final wages and all annual leave accrued as of your last working day in accordance with the West Virginia Wage Payment and Collection Act.
>
> * * *

J Ex 1 at L III.

24. There is no medical evidence that Grievant was physically or mentally incapacitated so that she could not comply with her employer's requirements for properly requesting sick leave or a leave of absence, or that she could not participate in a predetermination conference by telephone.

Discussion

This consolidated grievance involves both disciplinary and non-disciplinary matters. In regard to disciplinary matters, such as the disciplinary reprimands issued to Grievant, and the termination of her employment, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard

generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*. However, Grievant has the burden of establishing the elements of her grievance challenging her performance appraisal and a non-disciplinary coaching session by this same preponderance standard.

There is virtually no dispute regarding the facts which control the issues in this grievance. Grievant began developing medical issues after her employment commenced, and these medical issues became worse over time, affecting her ability to report to work as scheduled, as well as necessitating frequent medical appointments which caused her to use her available sick leave faster than it accrued. Due to lack of a working phone on occasion, Grievant failed to call off work in a timely manner when she became ill. Grievant also testified that her worsening medical condition made her so despondent, that she simply did not feel like calling in, when she was too sick to work.

Grievant does not contest that her attendance was deficient, as documented, contending instead that on each occasion when she was off work, she was suffering from an actual illness, and should be held blameless in the circumstances. Although Grievant provided documentation to support her inability to work for medical reasons on multiple occasions, there was no persuasive medical evidence that Grievant suffered from a particular medical condition that deprived her of the ability to call her supervisors in a timely fashion, or to obtain the required medical documentation for her absences,

as required by agency rules and the attendance improvement plan developed to improve her attendance. Nonetheless, Grievant asserts that she was not treated fairly or in accordance with certain applicable rules and laws. Each of these contentions will hereinafter be addressed.

Grievant proposes that, after the first reprimand which she grieved in May 2014, each subsequent adverse action taken against her by DHHR involved a form of retaliation for filing that grievance, and for each of her subsequent grievances. W. Va. Code § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or for any lawful attempt to redress it." In general, a grievant alleging reprisal or retaliation in violation of W. Va. Code § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

> (1) that she was engaged in activity protected by the statute (*e.g*., filing a grievance);
>
> (2) that her employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
>
> (3) that, thereafter, an adverse employment action was taken by the employer; and
>
> (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See Coddington v. W. Va. Dep't of Health & Human Res., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a

prima facie case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley*, *supra*. *See Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (1989).

Grievant established a *prima facie* case of retaliation for each action taken by DHHR subsequent to her May 2014 grievance. Grievant engaged in activity protected by the grievance statute, and was thereafter the subject of multiple adverse actions and an unfavorable employee evaluation, the supervisors who either initiated or proposed the subsequent adverse actions were aware of her protected activity, and these actions were taken in such temporal proximity to Grievant's protected activities to infer a retaliatory motive. *See Metz v. Dep't of Health & Human Res*., Docket No. 2013-2256-CONS (Aug. 7, 2014); *Matney v. Dep't of Health & Human Res*., Docket No. 2012-1099-DHHR (Nov. 12, 2013). Nonetheless, the evidence and Grievant's own admissions established that there was a justified reason for each of these actions involving Grievant's failure or inability to comply with established requirements for requesting and taking leave. Therefore, DHHR demonstrated by a preponderance of the evidence that there were legitimate, non-retaliatory reasons for each action taken, as set forth in the contested actions, and Grievant failed to show that these proffered reasons were merely a pretext for retaliation. *See Mace*, *supra*; *Metz*, *supra*.

Grievant also contends that Respondent DHHR violated her rights under the Family Medical Leave Act ("FMLA"). As a public agency with at least fifty employees at its work site, DHHR is an employer covered under the FMLA, and Grievant was an employee entitled to benefits under the Act. *Ervin v. Dep't of Health & Human Res*.,

Docket No. 2011-1794-CONS (July 24, 2012). *See* 29 U.S.C. § 2611(4)(A)(3); 29 C.F.R. § 825.108(d); *Fain v. Wayne County Auditor's Office*, 388 F.3d 257, 259 (7th Cir. 2004).

The FMLA permits an eligible employee to take up to 12 weeks of leave per year, if the employee has a serious health condition that renders the employee unable to perform one or more of the essential functions of her job. 29 U.S.C. § 2612(a); 29 C.F.R. 825.112(a). The Act further provides that employers may not "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the Act]." 29 U.S.C. § 2615(a)(1). The FMLA also allows an eligible employee who suffers from a "serious health condition" to take FMLA leave "intermittently." 29 U.S.C. § 2612(b)(1). Intermittently means "taken in separate blocks of time due to a single qualifying reason." 29 C.F.R. § 825.202.

This Grievance Board has previously determined that in order to prevail on a claim for FMLA interference, the employee must prove that: (1) she was eligible for FMLA protections; (2) her employer was covered by the FMLA; (3) she was entitled to leave under the FMLA; (4) she provided sufficient notice of her intent to take FMLA leave; and (5) her employer denied her FMLA benefits to which she was entitled. *Adkins v. Dep't of Health & Human Res*., Docket No. 2013-0264-DHHR (July 19, 2013), *citing Brown v. Auto. Components Holdings*, LLC, 662 F.3d 685, 689 (7th Cir. 2010); *Ervin*, *supra*. *See Burnett v. LFW Inc*., 472 F.3d 471, 477 (7th Cir. 2006).

A serious health condition within the meaning of the FMLA includes an illness, injury, impairment, or physical or mental condition that involves continuing treatment by

a health care provider. 29 U.S.C. § 2611(11). *See Burnett*, *supra*. Grievant's medical diagnosis meets this requirement, which Respondent acknowledged by authorizing Grievant's request to take intermittent FMLA leave. Indeed, the record in this matter does not demonstrate a single instance where Respondent denied a request by Grievant to receive FMLA leave.

Nonetheless, Grievant argues that various restrictions and limitations which Respondent applied to Grievant's leave taking interfered with her rights under the statute. This argument is based upon language in the regulations implementing the FMLA which state that an employer is interfering with FMLA rights by "not only refusing to authorize FMLA leave, but discouraging an employee from taking such leave." 29 C.F.R. § 825.220(b). *See Jennings v. Ford Motor Co*., No. 06 C 0877, 2008 WL 3853369, at *4 (S.D. Ind. Aug. 15, 2008). More particularly, Grievant contends that her employer's requirement that she request her intermittent FMLA leave in advance by calling her supervisor, and that she provide a medical excuse for each absence, was not warranted where it was already ascertained that Grievant was suffering from multiple medical conditions which qualified as a serious health condition under the FMLA, and simply served to harass her and discourage her, and other similarly situated employees, from requesting FMLA leave, by placing an additional and unreasonable burden upon her when exercising her right to such leave.

The FMLA is meant to prohibit employers from retaliating against employees who exercise their rights, refusing to authorize leave, manipulating positions to avoid application of the Act, or discriminatorily applying policies to discourage employees from

taking leave. *Callison v. City of Philadelphia*, 430 F.3d 117, 120 (3d Cir. 2005). *See* 29 C.F.R. § 825.220. Thus, an employer may not require employees receiving FMLA leave to meet requirements not imposed on other employees taking leave beyond the requirement in the Act to provide medical documentation certifying that the employee suffers from a serious health condition. Notwithstanding these limitations, the courts recognize that the FMLA allows employers to verify that its employees' FMLA-related absences are validly claimed, including by such means as requiring the employee to provide a doctor's note. *See Jackson v. Jernberg Indus., Inc*., 677 F. Supp.2d 1042, 1050 (N.D. Ill. 2010).

Accordingly, an employer may require that an employee call in to verify that her absence is FMLA-related. *See Callison*, *supra*, at 121. Requiring employees to comply with "usual and customary notice and procedural requirements when requesting FMLA leave is permissible. *Ervin*, *supra*. Arguably, Grievant established a *prima facie* case of interference by demonstrating that she was an eligible employee who took leave for the intended purpose of the leave, and was then denied a benefit in that she was subjected to additional requirements for taking or reporting her otherwise approved absences. *See Vail v. Raybestos Products Co*., 533 F.3d 904, 909 (7th Cir. 2008). However, DHHR provided preponderant evidence that the requirements for Grievant to request leave in a particular manner, and to document each absence for medical reasons with a statement from a medical practitioner, were the result of Grievant's established track record of failing to properly follow the requirements for taking leave expected of all its employees, and that any additional requirements in her attendance improvement plan

likewise resulted from Grievant's failure to properly request leave. Moreover, the expectations established for Grievant were substantially identical to those imposed on other employees who were similarly deficient in their leave compliance.

The FMLA also prohibits retaliation by an employer against an employee for exercising her rights under the Act. *Lewis v. School Dist. # 70*, 523 F.3d 730, 741 (7th Cir. 2008). The standard of proof for establishing FMLA retaliation essentially overlaps with the retaliation prohibition in the grievance procedure previously discussed in this decision. *See Seeger v. Cincinnati Bell Telephone Co*., 681 F.3d 274 (6th Cir. 2012); *Buie v. Quad/Graphics, Inc*. 366 F.3d 496, 503 (7th Cir. 2004). Certainly, Grievant established a *prima facie* case of FMLA retaliation in that she participated in activity protected by the Act, and was subjected to a materially adverse employment action (termination) within two months after her FMLA leave expired, raising an inference that her FMLA use may have been a motivating factor in her employer's decision. *See Lewis*, *supra*, at 741-42. However, the testimony of Mr. Long, Ms. Sansom and Mr. Bragg at Level Three provided credible, consistent and, ultimately, preponderant evidence that Grievant was terminated because she could not return to work, could not and did not provide documentation that she would ever be able to return to work at a particular time, and that DHHR could not leave Grievant's position unfilled indefinitely, while awaiting her return to duty.

In regard to Grievant’s termination, the employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil*

Serv. Comm'n, 181 W. Va. 49, 51, 380 S.E.2d 216, 218 (1989). The judicial standard in West Virginia requires that "dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. pt. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965).

Grievant argues that she was terminated on the basis of a mere technicality, failure to provide medical documentation of her continuing serious health condition, and failure to properly request an additional leave of absence. Unlike the situation in *Clark v. W. Va. Dep't of Military Affairs & Public Safety*, Docket No. 99-DJS-428 (Nov. 30, 1999), Grievant did not make every reasonable attempt to comply with the applicable procedures for obtaining and extending medical leave. By her own admission, Grievant slept as much as 16 hours per day, stared at the television during her waking hours, and made no effort to communicate with her employer until she was notified that her employment was going to be terminated. This Grievance Board has determined that an employee's failure to report to work after a leave of absence without pay, absent satisfactory reasons being provided to the appointing authority in advance of the expected return date, is a proper cause for dismissal under § 15.08(d) of the West Virginia Division of Personnel's Administrative Rule. See 143 C.S.R. 1 § 14.8(d)3 (2012); *Hayden v. Dep't of Health & Human Res*., Docket No. 98-HHR-133 (Nov. 30,

1999); *Cook v. W. Va. Dep't of Health & Human Res*., Docket No. 99-HHR-298 (Nov. 30, 1999). Thus, the Administrative Rule provides specific authority for terminating Grievant's employment.

Finally, Grievant asserts that she was denied due process of law because she was not afforded a predetermination hearing before the decision was made to terminate her employment, citing *Deyerle v. W. Va. Dep't of Health & Human Res*., Docket No. 2013-2231-CONS (July 15, 2014). However, Grievant was afforded an opportunity for a predetermination hearing, either in person or by telephone, in the correspondence notifying her that she might be terminated. A preponderance of the evidence indicates that Grievant received this notice, but did not respond until after the established date and time for a predetermination conference had passed, and did not request that the conference be rescheduled. Therefore, Grievant failed to demonstrate that her due process rights were denied in any meaningful regard.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly

affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 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 (1985); Syl. pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965).

3. The West Virginia Division of Personnel Administrative Rule, 143 C.S.R. 1 § 12.2(c), authorizes an agency to terminate an employee who fails to follow established agency policy for accounting for an absence from employment. *Toler v. Dep't of Health & Human Res*., Docket No. 2012-0189-DHHR (Aug. 1, 2012).

4. Failure of an employee to report to work at the end of an approved medical leave of absence without pay or, to provide in advance, justification for continued leave is grounds for dismissal under § 15.08(c) of the West Virginia Division of Personnel's Administrative Rule. *Hayden v. Dep't of Health & Human Res*., Docket No. 98-HHR-133 (Nov. 30, 1999). *See Cook v. W. Va. Dep't of Health & Human Res*., Docket No. 99-HHR-298 (Nov. 30, 1999).

5. Respondent established by a preponderance of the evidence that Grievant engaged in job abandonment as that term is used in the West Virginia Division of Personnel's Administrative Rule. 143 C.S.R. 1 § 12.2(c) (2012). *See Toler*, *supra*.

Where, as here, Grievant failed to return from a medical leave of absence, failed to provide documentation to justify her continued absence, and failed to provide medical documentation to establish when she could return to work or her condition would be re-evaluated, Grievant can fairly be said to have constructively resigned from her employment with the agency.

6. W. Va. Code § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or for any lawful attempt to redress it." In general, a grievant alleging reprisal or retaliation in violation of W. Va. Code § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

> (1) that she was engaged in activity protected by the statute (*e.g.*, filing a grievance);
>
> (2) that her employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
>
> (3) that, thereafter, an adverse employment action was taken by the employer; and
>
> (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See Coddington v. W. Va. Dep't of Health & Human Res., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining

whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley*, *supra*. *See Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (1989).

7. Grievant established a *prima facie* case of retaliation for each action taken by DHHR subsequent to her May 2014 grievance. *See Metz v. Dep't of Health & Human Res*., Docket No. 2013-2256-CONS (Aug. 7, 2014); *Matney v. Dep't of Health & Human Res*., Docket No. 2012-1099-DHHR (Nov. 12, 2013). However, Respondent DHHR demonstrated by a preponderance of the evidence that there were legitimate, non-retaliatory reasons for each action taken against Grievant, and Grievant failed to show that these proffered reasons were merely a pretext for retaliation. *See Mace*, *supra*; *Metz*, *supra*.

8. An employee grieving her evaluation must establish by a preponderance of the evidence that the evaluation is wrong because the evaluator abused her discretion in rating the grievant, or the performance evaluation was the result of some misinterpretation or misapplication of established policies or rules governing the evaluation process. *Gibson v. W. Va. Dep't of Health & Human Res*., Docket No. 2009-0700-DHHR (Jan. 19, 2010); *Wiley v. W. Va. Div. of Natural Res*., Docket No. 97-DNR-397 (Mar. 26, 1998). In order to prove a supervisor has acted in a manner that constitutes an abuse of discretion, the grievant must prove the evaluation was the result of arbitrary or capricious decision-making. *Spence v. Div. of Natural Res*., Docket No. 2008-1112-DOC (Jan. 30, 2009); *Kemper v. W. Va. Dep't of Transp*., Docket No. 91-DOH-325 (Mar. 2, 1992).

9. The "arbitrary and capricious" standard of review is a deferential one which presumes an agency's actions are valid as long as the decision is supported by substantial evidence or a rational basis. *See* Syl. pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). 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 & Human Serv*., 769 F.2d 1017, 1022 (4th Cir. 1985).

10. Grievant failed to establish by a preponderance of the evidence that her performance evaluation was the result of arbitrary and capricious decision making by her supervisor. *See Hurst v. W. Va. Dep't of Transp*., Docket No. 91-DOH-326 (Feb. 27, 1992).

11. The federal Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq*. ("FMLA") allows eligible employees to take up to twelve weeks of unpaid leave each year for a serious health condition that makes the employee unable to perform the functions of her position. 29 U.S.C. § 2612(a); 29 C.F.R. 825.112(a); *Adkins v. Dep't of Health & Human Res*., Docket No. 2013-0264-DHHR (July 19, 2013); *Ervin v. Dep't of Health & Human Res*., Docket No. 2011-1794-CONS (July 24, 2012). *See Myers v. W. Va. Dep't of Transp*., Docket No. 96-DMV-304 (Feb. 10, 1997).

12. The FMLA provides that employers may not "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the Act]." 29

U.S.C. § 2615(a)(1); *Ervin*, *supra*. The FMLA also allows eligible employees to take FMLA leave "intermittently." 29 U.S.C. § 2612(b)(1).

13. Respondent was an employer covered under the FMLA and Grievant was an employee entitled to benefits under the Act. *See* 29 U.S.C. § 2611(4)(A)(3); 29 C.F.R. § 825.108(d); *Fain v. Wayne County Auditor's Office*, 388 F.3d 257, 259 (7th Cir. 2004); *Ervin*, *supra.*

14. In order to prevail on a claim for FMLA interference, the employee must prove that: (1) she was eligible for FMLA protections; (2) her employer was covered by the FMLA; (3) she was entitled to leave under the FMLA; (4) she provided sufficient notice of her intent to take FMLA leave; and (5) her employer denied her FMLA benefits to which she was entitled. *Adkins*, *supra*, *citing Brown v. Auto. Components Holdings*, LLC, 662 F.3d 685, 689 (7th Cir. 2010); *Ervin*, *supra*. *See Burnett v. LFW Inc*., 472 F.3d 471, 477 (7th Cir. 2006).

15. The FMLA allows employers to verify that its employees' FMLA-related absences are validly claimed, by requiring employees to comply with established procedures for taking leave. *See* 29 C.F.R. 825.303(c); *Righi v. SMC Corp. of America*, 632 F.3d 404 (7th Cir. 2011); *Lewis v. Holsum of Fort Wayne, Inc*., 278 F.3d 706, 710 (7th Cir. 2002); *Jackson v. Jernberg Indus., Inc*., 677 F. Supp.2d 1042, 1050 (N.D. Ill. 2010); *Ervin*, *supra*.

16. All requirements which Respondent placed on Grievant for requesting, taking and documenting leave were consistent with agency practice for employees with a record of failure to properly request and document leave taken, and were not violative

of any prohibition in the FMLA against interfering with an eligible employee's right to take such leave. *See Jackson, supra.*

17. In the circumstances presented by this grievance, Grievant failed to establish by a preponderance of the evidence that any of the adverse employment actions taken against Grievant subsequent to her application for and approval to take FMLA leave, including her termination, violated any applicable provision of the FMLA. *See Ervin v. Dep't of Health & Human Res*., Docket No. 2011-1794-CONS (July 24, 2012).

18. The record in this matter establishes, by a preponderance of the evidence, that each of the reprimands and other adverse actions taken against Grievant prior to her termination were based upon Grievant's failure to comply with established rules for requesting, taking and reporting leave, and were otherwise consistent with agency policy on leave and progressive discipline.

19. Respondent proved the charges against Grievant, and demonstrated good cause for her dismissal.

Accordingly, this grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named.

However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: December 22, 2015

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LEWIS G. BREWER
Administrative Law Judge