THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KIMBERLY ANN TROZZI,
Grievant,

v. **DOCKET NO. 2015-0880-GraCH**

GRAFTON-TAYLOR HEALTH DEPARTMENT,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Kimberly Ann Trozzi, on February 12, 2015, challenging the termination of her employment by Respondent, the Grafton-Taylor Health Department. The statement of grievance reads:

> Received a letter of termination of employment on January 28, 2015, while on FMLA and under the care of physicians for breast cancer. A return to work slip given to Mr. Vanhorn 1 wk. Prior to termination letter.

The relief sought by Grievant is: "Return to work. Payment for my days off without pay since 7/14/14, payments to me for continuing health insurance I've been paying since 7/14/14; compensation of benefits; i.e.: sick leave, annual leave, retirement fund, accrued work days lost since 7/14/14."

A level three hearing was held before the undersigned Administrative Law Judge on August 12, 2015, at the Grievance Board's Westover, West Virginia office. Grievant appeared *pro se*, and Respondent was represented by Laverne Sweeney, Esquire. Respondent requested the opportunity to submit written argument, and this matter became

mature for decision on August 28, 2015, the deadline for submission of Proposed Findings of Fact and Conclusions of Law. Neither party submitted written argument.

Synopsis

Grievant was dismissed from her employment by Respondent for job abandonment. Respondent granted Grievant an open-ended medical leave of absence without pay, and at the end of six months, failed to notify her that her medical leave of absence would end or had ended, or that she could request a personal leave of absence without pay. Respondent did not demonstrate that Grievant abandoned her job or that her dismissal was for good cause under the facts presented.

The following Findings of Fact are made based upon the record developed at the level three hearing.

Findings of Fact

1. Grievant was employed by the Grafton-Taylor Health Department ("GTHD" or "Respondent"), as a permanent employee in the classified service as a Nurse III. She had been employed by GTHD since August 18, 2008.

2. Grievant had surgery for breast cancer, and underwent chemotherapy from February 2013 through July 31, 2013. She had an additional surgery on September 11, 2013, and remained off work recovering from the surgery until October 25, 2013, and was granted a medical leave of absence without pay for this time period. She underwent radiation treatment until December 31, 2013, but continued working an altered schedule during the radiation treatment.

3. Grievant underwent another surgery, and was off work recovering from April 25 through May 27, 2014.

4. Grievant was notified by Boyd K. Vanhorn, GTHD Administrator, by letter dated June 17, 2014, that she had exhausted all her sick and annual leave as of June 9, 2014. She was advised of the procedure for requesting a leave of absence without pay.

5. Grievant provided Respondent with a return to work slip dated June 23, 2014, which stated she could return to work on July 14, 2014, with a lifting restriction of no more than six pounds.

6. By letter dated June 24, 2014, Mr. Vanhorn advised Grievant that she would not be allowed to return to work with the lifting restriction, due to the duties of her position. The letter further states, "I have provided a Physician's/Practitioner's Statement (DOP-L5) that will be necessary to allow your return to duty, when you have reached that point in your recovery."

7. On June 30, 2014, Grievant submitted a form to Respondent entitled "Application for Leave for Federal Family and Medical Leave, State Parental Leave, and/or Medical Leave of Absence Without Pay," for her personal illness. The period of leave listed on the form is beginning on June 10, 2014, but there is no date in the ending date. Nonetheless, the leave was approved by Grievant's supervisor, Ida Bowman, on July 10, 2014, and by Mr. Vanhorn on that same date. The approval does not indicate when the leave of absence would expire.

8. Respondent did not notify Grievant at any time that her medical leave of absence would expire on December 9 or 10, 2014, nor did Respondent notify Grievant that her medical leave of absence had expired and that she was expected to return to work.[1]

9. On January 19, 2015, Grievant obtained a return to work slip from her doctor which stated she could return to work on January 20, 2015, with no restrictions, and presented it to Respondent. The record does not reflect what occurred when Grievant presented the return to work slip, but she did not return to work on January 20, 2015.

10. By letter dated January 26, 2015, Grievant was notified that she had been granted a medical leave of absence without pay "for a period of time that ended on June 9, 2014," and a personal leave of absence without pay for medical reasons for an additional six months, from June 9 through December 9, 2014. The letter states that Grievant could request another personal leave of absence without pay, which she did not do, and that her employment was being terminated. The dismissal letter does not state the effective date of Grievant's dismissal.

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[1] Mr. Vanhorn testified that he had sent Grievant a letter "at the end of her leave" and another one that her six months had expired. Then he testified that it may have been January before he sent Grievant a letter regarding the expiration of her leave. However, Respondent placed no such letters into the record, and Grievant testified that she received no letters notifying her that her leave of absence would or had expired. Mr. Vanhorn could not recall when GTHD has begun the search for a Nurse to replace Grievant, or when that Nurse was hired. When testifying without the supporting documents, his testimony on when Grievant took leave for her surgeries was inconsistent with the documents placed into the record. It was clear that Mr. Vanhorn was unable to provide an accurate description of events without the supporting documentation. The undersigned finds it more likely than not that the first letter to which Mr. Vanhorn is referring is the letter he sent Grievant in June 2014, telling her she had exhausted all her sick and annual leave, and that he did not ever send Grievant a letter telling her that her medical leave of absence expired December 9, 2015, until he sent the termination letter. In fact, the termination letter may well be the second letter to which he referred.

11. Prior to her breast cancer surgery, Grievant was a productive, skilled employee who had received excellent evaluations.

12. During 2014, Grievant was under a physician's care for anxiety issues, and her father died, and Mr. Vanhorn was aware of this.

Discussion

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. *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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

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, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264

S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir./W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

Grievant was notified in January 2015, that she was being dismissed from her employment for failing to return to work at the expiration of a leave of absence. However, at the beginning of the level three hearing, Respondent argued that Grievant had actually been dismissed in June 2014, because that was the finding made in Grievant's request for unemployment compensation. Respondent concluded from this then that when Grievant presented her return to work slip in January 2015, that she was not an employee, and that she was making application for new employment, and therefore, apparently, her grievance should be dismissed because she was not an employee; although the undersigned is still unclear as to exactly what the argument being made was. Respondent presented no legal authority for the proposition that rulings made related to unemployment compensation are binding on the Grievance Board. The undersigned has, however, on many occasions in the past heard respondents argue just the opposite. It is clear from the evidence that Grievant was, in fact, an employee of the GTHD until she was dismissed from her employment on January 26, 2015. The undersigned declines to be bound by the ruling on Grievant's request for unemployment compensation, which, to the extent there was a finding that Grievant had been dismissed from her employment in June or July 2014, was clearly erroneous.

With regard to whether the termination of Grievant's employment was appropriate, the West Virginia Division of Personnel's Legislative Rule states:

> (c) An appointing authority may dismiss an employee for job abandonment who is absent from work for more than three consecutive workdays without notice to the appointing authority of the reason for the absence as required by established agency policy. The dismissal is effective fifteen calendar days after the appointing authority notifies the employee of the dismissal.

143 C.S.R. 1 § 12.2(c). "It is well established that job abandonment is a valid ground for termination, even when the employee expresses a desire to eventually return to his position. *See Wolfe v. Dep't of Health & Human [Res.].,* Docket No. 2008-1863-CONS (Mar. 4, 2010); *Bachman v. Potomac State Coll. of W. Va. Univ*., Docket No. 07-HE-198 (Jan. 17, 2008); *Chapman v. Dep't of Health and Human Res*., Docket No. 06-HHR-277 ([Oct. 31,]2006)." *Conley v. W. Va. Div. of Highways*, Docket No. 2010-1123-DOT (Dec. 27, 2010). However,

> 143 C.S.R. 1 § 12.2(c) provides that an appointing authority may dismiss an employee who is absent from work for three consecutive days without notice but it certainly does not require such dismissal. Further, the rule does not eliminate consideration of other factors such as the employee's work record and the circumstances surrounding the incident that must be considered in a good cause determination. *See Conley v. Div. of Corrections*, Docket No. 00-CORR-109 (June 30, 2000); *Ferrell v. W.Va. Dep't of Transp./Div. of Highways*, Docket No. 00-DOH-237 (Dec. 22, 2000) *rev'd on other grounds*, *W.Va. Dep't of Transp./Div. of Highways v. Ferrell*, Kanawha County Circuit Court Civil Action No. 01-AA-6, (May 30, 2002).

Adkins v. W. Va. Dep't of Health and Human Res., Docket No. 2011-1392-DHHR (Dec. 22, 2011).

The dismissal letter refers to Grievant's leave without pay as a personal leave of absence, but the form submitted by Grievant and approved by Respondent was for a medical leave of absence without pay. Accordingly, the undersigned finds that Grievant was granted a medical leave of absence without pay. The Division of Personnel's Rules

set forth the requirements for an employee to obtain a medical leave of absence, stating as follows:

> An injured or ill permanent employee upon written application to the appointing authority shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve month period provided:
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> a. The employee (1) has exhausted all sick leave and makes application no later than fifteen (15) calendar days following the expiration of all sick leave or (2) has elected not to use sick leave for a personal injury received in the course of and resulting from covered employment with the State or its political subdivisions in accordance with W. Va. Code §23-4-1 and makes application no later than fifteen (15) calendar days following the date on which the employee filed a claim for Worker's Compensation;
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> b. The employee's absence is due to an illness or injury which is verified by a physician/practitioner on the prescribed physician's statement form stating that the employee is unable to perform his or her duties and giving a date for the employee's return to work or the date the employee's medical condition will be re-evaluated;
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> c. A prescribed physician's statement form is submitted each time the employee's condition is re-evaluated to confirm the necessity for continued leave; and,
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> d. The disability, as verified by a physician/practitioner on the prescribed physician's statement form, is not of such nature as to render the employee permanently unable to perform his or her duties.

143 C.S.R. 1 § 14.8(c).

Grievant's medical leave of absence should have been approved for a maximum period of six months. However, the only document approved by Respondent and referred to by either party with regard to approval of the medical leave of absence did not contain a date when the leave of absence would end. No testimony was offered that anyone ever told Grievant that her leave of absence would end in six months. While Grievant should have made herself familiar with the rules related to a medical leave of absence without pay, Respondent is certainly not blameless, and Grievant should have been able to rely on the

representations of her employer in such matters. Respondent gave Grievant no notice that her medical leave of absence would expire or had expired, or that she could request a personal leave of absence without pay, until Respondent presented Grievant with the letter terminating her employment. Grievant did not intend to abandon her job. She was unaware that the medical leave of absence had expired, as Respondent did not approve an end date to the leave of absence, and did not advise Grievant that it needed to know whether she was coming back to work. Respondent did not demonstrate good cause for Grievant's dismissal.

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. *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, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir./W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. "It is well established that job abandonment is a valid ground for termination, even when the employee expresses a desire to eventually return to his position. *See Wolfe v. Dep't of Health & Human [Res.].,* Docket No. 2008-1863-CONS (Mar. 4, 2010); *Bachman v. Potomac State Coll. of W. Va. Univ.*, Docket No. 07-HE-198 (Jan. 17, 2008); *Chapman v. Dep't of Health and Human Res.*, Docket No. 06-HHR-277(2006)." *Conley v. W. Va. Div. of Highways*, Docket No. 2010-1123-DOT (Dec. 27, 2010).

4. The Division of Personnel's Legislative Rules provide at 143 Code of State Regulations 1 § 12.2(c) "that an appointing authority may dismiss an employee who is absent from work for three consecutive days without notice but it certainly does not require such dismissal. Further, the rule does not eliminate consideration of other factors such as the employee's work record and the circumstances surrounding the incident that must be considered in a good cause determination. *See Conley v. Div. of Corrections*, Docket No. 00-CORR-109 (June 30, 2000); *Ferrell v. W.Va. Dep't of Transp./Div. of Highways*, Docket No. 00-DOH-237 (Dec. 22, 2000) *rev'd on other grounds*, *W.Va. Dep't of Transp./Div. of Highways v. Ferrell*, Kanawha County Circuit Court Civil Action No. 01-AA-6, (May 30, 2002)." *Adkins v. W. Va. Dep't of Health and Human Res.*, Docket No. 2011-1392-DHHR (Dec. 22, 2011).

5. Respondent did not demonstrate good cause for Grievant's dismissal under the circumstances presented here.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to reinstate Grievant to her position as a Nurse III, effective the date her employment terminated, and to pay her back pay to that date, plus interest at the statutory rate, and reinstate all other benefits to which she would have otherwise been entitled, effective that date, and to reimburse her for any insurance payments she made to her employer provided health insurance from January 20, 2015, forward.

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).

BRENDA L. GOULD
Administrative Law Judge

Date: September 21, 2015