THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BRIAN LARGE,

Grievant,

v. **DOCKET NO. 2017-0210-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,

Respondent.

DECISION

On July 26, 2016, Brian Large ("Grievant") filed this grievance directly at Level Three, challenging the decision of the Department of Health and Human Resources to terminate his employment. Following multiple continuances, each of which was granted for good cause shown, a Level Three hearing was held before the undersigned Administrative Law Judge at the Grievance Board's Westover, West Virginia office on May 25, 2017. Grievant was represented by Gordon Simmons with UE Local 170, and Dawn Morgan, Eastern Region President, West Virginia Public Employees Union. Respondent was represented by Assistant Attorney General Harry C. Bruner, Jr. Respondent presented testimony by Patrick W. Ryan, Debbie Quinn and Mary Stalnaker. Grievant testified under oath on his own behalf. This matter became mature for decision on July 3, 2017, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent established by a preponderance of the evidence that Grievant failed to communicate with his employer under a set of circumstances which constituted 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. Grievant failed to establish that Respondent's decision to terminate his employment resulted from retaliation for protected activities in which Grievant had previously participated.

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 Respondent Department Health and Human Resources ("DHHR") as a Health Services Worker ("HSW") at William R. Sharpe, Jr. Hospital ("Sharpe"), an in-patient psychiatric facility.

2. Grievant began working at Sharpe in 2009 as a Temporary HSW and was selected to fill a full-time HSW position in August 2010. When Grievant was hired as a full-time employee, he began working in a position that was posted as "Male Night Shift," because Grievant had another job during the day. Grievant later moved to the evening shift based on the needs of the hospital, and lack of conflict with his other employment.

3. No policy at Sharpe guarantees that an employee will remain on a particular shift indefinitely, without regard to the needs of the hospital.

4. HSWs provide direct care to patients at Sharpe, and are required to provide patient services on a 24-hour basis, seven days per week.

5. During the time period pertinent to this grievance, Linda Stalnaker, Nurse Manager over Unit G-1 at Sharpe, was Grievant's immediate supervisor.

6. At all times pertinent to this grievance, Patrick Ryan was Sharpe's Chief Executive Officer ("CEO").

7. During the time period pertinent to this grievance, Deborah Quinn was employed as the Human Resources ("HR") Director at Sharpe.

8. Grievant's job performance was satisfactory until the events which led to this disciplinary action, all of which involve leave and attendance deficiencies.

9. Sharpe employees are required to keep their employer apprised of their current contact information, including mailing address and telephone number.

10. Sharpe Hospital's policy for reporting of unscheduled absences has been in effect since June 1991, and includes the following provisions pertinent to this grievance:

> **POLICY STATEMENT**:
> In order to provide continuity of service to our patients, employees are expected to adhere to their work schedules and to report unscheduled absences in a timely manner to allow supervisory staff to arrange for adequate staffing to cover the absence.
>
> **PURPOSE OF POLICY**:
> The purpose of this policy is to provide the procedures staff are to utilize when calling in for an unscheduled absence.
>
> **PROCEDURES**:
>
> Direct Care Staff
> Direct care employees must report unscheduled absences (sick, emergency vacation) to the Switchboard, the NCC office and their immediate supervisor a minimum of one (1) hour prior to the start of their scheduled shift. Employees who continually call-in with less than 60 minutes notice will be subject to disciplinary action. For example, for a shift beginning at 7:15 a.m., the employee must report off at or before 6:15

a.m. to be considered timely. This allows supervisory staff to assure minimum staffing levels for the work area.

* * *

Employees must report unscheduled absences **each** day they are unable to report to work. If the absence is prescribed by an attending physician and/or is expected to last more than one workday, the employee will directly notify their supervisor of the tentative date of their return to duty. If the employee has not directly notified their supervisor of a tentative return to duty date, they are required to report the absence each scheduled workday.

Failure to follow the specified procedure for reporting absences may result in an unauthorized absence.

Any exceptions to this procedure can only be approved by the employee's supervisor/manager. The approval for and justification of the exception must be documented in the timekeeping system.

RESPONSIBILITIES

* * *

Employee – Employees are required to report their absence in accordance with this policy and to provide sufficient information to the Switchboard operator and their supervisor regarding their absence. Immediately upon return to work, the employee must complete and submit a Leave Request Form to their supervisor. The supervisor will return a copy of the request once (s)/he has approved or disapproved the request.

* * *

R Ex 5 (emphasis in original).

11. When an HSW at Sharpe is unable to report for a scheduled shift, or fails to report for a scheduled shift, another employee must be held over in most cases, or else an employee must be called in to work an additional shift, or an employee must be called in to begin a scheduled shift earlier than normal, in order to maintain continuity of care for Sharpe patients.

12. Grievant and other HSW's in Unit G-1 ordinarily provide a proposed work schedule to Ms. Stalnaker on a weekly basis. This proposed schedule is commonly referred to as "the wish list." Employees understand that their day and shift preferences are not guaranteed and their work schedule is not established for the week until it is approved by Ms. Stalnaker. Approved leave for FMLA, medical leave of absence, personal leave of absence, annual leave, sick leave, and emergency leave are given priority when scheduling employees to work.

13. The approved work schedule is disseminated to all Clinical Nurse Coordinators and the Nurse Educator. In addition, each employee receives a copy of the schedule in his or her work mail box, and it is posted on the Unit G-1 bulletin board.

14. Consistent with established practice, Grievant submitted his request for annual and holiday leave in May 2016 based on his plan to move his elderly father into a nursing home in Florida.

15. After requesting leave for May 2016, Grievant became concerned for his own health when he experienced various symptoms, including vomiting blood and insomnia, consistent with a family medical history that included a terminal illness. Grievant underwent medical tests which revealed a mass in his upper gastrointestinal region and was scheduled for a biopsy. Some of these scheduled tests were in conflict with his work schedule, which involved a recent move to day shift which he considered unwarranted and retaliatory.

16. On April 6, 2016, Grievant sent an e-mail to Mr. Ryan which stated as follows:

> I am writing you to request a leave of absence from my position as a HSW at Sharpe hospital. I have health issues and multiple Dr. Appointments, consults and tests scheduled for the next month. I have also been dealing with severe insomnia which has made it very difficult for me to show up for day shifts. I have communicated with my unit manager that day shift is not working for me and have requested that they put me back on my original evening shift, which they did for a month. Next month however they have, (without asking me) moved me to all day shifts – 10 in a row. I have 6 appointments that will conflict with those scheduled days, not to mention the days that I will not be able to work because of the insomnia.
>
> I do not wish to be a burden to my co-workers, but, my health must come first.
>
> Thank you for your time in considering this.

G Ex A.

17. Mr. Ryan considered Grievant's April 6, 2016 e-mail to constitute an "informal" request for some form of leave of absence because Grievant did not complete any of the applicable forms, provide any acceptable supporting documentation, or include a beginning and ending date for the leave. Mr. Ryan forwarded Grievant's e-mail request to Sharpe's HR office and DHHR headquarters in Charleston, West Virginia.

18. Ordinarily, the HR Director works with Sharpe employees to determine the appropriate type of leave to take in a given set of circumstances. Grievant expressed a strong disdain for HR Director Quinn to the point where he refused to discuss any personnel issue with her. Over a period of "several months," Grievant left voicemail messages for another employee in HR whose voicemail was still active, even though she no longer worked at Sharpe. Grievant did not investigate why this employee never returned any of his calls over such an extended period of time.

19. During Grievant's employment, he sought and obtained FMLA leave in 2014, after completing the required forms.

20. Grievant called Ms. Stalnaker on April 28, 2016, explaining that he had just been released from the hospital, and he was going to have surgery the following week. Ms. Stalnaker considered this to be a proper sick leave request and tentatively approved leave for Grievant, with the expectation that he would complete the required leave forms and provide the required medical documentation upon his return to work.

21. Until Grievant underwent a biopsy and a surgical procedure to remove the mass from his throat, which was thereafter determined to be benign, Grievant thought he had a terminal illness.

22. When Grievant had not returned to work or contacted Ms. Stalnaker by May 5, 2016, she called Grievant and left a message on his voicemail explaining that she needed his sick leave documentation, and she also needed to determine when he would be returning to work. Ms. Stalnaker expected Grievant to return to work, and continued to schedule him for work. Grievant was listed as "no call, no show" (NCNS) for those days he did not report to work or communicate his whereabouts.

23. On May 25, 2016, Mr. Ryan sent a letter to Grievant, via certified mail, addressed to the mailing address in Horner, West Virginia, contained in Grievant's personnel records, which correspondence stated the following:

> The purpose of this letter is to determine your intentions relative to your employment as a Health Service Worker with the West Virginia Department of Health and Human Resources.
>
> According to our records, you have been absent without approval since April 23, 2016. Specifically, you did not report to work nor did you notify your supervisor regarding the reasons for your absence or request annual

> or sick leave April 23 through April 27 and May 9 through May 25, 2016. On April 28, 2016, you left me a phone message stating "I just got out of the hospital and will be having surgery next Monday and will be off work all next week." On May 5, 2016, I notified you by voice mail upon your return, I would need a Health Practitioner's Statement covering the period of your absence since April 23, 2016 and releasing you to duty.
>
> As of today's date, William R. Sharpe Jr. Hospital has not received medical documentation covering your absence beginning April, 23 (*sic*.) or further communication concerning your whereabouts since May 9, 2016. In accordance with the in accordance with (*sic*.) the West Virginia Division of Personnel's Administrative Rule, §CSR1 (*sic*.) section 14.4g, your absence from work beginning April 23, 2016 through the date of this letter has not been approved and is being charged as unauthorized.
>
> It is necessary that you contact your supervisor immediately to discuss your intentions relative to employment with our agency. Should you choose not to contact your supervisor, as provided by 12.2.c. of the Administrative Rule, William R. Sharpe Jr. Hospital will have no other option but to consider your dismissal for job abandonment. If that becomes necessary, a predetermination conference will be held June 2, 2016, at 3:00 pm to provide you the opportunity to provide input in determining if dismissal appropriate (*sic*.). You may participate in the conference personally or telephonically by calling William R. Sharpe Jr.'s Office of Human Resources at [redacted]. Should you choose not to participate in the predetermination process; a decision will be made absent your input.

R Ex 1.

24. Mr. Ryan's May 25, 2016 letter to Grievant was delivered to Grievant's mailing address of record in Horner, West Virginia, where an unidentified person signed for the certified mail. *See* R Ex 6.

25. Ms. Quinn and Ms. Stalnaker met for Grievant's predetermination conference on June 2, 2017, as scheduled, but Grievant did not call in, appear, or contact them in advance of the meeting.

26. Ms. Quinn attempted to contact Grievant by telephone on multiple occasions after he failed to return from leave in April 2016. During this period, Grievant never answered any of the calls she placed from her state telephone at Sharpe.

27. The only time Grievant returned a phone call from Ms. Quinn was on June 8, 2016, on which occasion Ms. Quinn and Ms. Stalnaker called Grievant on Ms. Quinn's personal cell phone but left no message. Grievant returned the call from Ms. Quinn's phone on that date. Ms. Stalnaker spoke with Grievant while Ms. Quinn listened to their conversation.

28. During the telephone conversation between Grievant and Mary Stalnaker on June 8, 2016, which was recorded by Respondent, Grievant told Ms. Stalnaker that he no longer lived at his former mailing address in Horner, West Virginia. *See* R Ex 7.

29. During Grievant's recorded telephone conversation with Ms. Stalnaker on June 8, 2016, Grievant also told Ms. Stalnaker that he did not have an address in West Virginia, nor did he have an address in Florida, where she could send correspondence at that time, because he was in Florida assisting his elderly father in moving. *See* R Ex 7.

30. When Grievant made these statements to Ms. Stalnaker, he was receiving mail at a post office box in Weston, West Virginia, but never disclosed this address to his employer while employed at Sharpe.

31. Grievant did not provide Sharpe with a new mailing address to replace his Horner, West Virginia address, prior to May 26, 2016, nor at any time prior to his termination on August 7, 2016.

32. Grievant's representative listed the Horner mailing address on the grievance form submitted to the Grievance Board on July 25, 2016, to initiate this grievance in Grievant's behalf.

33. During Grievant's recorded telephone conversation with Ms. Stalnaker on June 8, 2016, Grievant told Ms. Stalnaker that he did not know how long he would be off work. *See* R Ex 7

34. During Grievant's recorded telephone conversation with Ms. Stalnaker on June 8, 2016, Grievant stated that he could not understand why Mr. Ryan had not approved his request for a Leave of Absence, given that Grievant was "an employee in good standing." Grievant also acknowledged that Mr. Ryan referred him to Human Resources in regard to his e-mail request for a Leave of Absence. *See* R Ex 7.

35. During Grievant's recorded telephone conversation with Ms. Stalnaker on June 8, 2016, Grievant stated that he did not "feel like going and talking to Debbie Quinn," Sharpe's Human Resources Director. *See* R Ex 7.

36. During Grievant's recorded telephone conversation with Ms. Stalnaker on June 8, 2016, Grievant indicated that he was familiar with the procedures for requesting leave under the Family Medical Leave Act. *See* R Ex 7.

37. During Grievant's recorded telephone conversation with Ms. Stalnaker on June 8, 2016, Grievant stated that he was taking care of his father, who needed his help more than Sharpe Hospital. *See* R Ex 7.

38. During Grievant's recorded telephone conversation with Ms. Stalnaker on June 8, 2016, Grievant stated: "Go ahead and fire me and I will file a grievance and I will get my job back in six months." *See* R Ex 7.

39. On June 15, 2016, Mr. Ryan sent correspondence to Grievant which stated, in pertinent part, as follows:

> The purpose of this letter is to clarify the status of your employment as a Health Service Worker at William R. Sharpe, Jr. Hospital. This letter has been sent via cell phone as Sharpe has no other means of contacting you at this time.
>
> On March 29, 2016, you emailed me requesting "a leave of absence." It was unclear from that email what type of leave you were requesting, or the time frame during which you would need this leave. There was no DOP-L1 (Application for Leave with Pay), DOP-L2 (Application for Leave without Pay – non-medical), or DOP-L4 (Application for Leave without Pay – medical) attached to that email. You were advised to speak with HR, which you did not do.
>
> You stated in your email that you had "health issues and multiple Dr. Appointments, consults and tests scheduled *for the next month.*["] (emphasis added) From this, it can be inferred that your request was for medical reasons, for the month of April only. You had paid leave available for use in the month of April, and in fact, used 74.5 hours of approved leave prior to April 23, 2016.
>
> On April 28, 2016, you left a voicemail message for Mary Stalnaker indicating that you had been in the hospital and would be having surgery the following Monday (May 2, 2016) which would keep you out the remainder of that week. Due to that voicemail, your absence from April 23, 2016 to May 6, 2016 was considered tentatively approved medical leave, pending the receipt of verifying medical documentation. In fact, you were paid were paid leave from April 23, 2016 to May 6, 2016 in anticipation of your return with appropriate medical documentation supporting your period of leave. In anticipation of your return, Ms. Stalnaker left you a voicemail on May 5, 2016 reminding you to bring in the appropriate physician's statement(s) upon your return.
>
> Because you did not return to work as anticipated, and you had not called in to seek additional time off, you were sent a letter dated May 25, 2016 to determine whether you intended to return to work. That letter was mailed

to your last known address in Horner, WV. You are advised annually during open enrollment that you must keep your current contact information updated with HR.

On June 8, 2016, at approximately 5:30 pm, Mary Stalnaker was able to reach you in Florida via cell phone. During that conversation, it became clear that you had not received the May 25, 2016 letter because you no longer lived in Horner and had no current WV address. You also claimed to not have an address in Florida, where you were assisting your 80-yr-old father to move. While you may not have an address in Florida, presumably your father does. At the least, mail could be sent to you in care of your father. However, your tone during this part of the conversation implied you would not give a valid address, whether there was one or not.

During that conversation, you confirmed that you now have a "clean bill of health." Therefore, regardless of your leave status between May 6, 2016 and June 8, 2016, you have admitted to no longer needing medical leave as of June 8, 2016.

As you should be aware, with the exception of unscheduled sick leave and emergency situations, all leave is to be requested and approved prior to being taken. Your current absence to assist your father in Florida has neither been requested nor approved.

Although you claim you had requested a Personal Leave of Absence directly from me, which was never denied, it is difficult to understand how a vague request for leave due to medical issues in April would still apply to cover an absence to assist your father with a move in Florida, when you have a "clean bill of health." Further, although you allegedly requested leave for a vacation in the second half of May, Ms. Stalnaker has no record of that request; and the period of that leave request would now be expired.

Taking all of the foregoing into consideration, I am now clarifying the following:

- There was no request made for a Personal Leave of Absence (PLOA) for undefined purposes for an indefinite period of time.

- Even if there was a valid request for leave made directly to me, such request was limited to medical reasons for a finite period of time.

- Your period of absence from April 23, 2016 to May 6, 2016 must be supported by valid medical documentation. You must provide appropriate leave slips and documentation covering your medical absence to Mary Stalnaker on or before your return to work.

- If your medical absence continued after May 6, 2016, the same would apply for any period supported by valid medical documentation.

- Failure to provide valid medical documentation supporting your medical absence from April 23, 2016 to May 6, 2016 (or later) will result in your being placed in an unpaid status; therefor (*sic*.), any Annual or Sick Leave you have been paid which is unsupported must be repaid.

- Presuming you supply valid medical documentation supporting your medical absence from April 23, 2016 to May 6, 2016, your leave balances as of May 6, 2016 are: 0.62 hr AL, 2.0 hr SL, and 16 hr HL.

- Because this is the first written communication clearly defining your current leave situation, any period of absence from April 23, 2016 to June 19, 2016, not otherwise addressed herein, will be unpaid but will not be held against you in any disciplinary matter.

Your options now are as follows:

1. Return to work on **Monday, June 20, 2016 at 7:00 am**. If you are unable to return to work at the designated date and time, you **must** speak with Mary Stalnaker by Friday, June 17, 2016 at [redacted telephone number] or [redacted e-mail address] to explain why you cannot return. Leaving a voicemail message by the designated time and date is not sufficient.

2. If you cannot return to work at the designated date and time for medical reasons, you **must**, by **Wednesday, June 22, 2016**, provide to Mary Stalnaker a DOP-L4: Application for Leave without Pay – medical, and provide medical documentation supporting your absence. Because you admitted on June 8, 2016 to being healthy, any medical documentation provided is subject to validation by the

Medical Leave Coordinator in DHHR's Office of Human Resources Management.

3. If you cannot return to work at the designated date and time for non-medical reasons, you **must**, by **Wednesday, June 22, 2016,** provide to Mary Stalnaker a DOP-L2: Application for Leave without Pay – non-medical, and fully explain the circumstances preventing your return. Your reasons will be considered; however, a PLOA may be denied. If you request a PLOA, you **must** provide a date/time you will return to work. An indefinite period of PLOA will **NOT** be granted. Should you request a PLOA, I will notify you of my decision by **Friday**[,] **June 24, 2016**.

If you fail to return to work at the designated date and time, or request leave by the date provided above, William R. Sharpe, Jr. Hospital will have no other option but to consider termination of your employment in accordance with provisions set forth in section 14.8.d.3 of the Division of Personnel's Administrative Rule. If that becomes necessary, a predetermination conference will be held on [reasonable date/time] (*sic*.) to provide you with the opportunity to provide input in the decision process. You may participate in the conference telephonically by calling [redacted telephone number]. Should you choose not to participate in any predetermination process a decision will be made absent your input.

Your last day worked was April 16, 2016. Pursuant to DOP's Administrative Rule, "Recovery of payment for sick leave [or annual leave in lieu of sick leave] made subsequent to the date and time [last worked] shall be made, by civil action, if necessary." 14.4.e. Therefore, if you do not return to work, you must repay the 106.25 hours of combined sick and annual leave you have been paid since April 16, 2016.

You stated in your June 8, 2016 conversation with Ms. Stalnaker that Sharpe could "do whatever you have to do." You also indicated that f Sharpe were to terminate your employment, you would "file a grievance and be back in six months." Finally, you stated that you hope to have a job to come back to, because you truly care about your co-workers and the patients you serve. I also hope you have a job to come back to. You are now on notice of what you must do to ensure that job is available upon your return. For the sake of your co-workers, Sharpe's patients, and yourself, I hope you comply.

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 at [phone number redacted] if you wish to schedule an appointment.
>
> * * *

R Ex 2 (emphasis in original).

40. Mr. Ryan intended his June 15 correspondence to provide Grievant with a second opportunity to state his intentions regarding his employment status, and to request the appropriate leave, if it was still needed.

41. Ms. Quinn sent Mr. Ryan's June 15, 2015 correspondence to Grievant in the form of a message addressed to Grievant's cell phone number on record with Sharpe.

42. Ms. Quinn received electronic confirmation that the message containing the June 15, 2015 correspondence was delivered to Grievant's phone.

43. Grievant acknowledged that he received notification of four messages from Ms. Quinn on his cell phone on or about June 15, 2016, but denied receiving any attachments or documents that he could access.

44. Grievant made no effort to reply to the messages on his phone or otherwise contact Ms. Quinn to ascertain what messages she was attempting to send him, instead calling for "Helen," in HR, and leaving a voicemail message for this employee who was no longer working at Sharpe.

45. In Ms. Quinn's experience as HR Director, she spent more time and effort attempting to contact Grievant and ascertain his status than any other employee who had failed to report for work for an extended period of time.

46. On July 22, 2016, Mr. Ryan sent a "Notice of Dismissal" to Grievant which stated, in pertinent part, as follows:

> The purpose of this letter is to inform you of my decision to dismiss you effective August 7, 2016 from your employment as a Health Service Worker at William R. Sharpe, Jr. Hospital. 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.
>
> Although the dismissal will not be effective until August 7, 2016, you are being dismissed for job abandonment; therefore, you will not be paid severance as authorized by W. Va. Code § 29-6-10(12). You will be paid for all annual leave accrued and unused as of your last workday; however, pursuant to the Administrative Rule, subsection 14.4.e, you must repay 54.28 hours of Sick Leave $574.97 (*sic*.) which was paid to you since your last day at work, April 16, 2016.
>
> Your dismissal is the result of more than three (3) consecutive absences without approval since April 23, 2016. So that you may understand the specific reason for your dismissal, I recount the following.
>
> On March 29, 2016, you emailed me requesting "a leave of absence." It was unclear from that email what type of leave you were requesting, or the time frame during which you would need this leave. There was no DOP-L1 (Application for Leave with Pay), DOP-L2 (Application for Leave without Pay – non-medical), or DOP-l4 (Application for Leave without Pay – medical) attached to that email. While I did not reply to you at the time of your e-mail request that the request was denied, I did not grant a request for continuous leave; I advised you to speak with the human resources office, which you did not do. As you are aware, leave is to be requested and approved prior to being taken. You used 74.5 hours of leave between April 1 and April 23, 2016.
>
> On April 28, 2016, you left a voicemail message for Mary Stalnaker, Nurse Manager, indicating that you had been in the hospital and would be having surgery the following Monday (May 2, 2016) which would keep you out the remainder of that week. Due to that voicemail, your absence from April 23, 2016 to May 6, 2016 was considered tentatively approved medical leave, pending the receipt of verifying medical documentation and the required request form. In fact, you were paid leave from April 23, 2016 to May 6, 2016 in anticipation of your return with appropriate medical documentation supporting your period of leave. Ms. Stalnaker left you a voicemail on May 5, 2016 reminding you to bring in the appropriate

physician's statement(s) upon your return. To date, neither medical documentation supporting your absence from April 23 to May 5, 2016 nor the required request form has been received.

Sharpe attempted to inquire about your intentions with respect to your employment by letter dated May 25, 2016, sent to the last known address that you provided. Sharpe again attempted to ascertain your intentions via telephone call to you on June 8, 2016. During that conversation with Ms. Stalnaker, you repeatedly maintained that you requested leave "that should have been granted." You were informed multiple times that the leave was not approved and/or had been denied. You were specifically directed to contact the Charleston office of the Department of Health and Human Resources to request federal Family and Medical Leave Act (FMLA) leave. You confirmed that you were familiar with the process and would contact them to request FMLA. There is no record of you attempting to contact the Charleston office or Sharpe concerning your absence from work. When Ms. Stalnaker asked for an address to which we could send a letter, you would not provide a mailing address. Nevertheless, Sharpe again sought to determine your intentions by sending a letter dated June 15, 2016 via text message to your cell phone on June 22, 2016.

Despite the repeated attempts to give you an opportunity to comply, you have not provided any medical documentation supporting your absence from work since April 23, 2016 nor have you submitted the required leave request form(s). You have presented no leave slips requesting time off since April 23, 2016. You have not been approved for leave since April 23, 2016. "An appointing authority may dismiss an employee for job abandonment who is absent for work for more than three (3) consecutive workdays or scheduled shifts without . . . approval for the absence as required by established agency policy." W. Va. Code R. § 143-1-12.2.c.

It is unfortunate that it has come to this. No element of employment is more basic than the right of the employer to expect employees to report for work as scheduled and to comply with established procedures for requesting absences as well as providing the necessary documentation. Your absence has placed an undue hardship on this facility as well as on your co-workers who must assume your assigned duties during this period.

* * *

You may respond to the matters of this letter in writing or in person, provided you do so within fifteen (15) calendar days of the date of this letter.

* * *

R Ex 4 (emphasis in original).

47. Prior to his termination in July 2016, Grievant filed multiple grievances against his employer, as authorized by the West Virginia Public Employees Grievance Procedure, W. Va. Code § 6C-2-1, *et seq*.

48. On December 16, 2011, Grievant filed a grievance challenging his termination for job abandonment. Following a Level Three hearing on July 31, 2012, Grievant was reinstated to his position as an HSW at Sharpe based upon a determination that his employer failed to substantiate the basis for his termination, and violated his due process rights in the course of terminating his employment. *Large v. Dep't of Health & Human Res*., Docket No. 2012-0632-DHHR (Oct. 11, 2012) ("*Large I*").

49. Grievant filed a second grievance on June 6, 2014, challenging his suspension pending an investigation for patient abuse. After Grievant was reinstated when the investigation did not substantiate misconduct, he was paid back pay which failed to include the overtime he was scheduled to work while on suspension. The Grievance Board ordered Sharpe to pay Grievant an additional $889.24 for 46 hours of scheduled overtime missed during his suspension. *Large v. Dep't of Health & Human Res*., Docket No. 2014-1634-DHHR (Sept. 28, 2016) ("*Large II*").

50. Grievant filed a third grievance on January 6, 2015, challenging a second termination of his employment, this time for allegedly having an improper relationship with a former patient. Following a Level Three hearing on May 28, 2015, the Grievance

Board ordered Grievant reinstated because the employer failed to establish the charges against grievant by a preponderance of the evidence. *Large v. Dep't of Health & Human Res*. Docket No. 2015-0721-DHHR (July 21, 2015) ("*Large III*").

51. Grievant also filed a grievance prior to his termination challenging a written reprimand he was issued. ("Large IV"). This grievance did not reach Level Three.

52. The outcome of *Large IV* is in dispute, with Grievant claiming the grievance was settled after Level One, when DHHR agreed to remove the reprimand from his personnel file, and Respondent asserting that the grievance was denied at Level One, and not appealed to Level Two by Grievant. DHHR introduced a Level One decision denying the grievance challenging the reprimand. *See* R Ex 17. Therefore, this disciplinary action may be considered as prior discipline supporting Grievant's termination.

53. As of the date Grievant was terminated on July 22, 2016, Grievant had failed to complete the leave forms required to support his medical absence from April 23, 2016 through May 6, 2016, and Grievant had not provided his employer with appropriate medical documentation to support any portion of that absence.

54. As of the date Grievant was terminated on July 22, 2016, Grievant had failed to properly communicate with his employer whether he intended to return to his position as an HSW at Sharpe.

55. Grievant was absent from work without approved leave from April 28, 2016, until his termination on July 22, 2016.

56. As of the effective date of Grievant's termination on August 7, 2016, Grievant did not communicate with his employer in response to his termination notice, nor did he appear for, or otherwise participate in, a predetermination conference.

Discussion

This grievance involves a disciplinary matter for which 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*.

Certain facts relating to the charges against Grievant were the subject of conflicting testimony. 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); *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). *See Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty,

attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

The Administrative Rule of the West Virginia Division of Personnel in effect on the date Grievant was terminated[1] explains "job abandonment" as follows:

> An appointing authority 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 appointing authority of the reason for the absence as required by established agency policy. Consecutive scheduled workdays or scheduled shifts are determined without regard to scheduled days off that occur during the period of sick leave. Thus, annual leave, holidays, modified holiday observance, compensatory time, regularly scheduled days off, or any other time for which the employee was not scheduled to work during the period of absence shall not constitute a break when determining the three consecutive work days. The dismissal is effective fifteen (15) calendar days after the appointing authority notifies the employee of the dismissal. Under circumstances in which the term job abandonment becomes synonymous with the term resignation, an employee dismissed for job abandonment is not eligible for severance pay.

143 C.S.R. 1 § 12.2(c) (2016).

Although Grievant asserts that he had no intention of abandoning his job, his actions contradict this claim. Over an extended period of time exceeding three months, Grievant made no meaningful effort to comply with his employer's requirements after he was referred to Sharp's Human Resources staff to complete an application for leave without pay. Grievant was not terminated because Respondent did not believe he was

[1] A new Division of Personnel Administrative Rule became effective on July 1, 2016, superseding the previous Administrative Rule which had been in effect since July 1, 2012. *See* 143 C.S.R. 1 § 1.4 (2016) and 143 C.S.R. 1 § 1.4 (2012).

hospitalized in April 2016, or had further medical testing and consultation appointments, nor that he was actually in Florida assisting his elderly father as he claims. Rather, Grievant was terminated because he failed or refused to comply with established procedures for taking leave applicable to state employees, including DHHR employees, despite having been afforded multiple opportunities to comply. *See Toler v. Dep't of Health & Human Res*., Docket No. 2012-0189-DHHR (Aug. 1, 2012). Grievant's statement that he never intended to abandon his job is contradicted by his actions. Even if he sincerely intended to return at some point, he nonetheless engaged in job abandonment through his obstinate and deliberate failure to inform his employer of his status and intentions. *See Bachman v. Potomac State College*, Docket No. 07-HE-198 (Jan. 17, 2008); *Chapman v. Dep't of Health & Human Res*., Docket No. 06-HHR-277 (Oct. 31, 2006). While there may be an ironic similarity between the situation where Grievant's termination was reversed in *Large I* and the present grievance, the current grievance is readily distinguishable, based upon the specific facts established in this record.

Grievant asserts that he was denied due process because he never received any of the written notices which Respondent issued in the course of attempting to ascertain his intentions and advise him that adverse action, including termination for job abandonment, was being contemplated. Grievant credibly testified that he did not receive Mr. Ryan's May 25, 2016 correspondence seeking to determine Grievant's intentions as to his HSW position. Grievant's testimony that he was unable to read Mr. Ryan's June 15, 2016 correspondence advising Grievant of his options regarding

employment at Sharpe which was attached to a text message sent to Grievant's cell phone was also credible. Likewise, Grievant was out of state, and no longer residing at his former residence in Horner, West Virginia, and did not actually receive Mr. Ryan's July 22, 2016 Notice of Dismissal. As a tenured public employee, Grievant has property and liberty interests which entitle him to procedural due process in regard to termination of his employment. *Bd. of Educ. v. Wirt*, 192 W. Va. 568, 573-74, 453 S.E.2d 402, 407-08 (1994); Adkins v. Dep't of Health & Human Res., Docket No. 2013-0264-DHHR (July 19, 2013). *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

Under the West Virginia Division of Personnel's Administrative Rule, an employer is required to give an employee "written notice of the specific reason or reasons for the dismissal." 143 C.S.R. 1 § 12.2.a.2 (2016). In regard to Mr. Ryan's May 25 correspondence and July 22 dismissal notice, Respondent mailed those notifications to Grievant's last known mailing address. Mr. Ryan's June 15 correspondence was sent as an attachment to a text message to Grievant's cell phone because the employer had become aware that Grievant was no longer living at his residence in Horner, West Virginia, and Sharpe's HR Director had a good faith belief that this was the most practical method available for communicating with Grievant.

This set of facts raises the issue of whether Grievant should benefit from his own failure or refusal to provide his employer with a current mailing address. The answer to this question can be found in jurisprudence governing analogous due process and employment rights in other administrative contexts. More particularly, similar circumstances have arisen in the realm of administrative appeals of driver's license

revocations in West Virginia, where licensees have a comparable requirement to notify the Department of Motor Vehicles ("DMV") of their current address. In that context, the West Virginia Supreme Court of Appeals has determined that the DMV properly mailed a revocation notice to a licensee at the licensee's address of record. Although the licensee no longer lived at that address and never received the notification, the Court concluded that the licensee's failure to apprise the DMV of his address change precluded him from asserting that he had been denied his right to a revocation hearing. *State ex rel. Miller v. Reed*, 263 W. Va. 673, 510 S.E.2d 507 (1998). *Accord*, *Davis v. W. Va. Dep't of Motor Vehicles*, 187 W. Va. 402, 419 S.E.2d 470 (1992); *State ex rel. Dep't of Motor Vehicles v. Sanders*, 184 W. Va. 55, 399 S.E.2d 455 (*per curiam*) (1990); *State ex rel. Mason v. Roberts*, 173 W. Va. 506, 318 S.E.2d 450 (*per curiam*) (1984).

Federal courts have adopted a similar approach in the context of civil rights plaintiffs who fail to inform the Equal Employment Opportunity Commission ("EEOC") of a change of address, and thus fail to receive notice of their right to sue. The consensus approach in multiple appeals has been to reject Title VII claims that are filed beyond the 90-day statute of limitations, concluding that providing a current mailing address to the EEOC is a reasonable requirement, and providing such address is ordinarily a matter within the plaintiff's control. *Hunter v. Stephenson Roofing, Inc*., 790 F.2d 472 (6th Cir. 1986); *St. Louis v. Alverno College*, 744 F.2d 1314 (7th Cir. 1984); *See also Espinoza v. Missouri Pacific R. Co*., 754 F.2d 1247 (5th Cir. 1985); *Mouriz v. Avondale Shipyards, Inc*., 428 F. Supp. 1025 (E.D. La. 1977).

This jurisprudence readily applies to the matter at hand, where Grievant had ceased residing at the home address on file with Sharpe and did not notify Sharpe of a new address. Indeed, Grievant's superiors at Sharpe were not aware that he was no longer residing at his former residence until nearly two weeks after mailing important correspondence seeking to ascertain Grievant's intentions toward returning to work. When Ms. Stalnaker finally made contact with Grievant in Florida by telephone, Grievant declined to provide an alternative mailing address. In addition, Grievant had a post office box in Weston, West Virginia, where he was receiving mail during this time, but never disclosed this to his employer until after he was terminated. In these circumstances, Grievant is estopped from complaining that he was denied due process because he did not actually receive the notices pertaining to his proposed termination, and lost the opportunity to participate in a predetermination hearing. *See Davis*, *supra*; *Hunter*, *supra*.

Further, although Sharpe could have sent CEO Ryan's June 15 correspondence to Grievant at his Horner mailing address (because that was the most recent mailing address in his personnel file), it was not improper for Sharpe to attempt to communicate with Grievant through text messaging. Grievant acknowledged receiving four text messages, but failed to inquire of the sender to ascertain what was transpiring with his employment situation. Grievant's claim that he called Sharpe's HR office and left a message with "Helen" on her voicemail represents a patently insufficient response. Grievant testified that Helen primarily handled benefits issues, such as health insurance, and it was highly unlikely that Helen would be attempting to send a message

to Grievant when he had not reported to work for more than a month. That person would be the HR Director, Ms. Quinn, who was, in fact, the person sending the messages. The weight of the evidence demonstrated that Grievant's petulant refusal to have any conversation with Ms. Quinn was the controlling force behind Grievant's actions.

In support of his claim that he was wrongfully terminated, Grievant presented evidence which demonstrated that he had an acrimonious argument with Ms. Quinn regarding a notice that his health insurance was being terminated, and his involuntary transfer to day shift for the first time since his employment began. Grievant also asserted that as a long-time employee with a satisfactory work record, he should have been granted a leave of absence from his employment without any hesitation. Grievant also contends that there was no legitimate reason to place him on day shift, other than to retaliate against him for obtaining reinstatement through the grievance process.

However, Grievant did not file a timely grievance challenging his employer's action to transfer him to day shift, either as being prohibited by his job posting, or as retaliation for filing grievances contesting his previous terminations and obtaining reinstatement. Likewise, he did not timely grieve his employer's failure or refusal to grant him a temporary leave of absence from his employment which he believed to have been unfairly rejected. Further, Grievant did not submit a grievance concerning an event where an erroneous notice cancelling his health insurance was issued, and Ms. Quinn allegedly "yelled" at him during a meeting where the insurance issue was being discussed, as well as his assignment to day shift.

Rather than file a grievance, it appears Grievant engaged in "self-help" by excusing himself from any further communication with Ms. Quinn, and taking leave from his employment as if he had obtained a leave of absence by following proper leave request procedures. This is inconsistent with the general rule that an employee who is required to comply with an illegal or improper directive of his employer must obey now and grieve later, unless certain factors are present, such as a *bona fide* concern for the employee's personal safety, or the safety of others. *See Stover v. Mason County Bd. of Educ*., Docket No. 95-26-078 (Sept. 25, 1995). *See also Peery v. Rutledge*, 177 W. Va. 548, 355 S.E.2d 41 (1987). *See generally*, Frank Elkouri & Edna A. Elkouri, *How Arbitration Works* 671 (3d Ed. 1973). Demonstrating an exception to the obey now - grieve later rule involves an affirmative defense for which Grievant has the burden of proof by a preponderance of the evidence. *Stover*, *supra*; *Parham v. Raleigh County Bd. of Educ*., Docket No. 91-41-131 (Nov. 7, 1991), *aff'd*, 192 W. Va. 540, 453 S.E.2d 374 (1994); *Young v. W. Va. Dep't of Health & Human Res*., Docket No. 90-H-541 (Mar. 29, 1991).

There is no credible evidence of any circumstance which would permit Grievant to bypass the grievance procedure. Moreover, these events were not the subject of a timely grievance as they preceded his termination by at least two months. Therefore, these complaints involve ancillary issues which may be considered only for the limited purpose of determining whether the change in shift is evidence of animus against Grievant for his grievance activity sufficient to contaminate the ultimate decision to terminate his employment for job abandonment, as hereinafter discussed.

Grievant asserts that his termination was effected in retaliation for his grievance activity while employed at Sharpe, including prevailing in two grievances which challenged earlier disciplinary actions wherein his employment was terminated. Employees who file grievances pursuant to the West Virginia Public Employees Grievance Procedure, W. Va. Code § 6C-2-1, *et seq*., are protected by a prohibition against retaliatory conduct by their employers contained in W. Va. Code § 6C-2-2(o). *Matney v. Dep't of Health & Human Res*., Docket No. 2012-1099-DHHR (Nov. 12, 2013); *Koblinsky v. Putnam County Health Dep't*, Docket No. 2011-1772-CONS (Oct. 23, 2012), *aff'd*, Cir. Ct. of Kanawha County, No. 12-AA-131 (July 24, 2013). 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 demonstrate by a preponderance of the evidence:

> (1) that he was engaged in activity protected by the statute (*e.g*., filing a grievance);
>
> (2) that his 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 (1988).

Grievant established a *prima facie* case of retaliation in regard to DHHR's decision to terminate his employment. Grievant engaged in activity protected by the grievance statute, and was thereafter subject to this adverse action, the supervisors who either initiated or proposed the subsequent adverse action were aware of his protected activity, and this action was 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*, *supra*. Nonetheless, the evidence and Grievant's own testimony established that DHHR had a proper reason for taking this adverse action in response to Grievant's failure and refusal to follow established procedures for requesting and taking leave. Although Grievant's transfer to working the day shift in Unit G-1 is suspect, it does not appear that Grievant ever reported for duty to work any of these shifts. CEO Ryan gave Grievant abundant time and opportunity to return to work, but Grievant, for whatever reason, chose to remain estranged from Sharpe, eschewing multiple chances to cooperate with his employer's need to find out when he would be returning to work.

While Grievant was the victim of prohibited retaliation from Respondent on prior occasions, and human nature suggests that his employer would entertain an additional opportunity to retaliate, Grievant forfeited any presumption of retaliatory animus by acting in a manner which no employer could be expected to tolerate. It is understandable that Grievant was frustrated by the previous unwarranted adverse

actions which Sharpe took against him, resulting in cancellation of his family's critical health insurance coverage. However, this does not justify his response to the present situation when he stayed away from work long beyond any reasonable expectation of being on approved leave. Checking to see if he was scheduled for annual training, rather than calling his immediate supervisor to confirm his status, or calling the HR Director to seek assistance in obtaining a proper leave of absence does not suffice. Grievant's actions indicate a deliberate indifference to complying with established procedures for taking leave, and the reasonable expectations of his employer. Accordingly, DHHR demonstrated by a preponderance of the evidence that there were legitimate, non-retaliatory reasons for Grievant's termination, and Grievant failed to show that these proffered reasons were merely a pretext for retaliation. *See Mace*, *supra*; *Metz*, *supra*.

As a public agency with at least 50 employees at its work site, DHHR is an employer covered under the Family Medical Leave Act ("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 his 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 prohibits retaliation by an employer against an employee for exercising his 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); *Burnett v. LFW Inc*., 472 F.3d 471, 481 (7th Cir. 2006); *Buie v. Quad/Graphics, Inc*., 366 F.3d 496, 503 (7th Cir. 2004).

Although Grievant previously exercised his right to take FMLA leave and suffered some sort of health condition at or about the time he requested a leave of absence, Grievant is not asserting FMLA interference or retaliation in this matter. Grievant acknowledged that he was aware of the FMLA and how to obtain leave under the Act. Even if he were claiming FMLA retaliation, Respondent presented preponderant evidence to demonstrate that Grievant's termination was the consequence of Grievant's conduct constituting job abandonment, as previously discussed, and not his exercise, or attempt to exercise, his FMLA rights. *See 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*.

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 he was terminated on the basis of mere technicalities, such as failure to request a leave of absence on a particular form, and failure to properly produce documentation of his medical treatment which was a matter of common knowledge in his unit. Unlike the situation in *Clark v. W. Va. Dep't of Military Affairs & Public Safety*, Docket No. 99-DJS-428 (Nov. 30, 1999), Grievant here did not make every reasonable attempt to comply with the applicable procedures for taking sick leave or requesting a leave of absence. Indeed, Grievant admitted that he was aware his leave of absence request needed to go through Sharpe's Human Resources Office, but refused to do so. Grievant's extended failure to keep his employer apprised of his plans to return to work involves a proper basis for terminating his employment. *See Toler*, *supra*.

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 Serv. 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 Serv. 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) (2016). *See Toler*, *supra*. Where, as here, Grievant failed to provide documentation to support medical leave taken, failed to request a leave of absence in the proper format with an expected date for beginning and ending such leave of absence, failed to submit a request for leave under the Family Medical Leave Act, declined to provide a current mailing address where his employer could send written communications, failed to provide leave requests to support his continued absence, and failed to indicate when he would be available to return to work, Grievant can fairly be said to have constructively resigned from his employment with the agency.

6. As a tenured public employee, Grievant has property and liberty interests which entitle him to procedural due process in regard to termination of his employment. *Bd. of Educ. v. Wirt*, 192 W. Va. 568, 573-74, 453 S.E.2d 402, 407-08 (1994); *Adkins v. Dep't of Health & Human Res*., Docket No. 2013-0264-DHHR (July 19, 2013). *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

7. Where Grievant's employer mailed notice by regular United States Mail to Grievant's last known mailing address, and Grievant failed or refused to provide his employer with his current mailing address, the fact that Grievant did not actually receive correspondence setting forth the reasons for his termination and right to respond did not

deprive Grievant of his right to procedural due process. *See State ex rel. Miller v. Reed*, 263 W. Va. 673, 510 S.E.2d 507 (1998); *Davis v. W. Va. Dep't of Motor Vehicles*, 187 W. Va. 402, 419 S.E.2d 470 (1992); *State ex rel. Dep't of Motor Vehicles v. Sanders*, 184 W. Va. 55, 399 S.E.2d 455 (*per curiam*) (1990); *State ex rel. Mason v. Roberts*, 173 W. Va. 506, 318 S.E.2d 450 (*per curiam*) (1984).

8. 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 he was engaged in activity protected by the statute (*e.g*., filing a grievance);
>
> (2) that his 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 (1988).

9. Grievant established a *prima facie* case of retaliation for his termination. *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 terminating Grievant for job abandonment as defined by the West Virginia Division of Personnel, and Grievant failed to demonstrate that these proffered reasons were merely a pretext for retaliation. *See Hall v. Dep't of Health & Human Res*., Docket No. 2014-1760-CONS (Dec. 22, 2015); *Mace*, *supra*; *Metz*, *supra*.

10. Respondent proved the charges against Grievant, and demonstrated good cause for his 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: July 20, 2017

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LEWIS G. BREWER
Administrative Law Judge