WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAWN PAXTON,
Grievant,

v. **Docket No. 2017-0421-DOT**

DIVISION OF MOTOR VEHICLES
Respondent.

D E C I S I O N

Dawn Paxton, Grievant filed this grievance against her employer the West Virginia Division of Motor Vehicles ("DMV"), Respondent on September 13, 2016, protesting her dismissal. This grievance statement provides; "[d]ismissal without good cause: bad faith." The relief sought was "[t]o be made whole in every way including back pay with interest and all benefits restored." Authorized by W. VA. CODE § 6C-2-4(a)(4), Grievant filed an expedited grievance directly to level three of the grievance process.[1]

A level three hearing was held before the undersigned Administrative Law Judge on February 7, 2017, at the Grievance Board's Charleston office. Grievant did not appear in person, but was represented by representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared in the form of Director of Legal Services Jill Dunn and legal counsel Gretchen A. Murphy, Assistant Attorney General. The Parties were provided the opportunity to submit written Proposed Findings of Fact and Conclusions of Law (PFFCOL). Both parties submitted PFFCOL documents

[1] W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

for consideration and this matter became mature for decision upon receipt of the last of the parties' fact/law proposals on or about March 7, 2017.

Synopsis

Grievant was employed by Respondent as an Office Assistant III (OA III). Respondent terminated Grievant for failing to report to work at the expiration of a leave of absence. Grievant challenges her dismissal. Grievant is aware there are rules and regulations governing attendance and absences from the work place. Unauthorized leave from the workplace is sanctionable conduct. Grievant was aware of the debated conduct, notice of the charges, explanation of Respondent's interpretation, and was provided an opportunity to respond. Applicable policies permit the actions exercised by Respondent. The undersigned does not conclude, in the circumstances of this matter, that Respondent's actions were unlawful. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Dawn Paxton, Grievant, was hired as an Office Assistant III (OA3) in May 2013 in the legal service section of the Division of Motor Vehicles in the Charleston headquarters.

2. Grievant was assigned to assist the Assistant Attorney Generals and other attorneys in the Legal Division. There is an abundance of time sensitive cases requiring

the calendaring of deadlines and performing tasks requiring interpretation and adaptation of office procedures, rules and regulations. Part of Grievant's duties required the application of principles to the cases and hearings where the DMV presents evidence at the Office of Administrative Hearings (approximately 2,500 hearings a year).

3. Respondent's Chief Administrator for the relevant period was Pat Reed. The Director of Respondent's Human Relations Office at the relevant time was Monica Price. Grievant's immediate supervisor during the most relevant time period was Joyce Abbott.

4. Grievant had a history of attendance problems during the course of her employment.

5. Joyce Abbott, Grievant's Supervisor, and Director of Legal Services (General Counsel) Jill Dunn had, on multiple occasions, attempted to assist Grievant by allowing her to work over, through her breaks and lunch breaks. L-3 Testimony

6. Grievant, more than once, fell into unauthorized leave status. Grievant's absences caused her to go off the payroll numerous times. *See* R Ex 6 and16.

7. Grievant was the subject of disciplinary actions for her tardiness and absences. There were no less than four different RL-544 forms,[2] 4/28/14, 8/12/14,

[2] An RL-544 is a Department of Transportation form used for disciplinary action and serves to notify the employee of pending action. The employee is given an opportunity to meet with the employer's designee and discuss the disciplinary action, which might vary in severity from a verbal warning to termination. At a designated time, the employee is provided the opportunity to further discuss the charges being directed and sign the RL-546. A RL-546 form is a standard form which Respondent uses to document an employee's remarks and/or provide additional information regarding a relevant disciplinary action in discussion.

4/8/16 and 4/22/16, entered into the record. R Ex 4,5,7 and 8 The title of the Form RL-544 is "NOTICE TO EMPLOYEE."

8. Grievant received a verbal warning on April 28, 2014, cautioning her about her leave usage and advising her that annual and sick leave may not be used until it is accrued. R Ex 4 *See* W. Va. Code R. § 143-1-14.3.

9. Among the information memorialized by the April 28, 2014 RL-544 was the following:

> This is to document that on April 28, 2014, I spoke with you about your leave usage. I explained that your last occurrence of Leave without Pay, from approximately 12:30 p.m. April 23, 2014 to 4:30 April 25, 2014 was unacceptable. I also explained that future requests by you for overtime would not be approved until further notice or until your total leave usage has improved. To clarify, I will not consider you for overtime hours for at least three months and only after a review of your leave usage shows it has decreased markedly. Also, in accordance with the Division of Personnel Rules and regulations, 143 CSR 1.14.3, I am advising you that I will not approve requests for annual leave unless it is requested at least one business day in advance. Please note, annual and sick leave can only be used once it has been accrued.

R Ex 4

(Grievant's signature is on the document and is dated April 29, 2014.)

10. A RL-544, dated August 12, 2014, regarding unauthorized leave was prepared for Grievant. This document was sent by certified mail to Grievant's address.

11. In addition to the information on the RL-544 form, a two-page letter was drafted and attached. R Ex 5 The August 12, 2014, document provided in part:

> The purpose of this letter is to address your continuous absence from work, clarify your current employment status, and communicate my expectations and the consequences for your failure to meet these expectations. Additionally, this is to notify you that your absence beginning July 29, 2014 is considered unauthorized.
>
> You have been continuously absent from work since June 3, 2014, at which time your annual and sick leave balances were exhausted. You requested and

were approved for a medical leave of absence through July 28, 2014, with an expected return to work date of July 29, 2014.

You not only failed to return to work on July 29, 2014, but have also failed to contact me to explain your continued absence. Since you have not submitted documentation to request a continuance on your medical leave of absence, it is necessary that you be placed on unauthorized leave in accordance with subsection 14.6 of the Division of Personnel's *Administrative Rule*. It is your responsibility to keep me informed of the reason(s) that prevent you from being at work as scheduled, and you have failed to do so.

R Ex 5

12. Grievant was absent from work causing her to be docked for leave without pay during the pay period including October 1-15, 2013, February 3-14, 2014, and April 15-30, 2014. R Ex 6

13. Grievant was absent from work for unpaid leave requested under the Family and Medical Leave Act (FMLA) between the dates of June 4, 2014 to November 3, 2014. R Ex 6

14. Pursuant to a November 14, 2014 interoffice memorandum, Grievant was formally notified that due to her prior leave usage/conduct her use of annual and sick leave would be restricted. All leave requests were to be in accordance with applicable DOP regulations and Grievant was required to obtain appropriate approval prior to any leave usage. R Ex 6 The leave restrictions period was six months. Grievant acknowledged receipt of this document and the contents of the memorandum by signature dated November 14, 2014.

15. In addition to Grievant's leave restriction, Grievant was also specifically informed that any request for overtime would not be considered for at least three months and only if her leave usage had significantly decreased. *Id*

16. On February 16, 2016, Grievant was involved in an automobile accident. In addition to any other medical treatment Grievant may have received, Grievant was examined by Kelley A. Whoolery, a Certified Physician Assistant. In a post-accident report, electronically signed by Ms. Whoolery, on February 20, 2016, Whoolery noted that Grievant had been sent home from St. Mary's Hospital after the accident, but was still reporting symptoms and being in pain. G Ex 3, pg. 4

17. A practitioner's statement for Grievant signed by Ms. Whoolery, dated February 22, 2016, stated that Grievant "*may* be able to resume full duty employment" on April 4, 2016. *Emphasis added.* R Ex 11, see also G Ex 2 and 4

18. In a 'follow-up' report signed by Whoolery on March 2, 2016, Grievant is noted as having had requested from her medical practitioner an application to Respondent for coverage under the Family Medical Leave Act (FMLA).

19. Grievant's medical practitioner, Kelley A. Whoolery completed a FMLA form for Grievant. G Ex 4 The document was signed March 7, 2016, when this form was actually received by Respondent is not clear.

20. Grievant did not report to work on April 4, 2016. Grievant did not contact Respondent, via her supervisor or a responsible agent indicating her intentions and/or an alternative return to work date.

21. On April 8, 2016, Respondent issued a RL-544 document of disciplinary action charging Grievant with 'unauthorized leave' for having failed to return to work on April 4, 2016. R Ex 7

22. The April 8, 2016, RL-544 was accompanied by a letter of the same date, signed by Grievant's supervisor Joyce Abbott. R Ex 7 The letter provided information pertaining to the unauthorized leave charge. Grievant had been absent from work since February 12, 2016. Her annual and sick leave expired on February 17, 2016. Grievant requested a medical leave of absence for the period February 17, 2016 through April 1, 2016. Id

23. On April 19, 2016, Grievant was medically examined by Darshan Dave, MD, of the Neurology and Headache Clinic, PLLC, of South Charleston, West Virginia pursuant to a referral by/from Physician Assistant Whoolery. G Ex 3

24. On April 22, 2016, Respondent issued another Form RL-544 document of disciplinary action charging Grievant with 'unauthorized leave.' In that Grievant had failed to return to work on April 4, 2016, and failed to contact Respondent requesting an extension of medical leave. Respondent indicated Grievant was being placed on unauthorized leave status and a recommendation for dismissal was being considered. R Ex 8

25. A meeting was scheduled for Grievant to meet with Director of Legal Services Jill Dunn for Friday April 29, 2016. There is no indication this meeting transpired.

26. On May 9, 2016, Grievant sent an email from her personal email account to Commissioner Reed with the subject line: "Termination letter dated May 3, 2016," the email in relevant part provided:

> Dear Commissioner Reed, Pursuant to your letter of May 2, 2016, this is to advise you that this is the first correspondence that I have received from the

> DMV since my accident on February 16, 2016. The other letters referenced in the May 3, 2016, correspondence were never received at my home. I filed for FMLA with all the pertinent information required and would like to know what the status of that filing currently is. I have never received any information regarding my request and was never advised that I needed to do anything further. I have a doctor's appointment on May 31, 2016, and it is my expectation that I will be returning to work after the doctor's release. I have had continuing doctors' excuses since my accident and will provide you with copies of the excuses upon your request.

R Ex 9

27. Joyce Abbott, Grievant's supervisor, advised responsible agents of Respondent in a May 11, 2016 e-mail that "[e]ven though I have advised Ms. Paxton on numerous occasions to stay in contact with me and/or our office while she is on extended leave, I have not heard from her since March 2, 2016. This is her usual practice." R Ex 9

28. On May 12, 2016, Grievant's medical practitioner, Kelley A. Whoolery signed a Form DOP-L3 pertaining to Grievant's absence from work. G Ex 2 When this form was actually received by Respondent is not clear.

29. On May 25, 2016, Commissioner Reed wrote Grievant a letter reiterating DOP policy and that Grievant was supposed to have returned to work on April 4, 2016. Commissioner Reed asked that Grievant submit an updated request for medical leave of absence and enclosed a DOP-L3. Human Resources Manager Monica Price emailed the letter to the Grievant on the same date. R Ex 17

30. On May 27, 2016, Grievant emailed Administrative Service Assistant Angie Cooper and Supervisor Abbott an application for FMLA leave. R Ex 13

31. Grievant made an application for FMLA, Form DOP-L4, "State Parental Leave and/or Medical Leave of Absence without pay," for reason of "Personal Illness." G Ex 2, pg. 4

32. Administrative Service Assistant Angela Cooper replied to Grievant in an email that stated: "I did receive this document yesterday, and I have gotten it approved by Joyce Abbott. However, your leave of absence is not a FMLA leave. It will have to be processed as a regular medical leave of absence . . . I just wanted to clarify this so you didn't think your absence was still covered under FMLA." R Ex 13

33. Grievant's absenteeism caused reallocation of her work, additional work for her supervisor monitoring her time and a great deal of additional tasks for Angela Cooper, who was required to document all of Grievant's time off the payroll. L-3 testimony of Joyce Abbott, Angela Cooper and Monica Price.

34. Adam Holley, DMV Assistant General Counsel, informed Director Dunn that he no longer wanted Grievant to do any of his work because of her habitual absenteeism and the fact that he could not count on her. L-3 testimony of Jill Dunn

35. On August 9, 2016, a certified letter was mailed to Grievant. The document signed by Commissioner Reed stated that Grievant was entitled to a six-month medical leave of absence and that Respondent "is unable to grant any type of additional leave of absence for you. If you are unable to return to work on August 18, 2016 immediately providing Form DOP-L3 releasing you to return to full, unrestricted duty, dismissal for failure to return from leave of absence is being considered." R Ex 2 The personal leave without pay that Grievant had requested had been denied and that she may respond to

the letter by contacting Jill Dunn within five days of her receipt of the letter. R Ex 2 In this letter, Commissioner Reed stated that if Grievant did not return to work on August 18, 2016, "*dismissal for failure to return from leave of absence is being considered*."[3] (Emphasis added.)

36. Respondent officially recognized Grievant's absence from work from February 17, 2016 through August 17, 2016 as a medical leave of absence.[4]

37. After Grievant's allowable medical leave of absence was exhausted, she requested a discretionary, personal leave of absence. The personal leave of absence was denied by Respondent. *See* W. Va. Code R. § 143-1-14.8.a

38. On August 19, 2016, Grievant was sent a letter signed by Director of Legal Services (General Counsel) Jill Dunn. Grievant was being placed on unauthorized leave for not returning to work after her six-month medical leave, which ended on August 17, 2016. Grievant's request for a personal leave of absence was denied. R Ex 15 In relevant part, the document specifically provided:

> As you have exhausted your six (6) month entitlement to a medical leave of absence in a twelve month period (February 17, 2016 through August 17, 2016), you were advised by letter dated August 9, 2016 that the agency was unable to grant a personal leave and that you must report to work on August 18, 2016 immediately providing Form DOP-L3 releasing you to return to full, unrestricted duty.

R Ex 15

[3] The letter did not say that "she will be dismissed" as stated in the Statement of Grievance.

[4] Grievant had been absent from work since February 12, 2016, her annual and sick leave expired on February 17, 2016.

39. Grievant was informed she had the opportunity to file a written response in five days and/or the option to meet with Director Dunn on August 26, 2016 at 9:30 a.m. in her office. R Ex 15 Grievant did not meet with Director Dunn.

40. West Virginia Division of Personnel's ("DOP") Legislative Rule 143 C.S.R. 1 § 12.2(c), provides that a state agency "may dismiss an employee for job abandonment who is absent from work for more than three consecutive workdays or scheduled shifts without notice to the appointing authority of the reason for the absence as required by established agency policy."

41. On September 8, 2016, a termination letter was sent to become effective on September 23, 2016. Grievant was dismissed for failure to return from a medical leave of absence. The dismissal letter, in relevant part, states:

> The purpose of this letter is to advise you of my decision to dismiss you from employment as an Office Assistant 3 with the Legal Division of the Division of Motor Vehicles effective September 23, 2016.
>
> . . .
>
> More specifically:
>
> You have been on medical leave of absence since February 17, 2016. Your six (6) month entitlement to a medical leave expired on August 17, 2016. You requested a personal leave of absence through September 7, 2016. By letter dated August 9, 2016, you were informed that the agency is unable to grant a personal leave of absence and advised that you should report to work on August 18, 2016 providing a physician's statement releasing you to return to full, unrestricted duty. You did not report to work on August 18, 2016, or contact your supervisor, Joyce Abbott.
>
> Subsequently, on August 19, 2016 an RL-544 was sent by certified mail notifying you that you were being placed on unauthorized leave effective August 18, 2016 and dismissal was recommended for failure to return from a medical leave of absence. You were given five (5) days to respond to this action and provided a time to meet with Jill Dunn, Director of Legal Services, to discuss the pending action or provide written comments. You did not attend the scheduled meeting, contact Ms. Dunn, or respond in writing concerning the recommended action.

> No element of employment is more basic than the right of the employer to expect employees to report to work, comply with established procedures, and keep your supervisor informed of your status, which you have failed to do. Your prolonged absence has placed an undue hardship on your co-workers who must assume your assigned duties during this period.

R Ex 1

42. A provision relevant to a medical leave of absence in the *Administrative Rule* of the West Virginia Division of Personnel states: "Failure of the employee to report to work promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to the appointing authority, is cause for dismissal." *Administrative Rule,* West Virginia Division of Personnel, §143 CRS 1, 14.8(c) 1 & 14.8(d) 3.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

This grievance requires that Respondent establish a good cause basis upon which to substantiate the disciplinary actions taken against Grievant. Grievant was a state employee in a classified service position. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." *Syl. Pt. 1*, *Oakes v. W.Va. Dep't of Finance and Admin.*, 164 W.Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W.Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep't of Health & Human Res*., 215 W.Va. 657, 661, 600 S.E.2d 554, 558 (2004) (*per curiam*) *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03.

Pursuant to the West Virginia Division of Personnel Administrative Rule, "[a]n 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. . . ." 143 C.S.R. 1 § 12.2 (c).

On September 8, 2016, a termination letter was sent to Grievant, to be effective September 23, 2016. Grievant filed a grievance dated September 13, 2016, which is the subject of the current action.[5] Grievant protests Respondent's disciplinary action and

[5] Previously, on August 15, 2016, Grievant filed grievance, Docket No. 2017-0674-DOT, which stated that although Grievant had "submitted documentation from her physician covering medical absence through September 7, 2016," she was given by Respondent "written notice to return to work on August 18, 2016, or ... be dismissed from employment." On August 26, 2016, Respondent, by counsel, filed a Motion to Dismiss that grievance asserting that a

contends the dismissal was procedurally faulty and done with bad faith. Respondent asserts that it lawfully terminated Grievant from employment. Respondent highlighted Grievant's repeated absences from the workplace and violation of leave policy. Specifically, Respondent contends that Grievant's conduct constitutes failure to return from a leave of absence.

DUE PROCESS

Grievant contends this grievance must be granted on the basis that her due process rights were violated. (Grievant's PFFCOL pg. 11) "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). *See also* West Virginia Supreme Court of Appeals case *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994). The question is whether the due process protections afforded Grievant were sufficient.[6] It has previously been held

"predetermination has not yet occurred," and "Grievant has not been dismissed from her job." On or about September 23, 2016, Respondent dismissed Grievant from employment. On September 30, 2016, this Board issued a Dismissal Order in the matter of Docket No. 2017-0674-DOT. The undersigned is aware of the proceedings and dismissal order of Docket No. 2017-0674-DOT (Sept. 30, 2016).

[6] The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supplement 228 (W. Va. 1968); *See Buskirk*, *supra*; *Edwards v. Berkeley County Bd. of Educ*., Docket No. 89-02-234 (Nov. 28, 1989).

that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. An employee is also entitled to written notice of the charges and an explanation of the evidence. *Wirt, supra*. In other words, notice of the charges, explanation of the evidence and an opportunity to respond is required to be provided.

Grievant contends her employment was terminated without the opportunity to respond to the charges giving rise to her dismissal. It is not totally clear whether Grievant is protesting lack of notice or the absence of a face-to-face meeting with an agency representative. Nevertheless, both propositions seem misplaced. While there may have been examples of miscommunication between the parties within the span of events, it is not factually accurate to contend Grievant, at the time of dismissal, was unaware of the issues in dispute. Further, Grievant was informed of the opportunity to meet and discuss the issue(s), present additional information and/or propose alternative solution.

Grievant was aware of the alleged offensive conduct, notice of the charges, explanation of Respondent's interpretation, and an opportunity to respond. Evidence of this can be found in several documents of record. *See* R Exs 1, 2, 10,13, and 15. The certified August 9, 2016, document signed by Commissioner Reed provided that Grievant was entitled to a six-month medical leave of absence and that Respondent is unable to grant any type of additional leave of absence. The personal leave without pay that Grievant had requested had been denied and that she may respond to the letter by contacting Jill Dunn within five days of receipt of the letter. R Ex 2 Further,

Commissioner Reed specifically stated that if Grievant did not return to work on August 18, 2016, "*dismissal for failure to return from leave of absence is being considered*."[7] (Emphasis added.)

The contention that Grievant was denied due process is an interesting proposition in the fact pattern of this case. However, the facts do not tend to support such a conclusion. Grievant acknowledges receipt of notice to return to work and protested the pending termination determination prior to the effective date of separation. *See Paxton v. Division of Motor Vehicles*, Docket No. 2017-0674-DOT (Sept. 30, 2016). Grievant filed said grievance on August 15, 2016. Grievant was presented the option of meeting with a responsible representative and choose to pursue another avenue of action.

Grievant was sent a letter signed by Director of Legal Services (General Counsel) Jill Dunn dated August 19, 2016. Grievant was being placed on unauthorized leave for not returning to work after her six-month medical leave which ended August 17, 2016. Grievant's request for a personal leave of absence was denied. R Ex 15 Grievant was informed she had the opportunity to file a written response in five days and/or the option to meet with Director Dunn on August 26, 2016 at 9:30 a.m. in her office. *Id.* Grievant for one reason or another deemed it prudent and did not meet with Respondent's agent. Respondent filed a motion to dismiss the aforementioned grievance Docket No. 2017-

[7] The letter did not say that "she will be dismissed" as stated in the Statement of Grievance. "*Is being considered"* might be interpreted to mean there was a possibility, even if remote, that Grievant's dismissal was not a forgone conclusion. Grievant was specifically informed of the option to communicate with a designated agent of Respondent to discuss the issue.

0674-DOT on August 26, 2016.[8] It is more likely than not that the motion was filed after Grievant failed to be present at the 9:30 a.m. meeting.

Grievant was aware of Respondent's interpretation of events, Grievant had notice of the issue(s) and an opportunity to respond. Grievant's allegation that Respondent acted in bad faith is not persuasive. Respondent was long suffering with events of this matter. Most if not every official action of Respondent was done in duplicate. It might be interpreted that Grievant made matters more complicated than generally necessary. Grievant's failure to timely present medical or other documentation as prescribed and/or requested by applicable authority tended to create additional confusion.

It is not established that Grievant's due process rights were violated, nor is it found that Respondent's agents acted in manner recognized, in the employment-grievance setting, as in bad faith. The undersigned is persuaded that Grievant had opportunity to respond and communicate with responsible agents of Respondent after notice of pending termination but prior to final determination.

MERIT

Grievant contests the termination of her employment. "A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syllabus point 4, *Waite v. Civil Service Commission,* 161 W.Va. 154. 241 S.E.2d 164 (1997). Permanent state employees who

[8] There was a September 6, 2016, telephonic conference convened to discuss the motion, the parties were duly present by their individual representatives, Gordon Simmons, representative for Grievant and Gretchen Murphy counsel for Respondent.

are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03.

Pursuant to applicable West Virginia Division of Personnel Administrative Rule, the "[f]ailure of [an] employee to report to work promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to and approved by the appointing authority, is cause for dismissal." W. Va. Code R. § 143-1-14.8(d) 3. Respondent maintains the instant Grievant did just that. Further, Respondent tends to highlight that Grievant has repeatedly failed to present relevant information and appropriate documentation in a timely fashion. West Virginia Code of State Rules § 143-1-12.2.c authorizes an agency to terminate an employee who fails to follow established agency policy for accounting for an absence from employment. Grievant's absence from the work place is not a fact in dispute. Nevertheless, Grievant is of the opinion that Respondent's actions are illegitimate and unlawful. Grievant contends her absences are excusable and should not establish proper justification for her termination.

Grievant was dismissed for failure to return from a medical leave of absence. Respondent maintains that it terminated Grievant's employment after extended, documented and significant absenteeism, as well as repeated failure to submit proper documentation related to her absences. Specifically, Grievant was often gone from work

for days, weeks and months after exhausting all personal leave, without following proper protocol of seeking a leave of absence or providing timely reports related to her absences from her medical providers. Respondent emphasizes that employers have the right to expect their employees to come to work. Timely attendance is a significant factor in serving the public.

Grievant's history is well documented. She received verbal counseling, verbal warnings and numerous disciplinary actions involving her leave usage. Grievant is aware there are rules and regulations governing attendance and absences from the work place. Respondent proved Grievant was chronically absent from work over the course of time and consistently failed to timely comply with the reporting requirements of applicable regulations and Respondent's policies. After the Grievant's allowable medical leave of absence was exhausted, she requested a discretionary, personal leave of absence which was denied. Personal Leaves of Absence are granted at the discretion of the appointing authority. *See* 143 C.S.R. 1 § 14.8(a).

Division of Personnel's Legislative Rules provide 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. *See* 143 C.S.R 1 § 12.2(c). 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 (December 22, 2011). The work record of a long-time tenured state employee is a factor to be considered in determining whether "good cause" exists for discharging the employee in cases of misconduct. Thus, Grievant's numerous extended absences, often spanning months, is of relevance to this dismissal action.

"Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ*., Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 20, 1997). Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ.,* Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.,* Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist.

Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corrections*, Docket No. 95-CORR-252 (July 23, 1996).

Mitigation is not found to be warranted in the fact pattern of this grievance. Respondent proved Grievant was chronically absent from work over the course of a number of years and consistently failed to comply with the reporting requirements of Respondent's policies. After Grievant's allowable medical leave of absence was exhausted, she requested a discretionary, personal leave of absence which was denied. Respondent complied with the pertinent provisions of DOP's Administrative Rule regarding medical and personal leaves of absence. Respondent gave Grievant every opportunity to provide the necessary evidence to justify her extended leave(s), but Grievant consistently failed to cooperate. Grievant was provided with notice and an opportunity to be heard before her dismissal from employment was effective. Respondent established by a preponderance of the evidence "good cause" for the termination of Grievant's employment.

The following conclusions of law are appropriate in this matter:

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 Rules of the W. Va. Public Employees Grievance Board. 156 C.S.R. 1 § 3 (2008).

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.,* 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

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 Resources,* 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).

4. The fact an employee produces a physician's excuse is not, in and of itself, dispositive of the issue of whether an employee abused his leave. *Parker v. W. Va. Dep't of Health & Human Res.*, Docket No. 97-HHR-042B (Sept. 30, 1997); *Lynge v. Dep't of Health & Human Res.*, Docket No. 00-HHR-258 (Dec. 15, 2000).

5. 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. Pursuant to the West Virginia Division of Personnel Administrative Rule, "[a]n 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." 143 C.S.R. 1 § 12.2(c)

6. Division of Personnel's Legislative Rules provide at 143 C.S.R 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. 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).

7. A technical violation of DOP policy, 143 C.S.R. 1 §12.2, does not necessarily amount to good cause for dismissal of a permanent public employee. *See Sloan v. Dep't of Health & and Human Res.,* 215 West Virginia 657, 661, 600 S.E.2d 554, 558 (2004) (*Per curiam).* "'Good cause' for dismissal will be found when the employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Service Commission,* 180 W. Virginia 143, 145, 375 S.E.2d 775, 777 (1988).

8. Personal Leaves of Absence are granted at the discretion of the appointing authority. See 143 C.S.R. 1 § 14.8(a). It is not established, in the fact pattern of this

matter, that Respondent violated any rule or policy in denying Grievant's request for PLOA.

9. "Failure of the employee to report to work promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to and approved by the appointing authority, is cause for dismissal." W. Va. Code R. § 143-1-14.8.d.3. An employee's failure to return to duty following expiration of a medical leave of absence may provide a proper basis for the employee's dismissal from employment. *Lewis v. W. Va. Dep't of Health and Human Res*., Docket No. 94-HHR-1146 (Apr. 25, 1995); *Maynard v. Dep't of Transp./Div. of Highways,* Docket No 2014-1670-DOT (Apr 9, 2015).

10. Respondent established that Grievant failed to report to work at the expiration of a leave of absence.

11. Respondent proved by a preponderance of the evidence that Grievant was chronically absent from her work over the course of a number of years and repeatedly failed to comply with the reporting requirements of policies applicable to Respondent's employees. Respondent established a valid basis for terminating Grievant's employment.

12. Respondent established by a preponderance of the evidence that Grievant failed to report to work as required by established and applicable policy, in the fact pattern of this matter, was good cause for termination.

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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: April 18, 2017

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Landon R. Brown
Administrative Law Judge