

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**ERIN KIRBY,**  
**Grievant,**

**v.**

**Docket No. 2017-2294-DHHR**

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

**DECISION**

Grievant, Erin Kirby, filed this action against her employer, Bureau for Children and Families, directly to Level Three on May 30, 2017. Grievant alleges that she was dismissed without good cause. Grievant requests to be made whole in every way including back pay with interest and benefits restored. A Level Three evidentiary hearing was conducted before the undersigned on July 20, 2018, in the Westover office of the Grievance Board. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by Cree Lemasters, Director for Region One, and by its counsel, Katherine A. Campbell, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on August 28, 2018.

**Synopsis**

Grievant was employed as an Economic Service Worker with the Bureau for Children and Families in Wheeling, West Virginia. Respondent met its burden of proof and demonstrated by a preponderance of the evidence that Grievant was dismissed for good

cause when she was absent from work for more than three consecutive workdays without notice. Grievant had no annual leave or sick leave and had been denied other types of leave due to ineligibility for lacking the necessary work hours. Respondent relies on the Division of Personnel Administrative Rule providing that if an employee is absent from work more than three consecutive workdays without notice to the employer of the reason for the absence, the employer may dismiss the employee for job abandonment.

The following Findings of Fact are based upon the record of this case.

### **Findings of Fact**

1. Grievant was employed as an Economic Service Worker with the Bureau for Children and Families in Wheeling, West Virginia, for approximately three years. Previously, Grievant was a Case Aide for Child Protective Services for approximately twenty months.

2. Mary Bennington is the Secretary for Mark Paree, Community Service Manager for Ohio, Brooke and Hancock counties. Ms. Bennington indicated that she is also tasked with human resource responsibilities for Mr. Paree's District. These responsibilities include maintaining time sheets, providing new employee orientation, and processing requests for Family Medical Leave, Medical Leave of Absence and Parental Leave.

3. Ms. Bennington gave testimony about Grievant's previous requests for Family Medical Leave which began in September 2015 through August 2016. During this time, Grievant took both intermittent Family Medical Leave and Medical Leave for blocks of time.

4. Ms. Bennington is not responsible for the decision as to whether the leave will be granted by Respondent. That decision is made by the Office of Human Resource Management in Charleston once they receive Ms. Bennington's calculations.

5. Grievant returned to work on September 1, 2016, and worked until approximately April of 2017 before requesting additional leave due to medical reasons.

6. At some point in April of 2017, Grievant approached Ms. Bennington to complete the paper work to request additional time.

7. Ms. Bennington explained that an employee, such as Grievant, would be reviewed for eligibility for leave he or she may qualify for by the Office of Human Resource Management.

8. Ms. Bennington explained that in order to qualify for Family Medical Leave an employee must have worked at least 1,250 hours in the last twelve months. She further stated that in order to be eligible for Medical Leave an employee must have worked 1,040 hours in the last twelve-month period of time. Ms. Bennington indicated that the twelve-month period of time is calculated at the time of the request.

9. Ms. Bennington reviewed each of the Grievant's "Individual Attendance Report" from April 2016 through May 2017 for calculation as to whether Grievant was eligible for Family Medical Leave or Medical Leave.

10. Ms. Bennington determined that Grievant had worked 988.75 hours in the preceding twelve months. Ms. Bennington's calculation revealed that Grievant failed to have the requisite number of hours to be eligible for either Family Medical Leave or Medical Leave.

11. Grievant was found to be ineligible for both Family Medical Leave and Medical Leave by the Office of Human Resource Management.

12. Mr. Paree was aware of Grievant's lack of hours to be eligible for Family Medical Leave and Medical Leave. Mr. Paree was also aware Grievant requested a Leave of Absence without Pay.

13. Mr. Paree indicated that a Leave of Absence without Pay is discretionary leave and is not decided by the Office of Human Resource Management, but by the Regional Director, Cree Lemasters.

14. Grievant was granted a Personal Leave of Absence from the time she went off payroll on April 7, 2017, through the end of her regularly scheduled time on May 8, 2017. This is referenced in the May 2, 2017, letter Ms. Lemasters sent to Grievant.

15. In this same letter, it was explained to Grievant that in the event she did not return to work on May 8, 2017, Respondent would have no other option but to consider termination of her employment.

16. Ms. Lemaster indicated that Respondent was unable to extend any further discretionary leave without pay because Grievant was an Economic Service Worker in one of her large districts, Hancock County. Grievant was unable to provide a return to work date and her position had not been filled when she was out on medical leave.

17. Ms. Lemasters explained that neither did Grievant return to work on May 8, 2017, as requested in the May 2, 2017, letter nor did she appear for the pre-determination conference scheduled for May 11, 2017.

18. Upon Grievant's failure to return to work on May 8, 2017, and failure to attend the pre-determination conference, she was dismissed from her position with Respondent via letter dated May 15, 2017, for job abandonment.

19. Grievant acknowledged that she was not eligible for a Family Medical Leave or a Medical Leave. Grievant took issue with Respondent's denial of a discretionary Leave of Absence without Pay.

### **Discussion**

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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).

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). “The 'term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees.' *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). See *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).” *Jaggers-Green v. Bur. of Empl. Programs*, Docket No. 03-BEP-026 (July 30, 2004).

The record of this case supports a finding that Respondent has met its burden of proof and established by preponderance of the evidence that Grievant abandoned her position. Grievant acknowledged that she was not eligible for a Family Medical Leave or a Medical Leave. Grievant took issue with Respondent's denial of a discretionary Leave of Absence without Pay. Pursuant to WEST VIRGINIA CODE R. § 143-1-14.8.a., “[a]n appointing authority may, at his or her discretion based on the agency's personal needs, grant a permanent, probationary, or provisional employee a leave of absence without pay for a specific period of time which normally should not exceed one (1) year.” Grievant was provided with a leave of absence without pay, which was discretionary and not mandatory leave. Respondent explained that it was unable to extend this leave because Respondent needed someone filling that position and working the 700-800 cases handled by an Economic Service Worker. It is undisputed that when considering Grievant's request for

a Leave of Absence without Pay, Respondent was permitted to consider its personnel need at the time

Respondent is correct to point out that Division of Personnel Rules provide that, “an appointing authority may dismiss an employee for job abandonment who is absent from work for more than three consecutive workdays without notice to the appointing authority of the reason for the absence as required by established agency policy.” Division of Personnel Administrative Rule 143 C.S.R. § 12.2©. That is what occurred in the instant case. Accordingly, dismissal was proper because Grievant failed to report to work for more than three consecutive days. Respondent has met its burden of proof and established by a preponderance of the evidence that Grievant was terminated for good cause.

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 Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2018); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

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

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 (2018).

**Date: September 14, 2018**

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**Ronald L. Reece**  
**Administrative Law Judge**