

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

YOLANDA MARGARET MOLINA,

Grievant,

v.

Docket No. 2018-0781-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
MILDRED MITCHELL-BATEMAN HOSPITAL,**

Respondent.

DECISION

Grievant, Yolanda Molina, filed an expedited level three grievance against her employer, Respondent, Department of Health and Human Resources (“DHHR”), Mildred Mitchell-Bateman Hospital (“MMBH”) dated December 7, 2017, which states as follows: “[t]erminating me for ‘JOB ABANDONMENT’ is in violation of W. Va. Code 143-1-12.2c, I clearly informed my nurse unit manager J. Boykin RN, and nurse supervisor, T. Denney RN of my pending absences that week and gave reason of emotional anxiety from unresolved work related issue. I had a pending meeting with CEO Craig Richards on 10/24/17 at 1:30 pm the following week, and told them I would return to work then”¹ As relief, Grievant asks for “[b]ackpay and job reinstatement (or) priority for future similar job openings.”

The level three hearing on this grievance was conducted on April 2, 2018, before the undersigned administrative law judge at the Grievance Board’s Charleston, West

¹ Grievant attached to the grievance form two type-written pages further detailing her claim, along with copies of the dismissal letter, and an incident report. Such is incorporated by reference herein as if stated *verbatim*. This grievance was received at the Grievance Board on December 7, 2017, by facsimile.

Virginia, office. Grievant appeared in person, *pro se*.² Respondent appeared by counsel, Brandolyn N. Felton-Ernest, Assistant Attorney General. This matter became mature for decision on May 4, 2018, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law, or other post-hearing submissions.

Synopsis

Grievant was employed by Respondent as a Nurse III at Mildred Mitchell-Bateman Hospital. Respondent dismissed Grievant for job abandonment after not appearing for, or calling-in prior to, four consecutive shifts. Grievant admits that she was not at work on the days in question, but denies Respondent's claims that she was a no call/no show on those days. Grievant asserts that she was on approved leave on the days in question. Grievant further argued that she was dismissed not for job abandonment, but for an incident with a coworker and for advocating for patients. Respondent proved by a preponderance of the evidence that Grievant failed to appear for the four consecutive shifts without calling-in or being on approved leave constituting job abandonment, and that such was good cause for dismissal. Therefore, the grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as a Registered Nurse III at Mildred Mitchell-Bateman Hospital ("MMBH"), a psychiatric facility operated by the Department of

² For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

Health and Human Resources. Grievant began her employment with MMBH in or about August 2016.

2. Craig Richards is the Chief Executive Officer of MMBH. Tamara Kuhn is employed by Respondent as the Director of Human Resources at MMBH.

3. At the times relevant herein, Jami Boykin was employed by Respondent as a Registered Nurse, serving as Grievant's supervisor, a Unit Manager, on Unit A5. Cheryl Williams was employed by Respondent as the Director of Nursing at MMBH.

4. On or about September 26, 2017, Grievant was involved in a verbal altercation of some kind with a coworker. Grievant had attempted to correct the coworker's manner of speaking to a patient which prompted the altercation. Grievant wrote an incident report regarding the matter on that same date, signed the same. It is unclear from the evidence presented as to whom this report was given, or what, if any, action was taken on the same. Grievant alleged that the coworker wrote an incident report regarding Grievant's conduct, but no other evidence or documentation of the same was presented in this matter.

5. On October 3, 2017, Unit Manager Boykin informed Grievant that she was sending Grievant to "staff development" because of the earlier incident with the coworker. Grievant disagreed with the decision to send her to staff development and became upset. At that point, Grievant decided to try to speak with CEO Richards.

6. On October 3, 2017, Grievant went to CEO Richards' office to speak with him about the decision to send her to staff development. Mr. Richards was present at this office when Grievant arrived, and they spoke briefly about Grievant wanting to meet with him to discuss a number of concerns she had. Mr. Richards advised Grievant to

make an appointment with his secretary for this meeting. This was to allow him the opportunity to have someone else present during the meeting to witness the same and to take notes.³ Grievant did so, and got an appointment to meet with CEO Richards on October 24, 2017, at 1:30 p.m. CEO Richards and Grievant did not have a detailed conversation about her concerns that day. They spoke only about scheduling the meeting to address her concerns.

7. Grievant continued to work as scheduled following the events of October 3, 2017, through on or about October 14, 2017. During her shift on October 14, 2017, Grievant was informed by a coworker that she was to go to staff development at 1:30 p.m. that day. Grievant went to the Human Resources office where she spoke with Ms. Kuhn and Ms. Williams about the same. Either one, or the both of them, told Grievant that she was to attend staff development. Ms. Kuhn asked Grievant if it would hurt her to go. Grievant informed them that she would not go that day, but did not say that she would not go at all.

8. After speaking with Ms. Kuhn and Ms. Williams, Grievant returned to her work area, and went to Unit Manager Boykin's office. Grievant told Unit Manager Boykin that she was very upset by everything that had happened since the incident with the coworker, including being sent to staff development, and she felt like she was being bullied, and that she was experiencing anxiety. Grievant further told Unit Manager Boykin that she did not think that she should work until her meeting with CEO Richards on October 24, 2017.

³ See, testimony of Craig Richards, CEO.

9. After speaking with Unit Manager Boykin, Grievant left work that day with the understanding that she would be on approved leave, either annual leave, sick leave, or both, until her meeting with CEO Richards. It was Grievant's further understanding that Unit Manager Boykin would be letting the nursing supervisors know that she would be out. Grievant completed no leave request paperwork before she left work that day. It has not been alleged that Grievant left before her shift ended on October 14, 2017.

10. Grievant had previously been scheduled to work on October 19, 2017, from 7:00 a.m. to 7:00 p.m. Grievant did not report to work on October 19, 2017. On that day, Tim Denny, who is believed to be a nursing supervisor, called Grievant and asked where she was. Grievant informed him that she was on leave through October 24. Grievant learned that Mr. Denny was not aware of her being on leave until that time.

11. Grievant had previously been scheduled to work on October 20, 2017, from 7:00 a.m. to 3:00 p.m. Grievant did not report to work that day. Sometime during that shift, Grievant called Sherry Cox, who is believed to be a nursing supervisor, to make sure that Ms. Cox knew that she was off on leave until October 24. Grievant learned that Ms. Cox was not aware of her being on leave.

12. Following her telephone conversations with Mr. Denny and Ms. Cox, Grievant did not call Unit Manager Boykin, Human Resources, Ms. Kuhn, or anyone else about her absences.

13. Grievant had not previously been scheduled to work on October 21-22, 2017, and she did not report to work on those days.

14. Grievant had previously been scheduled to work on October 23, 2017, from 7:00 a.m. to 3:00 p.m. Grievant did not report to work on that day, and she did not call in to report her absence.

15. Grievant had previously been scheduled to work on October 24, 2017, from 7:00 a.m. to 3:00 p.m. Grievant did not report to work on that day for her 7:00 a.m. shift. Grievant appeared at MMBH later in the day for her 1:30 p.m. meeting with CEO Richards.

16. Grievant arrived at CEO Richards' office for the scheduled meeting on October 24, 2017. CEO Richards and Ms. Kuhn were present. At that time, CEO Richards informed Grievant that her employment with MMBH was terminated for job abandonment as she had missed her scheduled shifts on October 19, October 20, October 23, and October 24, 2017, without being on approved leave, and without calling in violation of policy ("No call/No show").

17. Grievant was scheduled to work at MMBH on October 19, 2017, October 20, 2017, October 23, 2017, and October 24, 2017. These dates constituted consecutive shifts because Grievant was not scheduled to work on October 21, 2017, and October 22, 2017.

18. Grievant did not get to discuss with CEO Richards her concerns that had originally lead her to schedule the October 24 meeting back on October 3, 2017, such as the incident with the coworker, the coworker's treatment of the patient, and Unit Manager Boykin sending her to staff development and giving her a document about placing her "on probation."

19. Ms. Kuhn was informed of Grievant's missed shifts by Jami Boykin.⁴ CEO Richards made the decision to terminate Grievant's employment. Ms. Kuhn processed the paperwork to terminate Grievant's employment for job abandonment through DHHR's Office of Human Resources Management.

20. While Grievant was verbally informed of her dismissal on October 24, 2017, days later she received a dismissal letter bearing that date, which was signed by CEO Richards, stating the reasons for her dismissal and the effective date, November 9, 2017. Ms. Kuhn drafted the letter for CEO Richards' signature. This letter stated, in part, as follows:

The purpose of this letter is to advise you of my decision to dismiss you effective November 9, 2017[,] from your employment as a Nurse III with the Department of Health and Human Resources, Mildred Mitchell-Bateman Hospital for job abandonment. This action complies with Division of Personnel *Administrative Rule*, Section 12.2 and provides for the required fifteen (15)-calendar day notice period.

Your dismissal is the result of absences without approval on October 19, 2017[,] for a twelve-hour shift, October 20, 2017[,] for an eight-hour shift, October 23, 2017[,] for an eight-hour shift, and October 24, 2017[,] for a twelve-hour shift. Specifically, you did not report to work and neither notified your supervisor regarding the reasons for your absence nor requested annual or sick leave. You have been taken off the schedule. The last day worked was Wednesday, October 14, 2017.

Therefore, in compliance with W. Va. Code R. § 143-1-14.6, the period of absence from October 19-24, 2017[,] shall be charged to unauthorized leave. Your pay will be docked for your scheduled work hours during this period. You will be paid for all annual leave accrued and unused as of your last working day in accordance with the Wage Payment and Collection Act; however, because you are being dismissed due to job abandonment, you are ineligible for severance pay.

⁴ See, testimony of Tamara Kuhn.

So that you may understand the specific reason for your dismissal, I recount the following: [o]n October 19, 2017, October 20, 2017, October 23, 2017[,] and October 24, 2017[,] you failed to appear to work at your scheduled time; therefore, you were considered a no call no show for each day listed.

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 prolonged absence has placed an undue hardship on this hospital, as well as on your co-workers who must assume your assigned duties during your absence. Your absence also interferes with your co-workers (sic) opportunities to schedule vacation days.

This action is being taken in accordance with W. Va. Code R. § 143-1-12.2.c., which provides: “[a]n appointing authority may dismiss an employee for job abandonment who is absent from work for more than three (3) consecutive workdays or scheduled shifts without notice to the appointing authority of the reason for the absence or approval for the absence as required by established agency policy. . . .”⁵

21. Mildred Mitchell-Bateman Hospital Policy and Procedure Manual, Policy Number MMBHC016, “Leave Authorization and Absence Control,” defines “abandonment of position” as “failure to call-in or otherwise communicate for three (3) or more consecutive scheduled work days; 24 consecutive hours.”

22. Mildred Mitchell-Bateman Hospital Policy and Procedure Manual, Policy Number MMBHC016 defines “Approval (Request for Leave Form)” as “acceptance by the immediate supervisor and department director of the legitimacy of the reason for absence by the employee.”

⁵ See, Respondent’s Exhibit 2, Letter dated October 24, 2017.

23. Mildred Mitchell-Bateman Hospital Policy and Procedure Manual, Policy Number MMBHC016, "Leave Authorization and Absence Control," defines "unscheduled absence" as "[a]ny absence that is not approved by the end of the previous work day."

24. Mildred Mitchell-Bateman Hospital Policy and Procedure Manual, Policy Number MMBHC016 defines "No Call/No Show" as "the failure to call in to notify the employee's supervisor or designee of their anticipated absence prior to their appointed work schedule, per the employee's department procedure."

25. Mildred Mitchell-Bateman Hospital Policy and Procedure Manual, Policy Number MMBHC016 states that "[f]ailure to call-in more than three consecutive days constitutes abandonment of position and will result in dismissal."⁶

26. Mildred Mitchell-Bateman Hospital Nursing Service Procedure Manual, Policy Number NURb09, "Procedure for Reporting Absence from Duty," states, in part, as follows: "A. [d]irect Care Staff are to call at least two (2) hours in advance of your scheduled reporting time when reporting absence from duty. . . D. [a]ll members of Nursing Administration are expected to notify the Nursing Supervisor in the event they must be absent. Emergency call-in must be at least two (2) hours before beginning of shift . . . E. "Emergency Annual Leave will be approved or Nursing Department employees only by a Nurse Manager, Designated Supervisor or Chief Nurse Executive."

27. At the time CEO Richards made the decision to dismiss Grievant, he was not aware of Grievant having any disciplinary history while employed at MMBH.⁷

⁶ See, Respondent's Exhibit 5, Policy Number MMBHC016.

⁷ See, testimony of Craig Richards.

28. Neither party called Jami Boykin, Sherry Cox, Tim Denny, or Cheryl Williams as witnesses in this matter. The ALJ had granted Respondent permission to allow Unit Manager Boykin to appear by telephone to testify if called as a witness. Grievant had no objection to the same.

29. Grievant stated in a written communication with the Grievance Board before the level three hearing that she had decided not to call any of her coworkers as witnesses at the hearing because she did not want to jeopardize their jobs. Grievant made similar statements during her testimony at the hearing. Grievant was the only witness to testify in her case in chief.

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. W.VA. CODE ST. R. § 156-1-3 (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.*

Respondent argues that it properly terminated Grievant's employment for job abandonment because she failed to report to work, or call-in to work, for four consecutive shifts in violation of policy, and she was not otherwise on approved leave. Grievant denies Respondent's claims, asserting that her leave had been verbally approved by her supervisor, Unit Manager Boykin. Grievant also argued that she was bullied out of her

job because she was advocating for patients and for the incident with the coworker in September 2017.

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 Division of Personnel (DOP) Administrative Rule states the following regarding dismissal for job abandonment:

[a]n appointing authority may dismiss an employee for job abandonment who is absent from work for more than three (3) consecutive workdays or scheduled shifts without notice to the appointing authority of the reason for the absence *or approval 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 absence without notice or approval. 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 (3) consecutive scheduled work days. The dismissal is effective fifteen (15) days after the appointing authority notifies the employee of the dismissal. Whereas job abandonment is synonymous with the term resignation, a predetermination conference is not required and an employee dismissed for job abandonment is not eligible for severance pay.

W. VA. CODE ST. R. § 143-1-12.2.c. (2016). (Emphasis added).

In addition to the Administrative Rule, MMBH has its own policies regarding employee absence and leave. The evidence presented was that these policies are

provided to all employees at their orientation. Mildred Mitchell-Bateman Hospital Policy and Procedure Manual, Policy Number MMBHC016, "Leave Authorization and Absence Control," defines "abandonment of position" as "failure to call-in or otherwise communicate for three (3) or more consecutive scheduled work days; 24 consecutive hours." It further defines "Approval (Request for Leave Form)" as "acceptance by the immediate supervisor and department director of the legitimacy of the reason for absence by the employee." "No Call/No Show" is defined as "the failure to call in to notify the employee's supervisor or designee of their anticipated absence prior to their appointed work schedule, per the employee's department procedure." "Unscheduled Absence" is defined as "[a]ny absence that it is not approved by the end of the previous work day." Further, this policy states that "[f]ailure to call-in more than three consecutive days constitutes abandonment of position and will result in dismissal."⁸

The Mildred Mitchell-Bateman Hospital Policy and Procedure Manual, Policy Number MMBHC016, "Leave Authorization and Absence Control" states in the section entitled "Responsibility" as follows:

[e]mployees are expected to adhere to their assigned work schedules. If an employee must be absent, it is his/her responsibility to request prior authorization when possible, or to request approval upon return to duty from an unscheduled absence. The employee MUST call in to report their anticipated absence within the timeframe dictated by their department manager. The employee must complete and submit a leave request form, State of West Virginia Application for Leave form to their supervisor in advance, when applicable or within 2 days after return to duty from an unscheduled absence.⁹

⁸ See, Respondent's Exhibit 5, Policy Number MMBHC016.

⁹ See, Respondent's Exhibit 5, Policy Number MMBHC016. Emphasis as stated in policy.

Mildred Mitchell-Bateman Hospital Nursing Service Procedure Manual, Policy Number NURb09, "Procedure for Reporting Absence from Duty," states, in part, as follows: "A. Direct Care Staff are to call at least two (2) hours in advance of your scheduled reporting time when reporting absence from duty. . . D. [a]ll members of Nursing Administration are expected to notify the Nursing Supervisor in the event they must be absent. Emergency call-in must be at least two (2) hours before beginning of shift."¹⁰ This policy also states in paragraph E that, "Emergency Annual Leave will be approved for Nursing Department employees only by a Nurse Manager, Designated Supervisor or Chief Nurse Executive."

The parties agree on a number of the facts of this case. However, still, many of the facts in this case are in dispute. 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." *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any

¹⁰ See, Respondent's Exhibit 6, Policy NURb09.

fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

The parties agree that Grievant was not at work on October 19, 2017, October 20, 2017, and October 23, 2017. The parties agree that Grievant appeared for her scheduled 1:30 p.m. meeting with CEO Richards on October 24, 2017, but did not appear to work her shift that day which started at 7:00 a.m. The parties further agree that Grievant did not complete and submit a leave request form to her supervisor in advance of her absences, and did not call-in prior to each of those shifts and request unscheduled leave. The parties disagree as to whether Grievant's absences on these dates were unapproved, or unauthorized, constituting job abandonment warranting dismissal.

Grievant testified in the narrative on her own behalf at the level three hearing. Grievant has an interest in this matter as she is seeking reinstatement to her position which could be viewed as a motive to be untruthful. Grievant's demeanor was poor at times during the hearing. For instance, several times she became confrontational with all present and appeared defiant at other times. Grievant became visibly upset while questioning witnesses and was moved to tears. However, Grievant's demeanor was not indicative of untruthfulness. Grievant's demeanor most likely can attributed to her losing a job she very much enjoyed and believing the reasons given for such are untrue. Grievant's demeanor can also be explained by her lack of understanding of how her dismissal came to be, a resulting lack of trust in the Respondent, feeling she had been wronged, and unfamiliarity with the grievance process. Grievant was very passionate during her testimony. Grievant was adamant that Unit Manager Boykin told her that it was fine for her to take off work until her meeting with CEO Richards. Grievant admitted

that she did not complete and submit a leave request form for approval before her absences. There are no other known witnesses to this conversation.

Ms. Kuhn also testified at the level three hearing. Ms. Kuhn's demeanor was calm and professional. She answered the questions asked of her and she was not evasive. While Ms. Kuhn did not make the decision to dismiss Grievant, her involvement in the decision-making process can be viewed as interest in this outcome of this matter, or bias toward Grievant. Ms. Kuhn testified that Jami Boykin reported to her that Grievant's absences on the days at issue were no call/no shows. Based upon such, she began processing the paperwork with OHRM for Grievant's dismissal. It is unknown when Unit Manager Boykin reported Grievant's absences to Ms. Kuhn, or how it was done. It is also unknown when Ms. Kuhn discussed this matter with CEO Richards. Ms. Kuhn was not present during the conversation between Unit Manager Boykin and Grievant. Ms. Kuhn testified that she attempted to call Grievant at the phone numbers on file with Human Resources, but got no answer. Grievant agreed that she never received any calls from Ms. Kuhn during this time, but asserted that the correct numbers were somewhere and that human resources staff had not entered them properly. Ms. Kuhn testified that no one told her anything about Grievant taking leave on the dates at issue.

CEO Richards testified at the level three hearing. His demeanor was calm and professional. He answered the questions asked of him and he was not evasive. Given that CEO Richards made the decision to dismiss Grievant, such can be viewed as an interest in the outcome of this matter, or bias toward Grievant. CEO Richards testified that Grievant was dismissed for job abandonment as she had been a no call/no show for her last four shifts and she was not on approved leave for those dates. CEO Richards

relied on the information provided to him by Ms. Kuhn in making his decision to dismiss Grievant. He did not speak to Grievant before making the decision. Therefore, his decision was based entirely on the information provided by Ms. Kuhn. CEO Richards testified that he recalled Grievant coming to his office on October 3, 2017, and telling her to schedule a meeting with his secretary. Such is consistent with Grievant's testimony. He testified that he was not aware that Grievant had been asked to go to staff development on that day. CEO Richards testified that he was not aware that management had wanted Grievant to attend staff development before their October 24 meeting. CEO Richards also testified that he was not aware of Grievant having any disciplinary history when he made his decision to dismiss her.

In this case, all three witnesses who testified at level three appeared truthful even though Ms. Kuhn and CEO Richards disagree with Grievant. Grievant appeared to genuinely believe that Unit Manager Boykin verbally approved her to take leave on the days in question. One of the problems here is that no one called Jami Boykin to testify. The ALJ does not doubt that Grievant thought that she was on approved leave. However, Grievant's belief was not reasonable given the evidence presented. Further, this entire situation could be the result of Grievant misunderstanding what was said during her conversation with Ms. Boykin. Grievant admitted that she was upset and experiencing a great amount of anxiety when she spoke to Ms. Boykin. It is certainly plausible that such could have resulted in miscommunication. As Ms. Boykin was not called to testify by either party, there is simply no way to know what her recollection is, or to assess her credibility.

Additionally, Grievant testified that she understood from Unit Manager Boykin that Boykin would let everyone know she was going to be out on those days. However, Grievant learned on October 19 that Tim Denny had not been made aware because he called her to see where she was. Also, on October 20 Grievant learned that Sherry Cox did not know she was on leave, and that Mr. Denny and Ms. Boykin must not have told her either. Despite learning these things, Grievant did not call Ms. Boykin, Ms. Kuhn, or anyone else to make sure her everything was ok with her leave.

The evidence presented establishes that Grievant was absent from work on October 19, 20, and 23, 2017, and did not show for her scheduled shift at 7:00 a.m. on October 24. Grievant appeared at CEO Richards' office later that day for their scheduled meeting. It has not been alleged that she clocked-in on October 24. Grievant did not call-in two hours before her shifts to report her absence to her supervisor on these days, did not complete and submit for approval any leave request paperwork in advance of her absences, and there is no record that anyone approved leave for her on these dates. Thus, Grievant missed four consecutive shifts for which she was scheduled. Under the Administrative Rule, the employer *may* dismiss an employee for job abandonment under these circumstances. Dismissal is allowed, but it is not required. Such is the employer's discretion. MMBH Policy MMBHC016, requires that employee complete and submit a leave request form for approval in advance of taking scheduled leave, and states that "failure to call in on more than three days consecutive dates constitutes job abandonment and will result in dismissal."¹¹ No evidence was presented to suggest that scheduled leave can be approved verbally. Respondent has the burden of proof in this matter, and

¹¹ See, Respondent's Exhibit 5, Policy Number MMBHC016.

based upon the evidence presented, it has met its burden of proving that Grievant was absent from her scheduled shifts on the four days in question, and that this leave had not been requested in writing and approved in advance, and that Grievant did not call-in on these days before her shift to report unscheduled absences as required by policy. Such meets the requirements of the charge of job abandonment.

The undersigned is sympathetic to Grievant. From her testimony, it was clear that Grievant thoroughly believed that her supervisor verbally approved her leave for the four shifts, and that she had to do nothing else to take this leave. The evidence presented supports the conclusion that Grievant was mistaken in her belief. Further, even if she were not mistaken, Grievant had been employed at MMBH for over one year when these events occurred. Grievant stated in one of her questions to CEO Richards that she had taken vacation after everyone else. As such, Grievant had to have been at least somewhat familiar with the process of scheduling leave. Grievant had been to orientation and had been made aware of hospital policies and where to find them. Grievant did not follow the established policies for requesting leave for the days in question.

Grievant argued that she was dismissed not for missing work on the four days, but instead for advocating for patients and for the incident with the coworker on September 26, 2017. From Grievant's testimony and that of CEO Richards, she did not get a chance to discuss the incident, being sent to staff development, or her concerns about patients with him before he made the decision to dismiss her. There was no evidence that CEO Richards considered anything other than the absences when making the decision to dismiss her. The evidence presented did not suggest that Ms. Boykin spoke to Mr. Richards at all before he made the decision.

Further, Grievant testified that Ms. Boykin disciplined her in some way on October 3, 2017, for the incident with the coworker, stating that Ms. Boykin made her sign a piece of paper that said she was on probation for a year. Grievant testified that she had left this paper at home and did not have it with her on the date of the hearing. Mr. Richards testified that he was not aware of Grievant having any disciplinary history when he made his decision to dismiss her. Thus, such was never a consideration in his decision. The ALJ left the record open in this matter until April 4, 2018, to allow Grievant the opportunity to submit copies of text messages as evidence. On April 4, 2018, Grievant hand-delivered two pieces of paper to the Grievance Board Office for inclusion in the record. Grievant was to provide a copy of the same to counsel for Respondent, and she was given counsel for Respondent's address that day by a Grievance Board staff member. The documents she delivered to the Grievance Board were clocked-in and marked as Grievant's Exhibit 1. These documents were not text messages. Instead, one was a handwritten cover letter, and the other was the copy of the disciplinary sheet she signed on October 3. A review of the document reveals that Ms. Boykin issued Grievant a verbal reprimand for violating MMBHC038 Behavior Code of Conduct during the incident with the coworker, and that Ms. Boykin was sending her to staff development for "re-education regarding your conduct." The document states the "Date of Anticipated Removal from File: One year." There is nothing on this document regarding probation. It is signed by Grievant and Ms. Boykin. There is nothing to indicate that copies were provided to anyone. Further, Grievant is not known to have grieved this verbal reprimand.

Grievant presented no evidence other than her own testimony in support of her argument that her dismissal resulted from the incident with the coworker or because she

advocated for patients. Instead, the evidence presented suggests that CEO Richards did not know about any discipline when he made the decision, and Grievant had not talked to him about her concerns for patients at that time either. There is no evidence to suggest that Ms. Boykin or anyone else informed CEO Richards of the incident or Grievant's patient advocacy. Grievant did not call any witnesses other than herself and presented no other documentary evidence. As such, the evidence presented supports the conclusion that Respondent dismissed Grievant for its stated reason, and for no other reason.

Accordingly, for the reasons set forth herein, this grievance is denied.

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. W.VA. CODE ST. R. § 156-1-3 (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).

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. The Division of Personnel (DOP) Administrative Rule 12.2.c states as follows:

[a]n appointing authority may dismiss an employee for job abandonment who is absent from work for more than three (3) consecutive workdays or scheduled shifts without notice to the appointing authority of the reason for the absence or approval 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 absence without notice or approval. 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 (3) consecutive scheduled work days. The dismissal is effective fifteen (15) days after the appointing authority notifies the employee of the dismissal. Whereas job abandonment is synonymous with the term resignation, a predetermination conference is not required and an employee dismissed for job abandonment is not eligible for severance pay.

W. VA. CODE ST. R. § 143-1-12.2.c. (2016).

4. 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.” *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981).

5. In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness.

HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

6. Respondent proved by a preponderance of the evidence that Grievant failed to appear for work on four consecutive shifts without calling-in or being on approved leave, thereby constituting job abandonment, and that such was good cause for her dismissal.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The 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 (eff. July 7, 2008).

DATE: June 19, 2018.

Carrie H. LeFevre
Administrative Law Judge