

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**ROBERT K. BISHOP,  
Grievant,**

**v.**

**Docket No. 2019-0531-DHHR**

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

**DECISION**

Grievant, Robert K. Bishop, filed this action directly to Level Three on or about October 26, 2018, against her employer, Department of Health and Human Resources, alleging termination without cause, and requesting to be made whole. A Level Three evidentiary hearing was conducted before the undersigned on February 14, 2019, at the Grievance Board's Westover office. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared 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 April 8, 2019.

**Synopsis**

Grievant was employed at Sharpe Hospital as a Health Service Worker. Respondent met its burden of proof and demonstrated by preponderance of the evidence that Grievant was dismissed for good cause when he was absent from his employment without authority based upon being incarcerated on a misdemeanor charge. Grievant

contacted Respondent and advised that he was negotiating a plea agreement which would expose him to forty-five days of incarceration. Grievant was able to bond out on the misdemeanor charge fifteen days after his arrest, which represented the majority of his work schedule. Grievant did not have approved leave to cover his extended absence.

In the circumstances presented, Grievant's termination was not an abuse of discretion or an arbitrary action. The record is undisputed that Grievant was incarcerated for fifteen days of his month long work schedule. The record did not establish that Grievant had sufficient leave to cover this absence. Thus, Respondent had discretion to grant or deny Grievant's request for leave, so long as that discretion was not exercised in an arbitrary and capricious manner. This grievance is denied.

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

#### **Findings of Fact**

1. Grievant was employed as a Health Service Worker for approximately more than one year at William R. Sharpe, Jr. Hospital.
2. Jeff Price, former Human Resources Director, indicated that there was an issue with Grievant failing to show up for his scheduled work shifts in October 2018.
3. Mr. Price indicated that Grievant's mother called off for him on October 9, 2018, because he was in jail.
4. Michelle Farris, Lead Nurse Clinical Coordinator, received a call off on October 9, 2018, from Grievant's mother, who told her he was in jail and unable to report to work that day.

5. Grievant's mother called in for him on October 9, 2018, and informed Respondent that she did not know when Grievant could return to work as he had not been arraigned at that time.

6. Mr. Price indicated that there were no call offs between October 9, 2018, and October 15, 2018. In addition, there were no call offs between October 10, 2018, and October 14, 2018.

7. Mr. Price explained that the approval of annual leave is discretionary by the Department of Health and Human Resources, and there was no approval of annual leave for Grievant in this case.

8. Mr. Price spoke with Grievant on October 11, 2018, as he called to check on the status of his job. Grievant told Mr. Price, at that time, he was negotiating a plea agreement which would expose him to forty-five days in jail.

9. Grievant indicated that he was arrested on October 9, 2018, and was able to post bond and be released from incarceration on October 24, 2018.

10. Patirck Ryan, Chief Executive Officer of Sharpe Hospital, learned that Grievant's mother called on October 9, 2018, and told the Nurse Clinical Coordinator Office that her son was in jail. No leave was approved for this absence.

11. Mr. Ryan later learned that there were no call offs for the Grievant's next three subsequent scheduled shifts.

12. Mr. Ryan decided to dismiss Grievant for his unauthorized leave for October 9, 2018, October 10, 2018, October 11, 2018, and October 14, 2018.

13. Grievant acknowledged that he could be dismissed for unauthorized leave. Grievant does not dispute that he was incarcerated from October 9, 2018, until October 24, 2018.

14. Grievant indicated that he was not told to come back to work and was only given a two-week schedule. Grievant's own exhibit submitted at the hearing clearly established that Grievant's work schedule for the applicable period was for the entire month, and not for two weeks.

### **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 record supports a finding that Grievant failed to report to work at Sharpe Hospital on October 9, October 10, October 11, and October 14, 2018, and was deemed to be on unauthorized leave. Grievant does not dispute the fact that he was not present for work on those dates as he was incarcerated until October 24, 2018. There had been no approval for his time off from work as a Health Service Worker. Grievant failed to call off, but instead had his mother call off on October 9, 2018, and then she called again about a week later, which did not account for the three days referenced above. Grievant contacted Respondent on October 11, 2018, and advised that he was negotiating a plea agreement which would expose him to forty-five days of incarceration. Grievant was able to bond out on the misdemeanor charge fifteen days after his arrest, which represented the majority of his work schedule.

An essential element of employment is to be on the job when your services are required. *Barnes v. W. Va. Dep't of Trans./Div. of Highways*, Docket No. 99-DOH-305 (Jan 31, 2000). Whatever an employer's workload, an extended absence by an employee will tend to disrupt its operations. *Barnes, Id.* The record did not establish that Grievant had sufficient annual leave to cover the anticipated absence of forty-five days, or the actual amount of incarceration of fifteen days, when he was terminated. Accordingly, the undersigned finds that Respondent had discretion to grant or deny Grievant's request for

leave on October 9, and on October 15, 2018, so long as that discretion was not exercised in an arbitrary and capricious manner.

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

In applying an "arbitrary and capricious" standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. *Barnes, Id.* Given the length of time that Grievant reported that he would be off the job, and his previous unexcused absences from work on October 9, 10, 11, and 14, 2018, due to incarceration, Respondent refused to approve a leave of absence in this instance. Grievant did not demonstrate that Respondent routinely grants such requests by other employees in

similar circumstances. Accordingly, Respondent's determination that Grievant's absences should not be excused is not arbitrary and capricious, or an abuse of the agency's discretion in making such determinations. Grievant did not have approved leave to cover his extended absence. 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. "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 or approval for the absence as required

by established agency policy.” Division of Personnel Administrative Rule 143 C.S.R. § 12.2(c).

4. An essential element of employment is to be on the job when the employee services are required. A state employee may be dismissed for an extended absence when they are incarcerated. *See generally Barnes v. W. Va. Dep't of Trans./Div. of Highways*, Docket No. 99-DOH-305 (Jan 31, 2000).

5. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id. (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

6. Respondent has met its burden of proof and established by a preponderance of the evidence that Grievant was absent from his employment without authority based upon his incarceration following arrest for a misdemeanor charge. Grievant contacted Respondent and advised that he was negotiating a plea agreement which would expose him to forty-five days of incarceration. Grievant was able to bond



out on the misdemeanor charge fifteen days after his arrest, which represented the majority of his work schedule. In the circumstances presented, Grievant's termination was not an abuse of discretion or an arbitrary and capricious act.

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: May 7, 2019**

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