THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JEANNISE GRECO

Grievant,

v. **Docket No. 2019-0373-MonCH**

MONONGALIA COUNTY HEALTH DEPARTMENT,

Respondent.

DECISION

Grievant, Jeannise Greco, was employed by Respondent, Monongalia County Health Department. On September 18, 2018, Grievant filed this grievance against Respondent stating, "On August 27, 2018 I was fired from my 12 year job on the last day of my MLWOP by Dr. Lee Smith via phone without cause or prior notice. This action is contrary to law and my rights and property as a state employee etc. This action was arbitrary, capricious and I feel in (sic) was reprisal to previous grevance (sic) activity and unfounded claims against me etc. with abuse of discretion. Grievant seeks "In relief I ask my position be restored with any remedy; pay, benefits, penalties with interest etc. as if I would've rightfully returned to work 8-28-18 since this option was not permitted. Also be given the chance for medical release prior to, in lieu of termination."

Grievant filed directly to level three of the grievance process.[1] A level three hearing was held on November 7, 2018, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant appeared pro se.[2] Respondent was represented by Kenneth L. Hopper, Esq., of Pullin, Fowler, Flanagan, Brown & Poe,

[1]West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.
[2]For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

PLLC, and Drew M. Capuder, Esq. This matter became mature for decision on December 26, 2018.

Synopsis

Grievant contends her dismissal from employment with Respondent is arbitrary and capricious, an abuse of discretion, and in retaliation for her filing multiple grievances against Respondent. She contends that in citing conduct which occurred more than a year prior, for which she had already been disciplined, and which was addressed in a previous grievance, Respondent revealed its retaliatory motive. Respondent contends that it dismissed Grievant on the day her six months of unpaid family medical leave expired based on her disciplinary history and her physician statement. This physician statement gave a return to work date that was beyond the six-month period of unpaid leave and stated that Grievant's condition would permanently prevent her from performing her work duties. Respondent proved a proper basis to dismiss Grievant. Grievant did not prove her dismissal was arbitrary, capricious, or an abuse of discretion and did not prove that the dismissal was retaliation. Accordingly, 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 had been employed for twelve years by Monongalia County Health Department (MCHD) as a Nutritionist I.

2. Grievant last work for Respondent on October 2, 2017, as a part-time employee.

3. MCHD operates in offices in six counties in North Central West Virginia, including Harrison County.

4. Grievant is stationed at the Harrison County Women, Infants and Children ("WIC") office.

5. Dr. Lee Smith is the Executive Director at Monongalia County Health Department.

6. Kathy Kerin is Respondent's Personnel Benefits Coordinator.

7. On May 16, 2012, Grievant filed the first of her five grievances against Respondent, under Docket No. 2012-1293-MonCH. A level three decision therein was issued on April 22, 2018.

8. On June 21, 2016, Grievant filed grievances two through four against Respondent, which the Board consolidated under Docket No. 2016-1880-CONS. A level three decision was issued therein on November 22, 2017.

9. On October 3, 2017, Grievant began a paid leave of absence from her job with Respondent. (Respondent's Exhibit 23)

10. On October 10, 2017, Kathy Kerin, Respondent's Personnel Benefits Coordinator, sent a letter to Grievant informing her she was on Family and Medical Leave (FML) as of that day. Grievant was also informed of her rights and responsibilities under the Family Medical Leave Act (FMLA) including:

> The FMLA requires the employee to provide periodic reports, on request, to the employer during family and medical leave regarding the employee's status and intent to return to work.

> Please consider, via this correspondence, our request for you to provide periodic reports to the Personnel Benefits Coordinator, in writing, regarding information on your status and intent to return to work.
>
> Documentation is required for your time off (sic) We have received your physician completed DOP-3. Approval of FML and the use of sick leave are contingent upon proper documentation provided by the employee and the employee's physician. You are required to keep us informed, in writing, as to your status, i.e., anticipated return to work. You will also need to continue to turn in leave forms to your supervisor during your absence. Along with your required DOP-L3 documentation for time off from work, you will also be required to produce documentation showing that your physician releases you to return to work.
>
> (Respondent's Exhibit 13)

11. Grievant's doctor completed and submitted four State of West Virginia Physician/Practitioner's Statements (DOP-L3 form) to Respondent over the course of Grievant's leave of absence.

12. The first DOP-L3 form, covering Grievant's November 7, 2017, doctor visit, was submitted to Respondent around November 7, 2017, and stated that Grievant would be incapacitated from November 16, 2017, to February 5, 2018. It indicated that Grievant may be able to return to work on February 5, 2018, and that Grievant's condition would not permanently prevent her from performing her duties. (Respondent's Exhibit 2)

13. On December 8, 2017, Grievant emailed Kathy Kerin asking her to help determine when her paid leave would be exhausted and "to please clarify if and when

any other documentation is needed" from her regarding leave without pay while on FMLA after she exhausts her paid leave. (Respondent's Exhibit 14)

14. On December 8, 2017, Kathy Kerin sent Grievant a reply email informing her that if she returned to work on February 5, 2018, as specified in her DOP-L3, she would have sufficient leave to carry her through. But that "[i]f you need to extend the leave please contact me for Leave without Pay forms as there are many forms depending on circumstances." (Respondent's Exhibit 14)

15. On December 11, 2017, Grievant acknowledge her understanding, emailing Kathy Kerin that "I will keep you informed of any changes ASAP". (Respondent's Exhibit 14)

16. A second DOP-L3 form, covering Grievant's January 25, 2018, doctor visit, was submitted to Respondent around January 25, 2018, and stated that Grievant would be incapacitated from January 25, 2018, to April 17, 2018. It indicated that Grievant may be able to return to work on April 17, 2018, and that Grievant's condition would not permanently prevent her from performing her duties. (Respondent's Exhibit 3)

17. Sometime between February 16, 2018, and February 27, 2018, Grievant used up her sick and annual leave, whereupon her FMLA leave of absence became unpaid. (Respondent's Exhibit 23 and Exhibit 16)

18. On February 27, 2018, Grievant faxed to Respondent an Application for Leave Without Pay-Medical, requesting medical leave without pay for six months.

19. On February 28, 2018, Dr. Smith sent Grievant a letter approving her request for six months unpaid leave. He informed Grievant that the most recent DOP-L3 form stated that she may be able to return April 17, 2018, and that she should submit an updated DOP-L3 "if this date is extended or to show you have been released to return". (Respondent's Exhibit 16)

20. On April 12, 2018, Ms. Kerin emailed Grievant a reminder to let Respondent know if she would be able to return to work on April 17, 2018. (Respondent's Exhibit 20)

21. On April 13, 2018, Grievant emailed Ms. Kerin that she would not be returning to work on April 17, 2018. (Respondent's Exhibit 20)

22. A third DOP L3 form, covering Grievant's doctor visit on an undetermined date, was submitted to Respondent around April 13, 2018, and stated that Grievant would be incapacitated from April 13, 2017, (apparently April 13, 2018) to August 20, 2018. It indicated that Grievant may be able to return to work on August 20, 2018 and that Grievant's condition would not permanently prevent her from performing her duties. (Respondent's Exhibit 4)

23. On July 31, 2018, Ms. Kerin received by email a request from the West Virginia Consolidated Retirement Board on behalf of Grievant asking Ms. Kerin to complete a disability retirement benefits employer's report on Grievant's behalf. (Respondent's Exhibit 21)

24. On August 3, 2018, Grievant informed Ms. Kerin via email that her doctor did not feel she could return to work on August 20, 2018, and requested to be informed of her options and the documents she needed to submit. (Respondent's Exhibit 22)

25. On August 6, 2018, Ms. Kerin emailed Grievant advising her to have her doctor complete an attached DOP-L3 form. (Respondent's Exhibit 22)

26. A fourth DOP-L3 form, covering Grievant's doctor visit on an undetermined date, was submitted to Respondent on August 17, 2018, and stated that Grievant would be incapacitated from August 20, 2018, to December 31, 2018. It did not contain a return to work date and indicated that Grievant's condition would permanently prevent her from performing her duties. (Respondent's Exhibit 5)

27. On August 27, 2018, Respondent informed Grievant by phone of her dismissal.

28. On August 27, 2018, Dr. Smith sent a letter dated August 22, 2018, to Grievant informing her of her dismissal and that it would be effective September 11, 2018.

29. The letter went on to state the basis of Grievant's dismissal as follows:

> In accordance with subsection 14.8 of the Division of Personnel's Administrative Rule, W.Va. Code R. §143-1-1 et seq., Leave of Absence Without Pay, you are entitled to a medical leave of absence without pay not to exceed six (6) months within a twelve (12) month period. Our records indicate that you were granted a medical leave of absence from your position as Nutritionist I, from February 27, 2018 to August 27, 2018.

> Whereas the six-month medical leave of absence entitlement has been exhausted, this letter shall serve as notification of your dismissal from Monongalia County Health Department, effective September 11, 2018.
>
> (Respondent's Exhibit 1)

30. The dismissal letter also referred Grievant to Subsection 14.8.d. of the Administrative Rule of the West Virginia Division of Personnel (Administrative Rule). The Rule sets forth an employee's responsibility at the end of a leave of absence without pay, including a prompt return at the expiration of leave.

31. On August 27, 2018, Grievant emailed Dr. Smith in part as follows:

> I do not agree with the action taken against me and I do not feel the information in the letter was accurate. On August 3rd I requested of Kathy Kerin to be informed of what my options would be in order to move forward with my employment as I knew my medical leave without pay was due to expire. Although the updated DOPL3 form from my doctor requested by Kathy Kerin for August 2018 indicated he did not approve of my return to work, his decision was greatly influenced by possibly and historically the abusive hostile conditions at my work site continuing which in turn would hinder my care etc. Even though those conditions were mostly due to the disturbing actions toward me Brenda Fisher and Kelly Rolstad administration was negligent to assist me for many months which altogether greatly caused the need for my medical leave. I was hopeful there would be discussions and options offered to me by MCHD that would ensure a safe and peaceful plan enabling me to return to my job. However, that did not occur. I had not expressed any intention on separating my employment from MCHD and I am asking that you reevaluate the decision to terminate my position also considering the information contained in this response. Please respond and clarify the reason for my termination as I am still stunned and confused. Fyi the policy you referred to in the letter was not enclosed with the letter as it stated

> however I tried to research and interpret any rules to the best of my ability.
>
> (Respondent's Exhibit 6)

32. On August 28, 2018, Grievant again emailed Dr. Smith in part as follows:

> I expected there to be options discussed as I had asked of Kathy Kerin on 8-3-18 to 'please let me know what my options are' moving forward of which were not discussed yesterday. I was not aware before yesterday that the updated form from my doctor for 8-2018 that Kathy requested would lead to grounds for my termination etc. After reflecting on the abrupt content of the phone call, I have a few questions. Upon returning would I have continued to work under Brenda Fisher and with Kelly Rolstad (which is what I was anticipating)? Why were the options of a possible schedule change, modification or personal leave of absence as has been to others in the past etc.?
>
> (Respondent's Exhibit 7)

33. On September 7, 2018, Grievant contacted Dr. Smith via fax and asked him to provide justification for her dismissal.

34. Dr. Smith sent Grievant an undated letter responding to her August 28, 2018, email and her faxed letter of September 7, 2018. It justified Grievant's dismissal as follows: that her last day worked was October 3, 2017; that she was on combined annual and sick paid leave from October 3, 2017, until February 15, 2018; that she received six months of unpaid leave starting February 27, 2018, which was set to expire on August 27, 2018; that by August 27, 2018, she had consumed all permitted paid and unpaid leave; that she requested additional unpaid leave through December 31, 2018; that the DOP-L3 form submitted on August 20, 2018, stated her inability to return to work

was “permanent”; and “further based on the fact that you had frequently created difficulties with your co-workers where the circumstances indicated that you were too often being difficult and uncooperative with your coworkers”. (Respondent’s Exhibit 8)

35. The incidents between Grievant and her coworkers that factored into the dismissal included Grievant raising her voice to Kelly Rolstad in an inappropriate manner in June of 2016, and Grievant’s failure to adhere to the dress code policy on October 13, 2016, when she wore a Halloween themed shirt. (Dr. Smith’s testimony)

36. In a decision issued under Docket No. 2016-1880-CONS, the ALJ found that “[o]n June 9, 2016, Grievant confronted Ms. Rolstad. Grievant raised her voice to Ms. Rolstad and told her not to tell her how to do her job. Grievant was loud enough that other employees in the office could hear her, although they could not hear what she was saying.” (Respondent’s Exhibit 9)

37. The ALJ further found that “[o]n June 13, 2016, Grievant received a verbal warning from Ms. Fisher for retaliating against and verbally attacking Ms. Rolstad for reporting Grievant’s action to her supervisor, and Grievant was placed on a corrective action plan. (Respondent’s Exhibit 9)

38. The ALJ went on to find that “[o]n October 31, 2016, Grievant wore a Halloween themed T-shirt to work. . . Grievant did not deny that her attire was in violation of the Dress Code.” (Respondent’s Exhibit 9)

39. On November 7, 2018, Grievant emailed Ms. Kerin, stating that Respondent acted improperly in terminating her because Ms. Kerin had failed to respond

to her August 3, 2018, email requesting Ms. Kerin to inform her of her options and documents she needed to submit. (Grievant's Exhibit 3)

Discussion

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Respondent contends that it dismissed Grievant on August 27, 2018, because she had fully exhausted the six months of unpaid leave provided her under the law and engaged in conduct that made it difficult to get along with coworkers. Respondent had awarded Grievant six months of unpaid medical leave under FMLA starting February 27, 2018, and expiring August 27, 2018. Respondent referenced Grievant's most recent physician statement (form DOP-L3) submitted on August 20, 2018. Grievant's most recent DOP-L3 from August 20, 2018, provided Grievant a return to work date of December 31, 2018, which was beyond the approved six-month period of unpaid leave

ending on August 27, 2018. The DOP-L3 also stated that Grievant's condition would permanently prevent her from performing her work duties.

Respondent cites the Administrative Rule of the West Virginia Division of Personnel (Administrative Rule) in support of its contention that medical leave is not to exceed six months. It provides that "[a]n injured or ill permanent classified employee upon written application to the appointing authority shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve-month period provided: …" W. VA. CODE ST. R. § 143-1-14.8.c.1. (2016).

Grievant counters that Respondent was required to wait until she missed three consecutive days before dismissing her. In support thereof she cites another section of the Administrative Rule, which provides that "[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).

Respondent contends that the Administrative Rule allowed it to dismiss Grievant immediately when she failed to report promptly to work at the expiration of her leave of absence without pay. "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 ST. R. § 143-1-14.8.d.3 (2016). Grievant counters that she did not have to report to work until August 28, 2018, because her leave lasted through August 27, 2018. In the alternative, Grievant counters that a technical violation of the rules does not amount to good cause for dismissal of a permanent public employee. She argues that the rules are in place as general guidance and do not require dismissal, especially in the absence of misconduct and unsatisfactory performance.

Section 14.8.c. of title 143 of the Administrative Rule is applicable to "Medical Leave". As such, because Grievant was under medical leave of absence and did not report to work promptly at the expiration of her leave, Respondent had cause to dismiss her. When Respondent received Grievant's DOP-L3 on August 20, 2018, Grievant's medical leave should have ceased. This section limits medical leave of absence by stating it shall only be granted if "[t]he disability, as verified by a physician/practitioner, is not of such nature as to render the employee permanently unable to perform his or her duties. Though not eligible for medical leave of absence under this subsection, the employee may be eligible for leave under FMLA." W.VA. CODE ST. R. § 143-1-14.8.c.1.D. (2016). The question arises whether a cessation of medical leave under section

14.8.c.1.D is automatic or whether Respondent needs to take some action to revoke it. Even though section 14.8.c.1.D. says an "employee permanently unable to perform his or her duties" is "not eligible for medical leave of absence under this subsection", Respondent never revoked Grievant's medical leave. Respondent received notification on August 20, 2018, that Grievant was permanently unable to perform her duties. Yet Respondent never terminated the medical leave of absence that was in effect until August 27, 2018, when it dismissed Grievant for failing to appear for work on her first day of eligibility to return to work under the granted leave request. Grievant never argued that Respondent was obligated to revoke Grievant's medical leave immediately when notified on August 20, 2018. If Respondent had terminated Grievant's medical leave on August 20, 2018, when it received confirmation that Grievant was "permanently unable to perform" and no longer eligible to remain on leave, Grievant's leave of absence would not have disappeared, but would have simply expired earlier than had been scheduled, obliging her to return to work a week sooner than scheduled.

The period of a month extends from any date in a month to the date preceding that same date in the following month. The same holds true for a six-month period. Since Grievant's six month leave of absence began on February 27, 2018, Grievant's last day off would have been August 26, 2018. Therefore, Grievant's first day back to work would have been August 27, 2018, rather than August 28, 2018. It can be said that Respondent did Grievant a favor by not immediately revoking her leave of absence on August 20, 2018, which would have obligated her, under the Administrative Rule, to return to work promptly on August 21, 2018. However, Respondent kept Grievant's leave of absence in place until its natural expiration at the end of the day on August 26, 2018.

As such, Grievant's failure to appear promptly for work the morning of August 27, 2018, was cause for dismissal. Respondent was therefore justified in immediately firing Grievant the day she failed to return to work. Grievant implies that if her leave of absence expired on August 27, 2018, her first day back to work would be August 28, 2018. Respondent did not tell Grievant whether she had to be back at work on August 27 or August 28. Grievant did not cite any authority for the proposition that Respondent was obligated to advise her regarding the rules of interpretation. While Grievant may have been justifiably confused as to the exact day her leave of absence expired, she cited no authority for the proposition that Respondent had to provide her with the exact return-to-work day rather than just her medical leave expiration date.

Grievant contends that her dismissal is retaliatory. She mentions in support of this contention the fact that Respondent improperly based her dismissal partly on conduct alleged to have occurred over a year prior and which had already resulted in her discipline. Grievant argues that the stale citation of old allegations is proof of retaliation, especially in light of the four grievances she filed between the time of the alleged conduct and Respondent's citation of that conduct in explaining her dismissal. On its face Grievant's contention of retaliation has merit. Respondent could have dismissed Grievant under the Administrative Rule without any reliance on bad conduct. Yet Respondent felt the need to rehash old battles by referencing various alleged infractions for which it had already disciplined Grievant and over which it had clashed with Grievant in prior grievances. The curious aspect of Respondent's referencing this prior conduct as grounds for dismissal is that Grievant has not been back to work since the last of her alleged infractions for which she had already been disciplined.

"No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.VA. CODE § 6C-2-2(o).

"In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a prima facie case." *Freeman v. Fayette Cty. Bd. of Educ*., 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a prima facie case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (*citing* Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

Grievant proved that she filed multiple grievances, a protected activity. She proved that, as a party to the grievances, Respondent was aware of this protected activity. She proved that she was subsequently dismissed, and that it was within such period of time following the protected activity that the court can infer retaliatory motivation. Grievant filed her first grievance against Respondent in 2016, in which, she alleged wrongful termination when, in conjunction with her probationary period, Respondent had dismissed her for misconduct and poor performance after she had refused to accept a demotion to an hourly position devoid of benefits. The Board granted her grievance and reinstated her employment. The more recent grievances, which alleged retaliation and reprisal, violations of posting and selection procedures, improper classification, and harassment, and contesting a written reprimand issued to Grievant, were dealt with as consolidated grievances through a November 22, 2017, decision siding almost wholly with Respondent. Grievant was at the time of the hearing under her medical leave of absence which began October 3, 2017, and had never ventured back to work at any point thereafter. While nine months transpired between the November 22, 2017, decision and her August 27, 2018, dismissal, Respondent ensured that the intervening time was a non-issue by using Grievant's difficulties with coworkers as a basis for dismissing her. As these "difficulties" formed the basis of her grievance heard by the Board on September 11, 2017, and given that Grievant was on leave continuously between this hearing and her dismissal, Respondent's retaliatory motive is apparent. Grievant has established a prima facie case of retaliation.

Respondent now has an opportunity to rebut the presumption of retaliation. "An employer may rebut the presumption of retaliatory action by offering 'credible evidence

of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc*., 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). In spite of providing a reason for discharging Grievant which reeked of retaliation, Respondent also provided a reason for discharging Grievant which was permissible under the Administrative Rule. As previously elaborated, the Administrative Rule allows Respondent to dismiss Grievant immediately upon her failure to report promptly to work at the expiration of a leave of absence without pay. Respondent has rebutted the presumption of retaliatory motive inherent in its dismissal of Grievant.

When an employer rebuts a presumption of retaliatory motive, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ*., 200 W. Va. 405, 409, 489 S.E.2d 787 (1997). Grievant had been on leave and had not worked for Respondent in almost a year at the time of dismissal. If Respondent actually thought it had a legitimate reason to dismiss Grievant for failing to get along with coworkers, it is curious why Respondent did not fire Grievant when Grievant committed these infractions with coworkers. The undersigned is struck by the bitterness that still exists between Grievant and her superiors at MCHD, but not surprised given that it has been festering since Grievant filed her first grievance in 2012. Each party has had occasion to suffer the sting of defeat and rejection in this grievance process: first, when Respondent was forced to

reinstate Grievant after dismissing her for misconduct and unsatisfactory performance during her probationary status when she refused to become an hourly employee without benefits and, second, when Grievant's claims of retaliatory treatment against Respondent were dismissed. Respondent provided a valid basis to dismiss Grievant and did not need to supplement it with Grievant's disciplinary history. Yet, Respondent inexplicably threw in as additional grounds in its letter of explanation to Grievant that she was difficult and uncooperative with coworkers. Respondent provided little evidence at the hearing to back up this claim but did cite the November 22, 2017 level three decision. In spite of proving that the allegations of being difficult and uncooperative with co-workers was pretext for dismissal, Grievant did not prove that her dismissal for failure to report promptly to work at the expiration of leave of absence without pay was pretext for retaliation.

Grievant contends that Respondent could only dismiss her for cause, implying that this means good cause, necessitating unsatisfactory performance or misconduct. "An appointing authority may dismiss any employee for cause. …" W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "Cause" means "reason, motive".[3] Permanent state employees who are in the classified service can only be dismissed "for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 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.

[3]MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS 116 (2007)

657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "Although it is true that dismissal is inappropriate when the employee's violation is found to be merely a technical one, it is also true that seriously wrongful conduct can lead to dismissal even if it is not a technical violation of any statute. . . The test is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public." *W. Va. Dep't of Corr. v. Lemasters*, 173 W. Va. 159, 162, 313 S.E.2d 436, 439 (1984). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (per curiam).

While the undersigned has leeway to determine whether the basis for a dismissal is "good cause" if that basis is not specified under the law, where statute specifies a basis for dismissal, the undersigned must assume that the stated basis is "good cause". Grievant did not cite any authority permitting the undersigned to find otherwise. The Administrative Rule states that "[f]ailure of the employee to report to work promptly at the expiration of a leave of absence without pay … is cause for dismissal. …" W. VA. CODE ST. R. § 143-1-14.8.d.3 (2016). Grievant failed to report to work promptly on August 27, 2018. As Respondent based the dismissal in part on Grievant's failure to report promptly to work at the expiration of her leave of absence without pay, the undersigned must assume that Respondent dismissed Grievant for good cause. Nevertheless, Respondent provided Grievant with other good cause for her dismissal in citing her fourth DOP-L3, which proclaims Grievant permanently unable to perform her duties without a return to work date. Respondent also cites its receipt of a PERS Application for Disability

Retirement Benefits – Employer's Report completion request that it received on Grievant's behalf. Respondent contends that leaving open indefinitely Grievant's position as a Nutritionist I in the Harrison County WIC office would place an undue hardship on other employees and the public. Grievant counters that Respondent has additional staff at its disposal and therefore the interests of the public are not being adversely affected by Grievant's absence. She further argues that Respondent presented no evidence that her work performance was unsatisfactory. In order to have satisfactory performance, an employee must show up for work. In the absence of a legally acceptable excuse, not showing up for work is unsatisfactory performance. When her leave of absence expired, Grievant did not have a legally acceptable excuse to be absent. Respondent also based its decision on the well-founded conclusion that Grievant would be absent well beyond the expiration date for her leave of absence.

Grievant contends that Respondent's conduct in dismissing her was arbitrary and capricious and an abuse of discretion. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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 Res., Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003). Respondent's decision to dismiss Grievant was supported by a rational basis. While some of the allegations provided by Respondent to justify the dismissal were not supported by the evidence, one allegation was supported by the evidence. It was undisputed that Grievant's leave of absence expired on August 27, 2018, and that Grievant failed to show up for work that day.

Grievant contends that Respondent violated her due process rights by terminating her prior to the required 15-day period she was granted under the Administrative Rule and by not providing her with a predetermination conference. "An 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). It is uncontested that on August 27, 2018, Respondent notified Grievant of her effective dismissal date of September 11, 2018. This is a lapse of fifteen days. Grievant contends that Respondent was obligated to provide her at least fifteen working days between the date of notification and the effective date of dismissal, resulting in an effective termination date of September 18, 2018. While Section 12.2.c. is silent as to whether fifteen days means calendar or working days, the contrasting detail provided for calculating three consecutive scheduled work days provides guidance. Had the authors wanted the fifteen days to mean working days, they could have easily included such details as they had provided for three consecutive work days. Section 12.2.c. also specifies that a predetermination conference is not required for job abandonment. Section 14.8.d.3. implies that not returning to work promptly at the expiration of leave without pay is job abandonment in that it is cause for dismissal. Grievant did not prove

that she was entitled to an effective dismissal date beyond fifteen calendar days from the day she was notified of her dismissal or that she was entitled to a predetermination conference.

Grievant contends that Respondent did not reply to the inquiries she made in her August 3, 2018, email regarding further action she needed to take. Even though Grievant's most recent DOP-L3 states that Grievant would be incapacitated from August 20, 2018, to December 31, 2018, it did not contain a return to work date and indicated that Grievant's condition would permanently prevent her from performing her duties, Respondent did not rely solely on this report to dismiss Grievant. Grievant's six months of unpaid leave had expired and Respondent was within its authority under the CSR to dismiss Grievant. Respondent replied to Grievant's inquiry on August 3, 2018, by telling her to submit another DOP-L3. Even if the fourth DOP-L3 had provided a return to work date for Grievant and had determined that Grievant's condition would not permanently prevent her from performing her duties, Respondent would still be justified in dismissing Grievant for not showing to work on August 27, 2018, the first day after she had been on unpaid leave for six months. Grievant is understandably upset that she processed the forms Respondent told her to process after her August 3, 2018, inquiry. However, Grievant did not cite any authority for the proposition that Respondent was required to further accommodate her medical condition.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence.

W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "An injured or ill permanent classified employee upon written application to the appointing authority shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve-month period provided: …" W. VA. CODE ST. R. § 143-1-14.8.c.1. (2016).

3. The six months of unpaid leave is only applicable under this Administrative Rule if "[t]he disability, as verified by a physician/practitioner, is not of such nature as to render the employee permanently unable to perform his or her duties. Though not eligible for medical leave of absence under this subsection, the employee may be eligible for leave under FMLA." W. VA. CODE ST. R. § 143-1-14.8.c.1.D. (2016).

4. "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 ST. R. § 143-1-14.8.d.3 (2016).

5. "An appointing authority may dismiss any employee for cause. …" W. VA. CODE ST. R. § 143-1-12.2.a. (2016).

6. “An 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).

7. “No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination.” W.VA. CODE § 6C-2-3(h). Reprisal is defined as “the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” W.VA. CODE § 6C-2-2(o).

8. “In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation

must establish a prima facie case." *Freeman v. Fayette Cty. Bd. of Educ*., 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a prima facie case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (*citing* Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

9. "An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.,* 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. Mace, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v.*

Myers, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

10. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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 Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

11. "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K

(Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

12. Respondent proved by a preponderance of evidence that cause existed to dismiss Grievant.

13. Grievant did not prove that her dismissal was wholly retaliatory, that it was arbitrary and capricious, or that it was an abuse of discretion.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: February 8, 2019

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Joshua S. Fraenkel
Administrative Law Judge