THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ERNEST GREEN,
Grievant,

v. **Docket No. 2019-0788-DOA**

GENERAL SERVICEs DIVISION,
Respondent.

DECISION

Ernest Green, Grievant, is employed by Respondent, General Services Division (GSD), as an HVAC[1] Technician. He filed a grievance directly to level three dated January 22, 2019, alleging: "Reprisal." For the relief sought, Mr. Green wrote: "Termination of Parties Involved."[2] Because the allegations did not appear to meet the requirements for an expedited grievance set forth in W. VA. CODE § 6C-2-4(a)(4), an order was entered on April 10, 2019, transferring the grievance to level one for processing. On April 25, 2019, the Grievance Board received a handwritten note from Grievant explaining that he had filed at level three because his employment had been terminated on January 3, 2019. Based upon this new information, an order was entered vacating the previous transfer order and requesting dates from the parties for a level three hearing.

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on October 9, 2019. Grievant appeared *pro se.*[3]

---

[1] HVAC is short for Heating Ventilation and Air Conditioning.
[2] The grievance statement and relief sought are set out herein as they appear on the grievance form.
[3] "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary,* 8th Edition, 2004 Thompson/West, page 1258.

Respondent appeared through GSD Director Greg Melton and was represented by Mark S. Weiler, Assistant Attorney General. This matter became mature for decision on November 8, 2019, upon receipt of the Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant had been on various paid and unpaid leaves of absence from employment for a period of roughly fifteen months. Respondent notified Grievant of the specific date which the last leave of absence ended and dismissed Grievant when he failed to report to work the day after the leave expired. Grievant argued that Respondent was prohibited from terminating his employment while he had a separate grievance pending.

Respondent proved that there were compelling reasons for the termination of Grievant's employment which were not related to the pending grievance.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Ernest Green, Grievant, is employed by Respondent, General Services Division (GSD), as an HVAC Technician.

2. During his employment with the GSD, Grievant had significant problems with attendance, many related to illness.

3. A letter dated April 18. 2017, suspending Grievant for three days without pay, lays out many of these issues and Respondent's steps to address these problems. The actions may be summarized as follows:

- On August 25, 2016, Grievant called his supervisor one hour after the scheduled start time and advised that he would be 15 minutes late. Grievant clocked in approximately 2 hours after the scheduled start time and offered no explanation to his supervisor. Grievant received a letter of reprimand regarding this matter in September 2016.
- On June 28, 2016, Grievant texted his supervisor seven minutes after the scheduled start time stating that he was "just running behind." Grievant clocked in 27 minutes late without any explanation. Grievant received a letter of reprimand regarding this matter in July 2016.
- On January 15, 2016, Grievant called his supervisor an hour after his scheduled start time saying he would be late. Three hours after the scheduled start time, Grievant called in to say he was not going to come to work.
- On January 29, 2016 Grievant called his supervisor 30 minutes after his scheduled start time, to say that he had overslept. Grievant showed up for work 82 minutes after the scheduled start time.
- On February 12, 2016, Grievant called his supervisor one hour after the scheduled start time saying that he'd overslept. Grievant showed up for work 2 ½ hours past the start time.
- On February 16, 2016, Grievant reported to work eight minutes late.
- On March 7, 2016, Grievant failed to clock-in upon coming to scheduled work approximately 15 minutes after the start time.
- On March 14, 2016, Grievant called at his start time to report that he'd overslept. Grievant arrived at work 30 minutes after the start time.
- On April 1, 2016. Grievant failed to call in and clocked-in 51 minutes after the scheduled start time with no explanation.
- Grievant received a letter of reprimand for the incidents that occurred between January 15, 2016 and April 1, 2016.
- The April 18, 2017 suspension resulted after Grievant called his supervisor approximately one hour after his start time to advise his supervisor that he just woke up and did not clock in until approximately 2 ½ hours after his scheduled start time (7:00 AM).

Respondent Exhibit 2.

4. Grievant submitted a work release form from his doctor on July 25, 2017, indicating that Grievant had been ill and unable to work since July 11, 2017. Grievant's medical provider anticipated that Grievant would be able to return to work on August 1, 2017, without restriction. (Responded Exhibit 4)

5. Grievant submitted a second note from his medical provider dated August 1, 2017, indicating that he would be off work until August 11, 2017, after which he was expected to return to work without restriction. (Respondent Exhibit 6)

6. Grievant was issued a letter of reprimand on August 3, 2017, for calling in 10 minutes after his scheduled start time and clocking in at 7:24 AM. Respondent's policy GSD – P2 requires that an employee report an anticipated absence 45 minutes prior to the start of the shift. Grievant's scheduled start time is 7:00 AM.

7. Because Grievant had exhausted his medical leave, Respondent approved a medical leave of absence without pay for the period of August 3, 2017 through August 10, 2017. (Respondent's Exhibit 8)

8. Grievant's medical provider extended Grievant's anticipated time for return to work on at least three occasions, through January 11, 2019. Respondent extended Grievant's leave of absence on each of these occasions. (Respondent's Exhibits, 9, 11, 13, and 14)

9. By letter dated October 19, 2017, Grievant was notified that he had exhausted his sick leave, annual leave, and FMLA leave. The letter notified Grievant that he'd been approved for unpaid leave of absence. (Respondent Exhibit 15)

10. Grievant's medical provider notified Respondent by letter date January 11, 2018, that Grievant needed to be off work until February 11, 2018. (Respondent Exhibit 16)

11. Respondent notified Grievant by letter dated January 12, 2018, that his six-month unpaid medical leave of absence would expire February 2, 2018. Grievant was

informed that he could request a “discretionary personal leave of absence” when his medical leave of absence ran out. (Respondent Exhibit 17)

12. Grievant provided a note from his medical provider dated February 12, 2018, stating that Grievant would not be able to work until May 1, 2018. (Respondent Exhibit 18)

13. GSD Director Gregory Melton sent a letter dated March 6, 2018 regarding Grievant’s leave status. In that letter Director Melton extended Grievant’s discretionary leave of absence until March 27, 2018 and requested additional information regarding the duration of Grievant’s medical condition.

14. Effective February 24, 2017, all HVAC Technicians were required by State regulations to obtain and maintain a current W. Va. State Electrical License for Specialty Electrician (HVAC). Grievant was informed of this new requirement by a letter from William Berry dated March 30, 2017. The letter also noted that starting April 1, 2017, State HVAC employees were given six months to obtain the newly required license. The letter also informed Grievant and other HVAC Technicians that failure to obtain the license by October 1, 2017, would result in the employee’s demotion or dismissal.

15. In Director Melton’s March 6, 2018 letter, he reminded Grievant of the requirement that he gain the specific license to continue working as an HVAC Tech and that the agency had agreed to reimburse all GSD HVAC Techs for any costs incurred in obtaining the license. Grievant was provided a copy of the acknowledgement form he signed when he was notified of the license requirement. Director Melton noted that he had not received documentation from Grievant demonstrating that he had met the

requirement and instructed Grievant to forward such documentation to him at his earliest convenience. (Respondent Exhibit 19)

16. By letter dated April 3, 2018, Director Melton advised Grievant that he had not received the requested medical documentation and included blank forms for Grievant to provide to his medical provider to obtain that documentation. He specifically noted that he would consider extending Grievant's personal leave of absence if he received the information by April 10, 2018, and concluded:

> In the absence of a request for a personal leave of absence and the documentation requested above, I will have no choice but to place you on unauthorized leave effective February 20, 2018, per the Division of Personnel, *Administrative Rule,* sections 14.8.a and 14.6.

Director Melton also noted that he had not received the required documentation indicating Grievant had completed the requirements for the mandatory HVAC license. (Respondent Exhibit 20)

17. Grievant was sent a letter dated July 10, 2018, noting that a predetermination conference was scheduled for him because the agency was considering demoting him for failing to obtain an HVAC license. Grievant neither replied nor attended the meeting. He was sent a subsequent letter dated August 6, 2018, informing him that he had been demoted from his HVAC Tech position to a Facilities Equipment Maintenance Tech, with a commensurate reduction on pay, due to his failure to obtain the HVAC license. Grievant did not contest the demotion. (Respondent Exhibit 21)

18. By letter dated October 5, 2018, Grievant was put on notice that he would no longer be granted any further discretionary unpaid leave of absence without an updated "comprehensive prognosis" from his medical provider indicating "a clear path

forward" medically for his return to work. Grievant was also notified that no further discretionary leave requests would be considered without such information. Grievant was instructed that he must provide the updated information no later than November 1, 2018. If Grievant failed to provide that information Respondent would start the process of dismissing him from employment. (Respondent Exhibit 22)

19. On or about October 29, 2018, Grievant's medical provider completed a form indicating Grievant would not return to work until January 1, 2019.

20. GSD Director Melton noticed that the medical provider had not actually seen Grievant since September 7, 2018, when Grievant was taken off work until November 1, 2018. Director Melton did not consider this information to be "updated" medical information since the medical provider had not seen Grievant since September 7, 2018 to determine that there was a basis for increasing his time off from November 1, 2018 through January 2019. (Responded Exhibit 24)

21. On October 31, 2018, Grievant's discretionary leave of absence expired as set out in Director Melton's letter of October 5, 2018. Grievant did not return to work.

22. By letter dated November 14, 2018, Director Melton noted that Grievant had not provided updated medical information nor provided any indication that he would be able to return to work in the immediate future. Director Melton informed Grievant that a predetermination conference was going to take place on November 27, 2018, concerning his employment status. Grievant was given the option to attend the predetermination conference by telephone if necessary. Grievant neither responded to the letter nor participated in the predetermination conference.

23. Grievant was provided with a letter from Director Melton dated December 18, 2018, notifying him that his employment with Respondent was terminated effective January 3, 2019. The reasons cited for the dismissal were the following:

- Grievant had failed to return to work at the conclusion of a discretionary unpaid personal leave of absence;
- Grievant had abandoned his job by failing to return to work after the expiration of the discretionary unpaid personal leave of absence;
- Grievant was insubordinate for failing to comply with the agency's request for updated medical and other information; and
- Grievant failed to follow procedures for requesting a discretionary personal leave of absence without pay.

(Respondent Exhibit 25)

24. Grievant Green has another grievance presently pending before the West Virginia Public Employees Grievance Board with the docket number 2017-2506-CONS. That grievance relates to allegations of harassment, bullying, and retaliation. The grievance was placed in abeyance by order dated May 10, 2019, until the resolution of the instant grievance because the issues would be moot if Grievant's dismissal was upheld.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters,

> the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W. Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant was a regular, full-time, classified employee of a State agency. 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. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.02 (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*).

Respondent terminated Grievant's employment because Grievant, failed to return to work after the end of a leave of absence. Grievant exhausted all his sick and annual leave. Grievant also exhausted all the unpaid medical leave entitled to him under the Family and Medical Leave Act and additional time off as an unpaid medical leave of absence. At the conclusion of the medical leave of absence,[4] Grievant was granted an unpaid personal leave of absence. Such leave is discretionary, and Respondent is under no obligation to grant it, providing any denial is not arbitrary or capricious. W. VA. CODE ST. R. § 143-1-14.8.a. Grievant was off work on some form of paid and unpaid leave from July 11, 2017 through October 31, 2018.

Respondent unequivocally notified Grievant that his leave of absence ended on October 31, 2018, and he was expected to return to work on November 1, 2018. Grievant neither appeared nor provided any new or recent medical reason why he could not. The Division of Personnel *Administrative Rule* states the following regarding the end of a leave of absence:

> 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. An employee dismissed for failure to return from leave of absence without pay is not eligible for severance pay.

W. VA. CODE ST. R. § 143-1-14.8.d.3.

[4] W. VA. CODE ST. R. § 143-1-14.8.c.1. 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.

The Grievance Board has clearly addressed the effect of this provision by holding that Respondent must prove its charge that Grievant abandoned his or her job by failing to return after the expiration of her approved leave of absence." *Kitchen v. Dep't of Health and Human Res.*, Docket No. 05-HHR-175 (Oct. 18, 2005). "Failure of an employee to report to work at the end of such a leave of absence or to provide, in advance, justification for continued leave is grounds for dismissal." *Hayden v. Dep't of Health and Human Res.*, Docket No. 98-HHR-133 (1999). *Bogard v. Div. of Veterans Affairs,* Docket No. 2011-0562-MAPS (June 7, 2011). Respondent proved by a preponderance of the evidence that the dismissal of Grievant from employment was justified.

Grievant did not argue that Respondent improperly denied him leave. Grievant's sole argument was that he could not be fired while other grievance procedures are ongoing. His position is that while he has a grievance pending before the Grievance Board, his employment cannot be terminated. In support of that proposition, Grievant cites *Wounaris v. W. Va. State Coll,* 214 W. Va. 241, 588 S.E.2d 406 (2003). Grievant's reliance on *Wounaris* is misplaced.

The grievant in *Wounaris* was a college professor who was an "at-will" employee. He was dismissed and contested his dismissal through the grievance procedure. The Administrative Law Judge found in the professor's favor and ordered the college to reinstate him. The college appealed to Kanawha County Circuit Court. A few days after the grievant returned to work, the college fired him again without citing any additional reasons for their action. The Supreme Court held that a significant public policy supported the grievant's right to contest his original dismissal through the grievance procedure. The Court found that the college could provide no compelling reason for firing the grievant a

second time while the prior decision was on appeal other than attempting to thwart his grievance rights. Under those specific circumstances the Court ruled that the college could not terminate the grievant while the original matter was still under litigation in the circuit court.

The Court majority was careful to limit the ruling to the specific situation by writing:

> [W]e are not holding that any employee who has filed a grievance or alleged a wrongful discharge is immune from termination. Obviously, as the College and the trial court noted, there are hypothetical circumstances under which an employer could terminate an employee before the grievance process has concluded, even in the face of an order of reinstatement.

Wounaris v. W. Va. State College, 588 S.E.2d 406 (W. Va. 2003). Justice Albright, in his concurring opinion, further clarified this point by stating:

> [T]he majority opinion rendered in this case *does not* stand for the proposition that a public employee *may not under compelling circumstances* be discharged while a grievance filed by that employee is pending. The sad fact is that no such *compelling* circumstances appear in the record of the case before us, and one is left with the strong impression that the second discharge occurred primarily to frustrate the grievance process and its underlying public policy. (emphasis in original).

Wounaris v. W. Va. State College, supra. Albright concurring opinion.

In the present case, the pending grievance was wholly unrelated to the dismissal case. In the pending matter, Grievant was alleging that he was subjected to harassment, retaliation and bullying. There was no ruling in that matter which was pending appeal. Most importantly, in this case, Respondent presented compelling circumstances justifying Grievant's dismissal which were independent of the issues in the grievance which was already pending before the Grievance Board. Consequently, *Wounaris v. W. Va. State*

College, supra is not applicable to the facts and issues in this matter. Accordingly, the grievance is **DENIED**.

Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W. Va. Supreme Court, June 5, 2013) (memorandum decision).

2. 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. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.02 (2016).

3. The Division of Personnel *Administrative Rule* states the following regarding the end of a leave of absence:

> 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. An employee dismissed for failure to return from leave of absence without pay is not eligible for severance pay.

W. VA. CODE ST. R. § 143-1-14.8.d.3.

4. Respondent must prove its charge that Grievant abandoned his or her job by failing to return after the expiration of her approved leave of absence." *Kitchen v. Dep't of Health and Human Res.*, Docket No. 05-HHR-175 (Oct. 18, 2005). "Failure of an employee to report to work at the end of such a leave of absence or to provide, in advance, justification for continued leave is grounds for dismissal." *Hayden v. Dep't of Health and Human Res.*, Docket No. 98-HHR-133 (1999). *Bogard v. Div. of Veterans Affairs,* Docket No. 2011-0562-MAPS (June 7, 2011).

5. Respondent proved by a preponderance of the evidence that the dismissal of Grievant from employment was justified.

6. In this case, Respondent presented compelling circumstances justifying Grievant's dismissal which were independent of the issues in the grievance which was already pending before the Grievance Board. Consequently *Wounaris v. W. Va. State College,* 588 S.E.2d 406 (W. Va. 2003) is not applicable to the facts and issues in this matter.

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* 156 C.S.R. 1 § 6.20 (2018).

DATE: December 18, 2019.

_____

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE