THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANDREW BROOK JENSEN,
Grievant,

v. **Docket No. 2019-0220-DOR**

OFFICES OF THE INSURANCE COMMISSIONER,
Respondent.

DECISION

Grievant, Andrew Brook Jensen, was employed by Respondent, Offices of the Insurance Commissioner. On August 3, 2018, Grievant filed this grievance against Respondent protesting the termination of his employment for job abandonment. For relief, Grievant seeks reinstatement, back pay including yearly raise, and restoration of benefits.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held over two days on December 17, 2018 and March 11, 2019, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by David Scott Clark. Respondent was represented by counsel, David E. Gilbert, Assistant Attorney General, during the first day of hearing and by William C. Ballard, Assistant Attorney General, during the second day of hearing. During the level three hearing, Grievant's criminal attorney testified that the criminal charges against Grievant were in the process of being dropped and the record was left open to allow Grievant to submit the dismissal order. Such was received by email on June 6, 2019. This matter became mature for decision on April 10, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as an Office Assistant 2 and was terminated from his employment for job abandonment. Grievant was absent due to his incarceration on criminal charges that were later dismissed. While Grievant was incarcerated, he was denied access to a telephone and had no ability to contact Respondent personally. Grievant provided notice of the reason for his absence through an intermediary as soon as he was permitted a visitor at the jail. Respondent failed to prove it was justified in terminating Grievant's employment for job abandonment under those circumstances. Accordingly, the grievance is granted.

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 an Office Assistant 2 and had been so employed since 2006 when Grievant's employment was transferred from the Workers Compensation Commission, which had been dissolved, to Respondent. Grievant had been employed with the Workers Compensation Commission since at least October 2000.

2. On July 13, 2018, Grievant was arrested and jailed at the Western Regional Jail on charges unrelated to Grievant's employment.

3. When Grievant failed to appear for his scheduled work time on Monday, July 16, 2018, Grievant's supervisor, Vance Hill, Jr., became concerned as Grievant had never missed an entire day of work without reporting his absence.

4. After being unable to reach Grievant by calling his cell phone on July 16, 2018, and again on July 17, 2018, Mr. Hill shared his concern with Assistant Commissioner Tonya Gillespie.

5. On July 17, 2018, Assistant Commissioner Gillespie contacted one of the employer's investigators and requested he make a wellness visit to Grievant's home.

6. On the same day, the investigator reported to Assistant Commissioner Gillespie that Grievant had been arrested and was incarcerated on pending charges.

7. Individuals incarcerated at Western Regional Jail are not permitted to make any telephone calls until they are processed and provided a personal identification number. Inmates are not allowed any free telephone calls and can only make a telephone call if they have funds in their account to do so, or if they make a collect call. Further, inmates are not permitted ready access to a telephone unless they are housed in a general population pod.

8. Due to the overcrowding conditions at the jail and the difficulty housing Grievant safely, he was not permitted to make any telephone calls until July 29, 2018, his seventeenth day of incarceration.

9. Grievant's sister, Lucinda Ward, learned of Grievant's incarceration through other means and she and their brother visited Grievant in jail on July 19, 2018, which was Grievant's first opportunity to have contact with the outside world.

10. Jail security procedures do not permit visitors to bring anything with them to a visit so Ms. Ward was unable to take notes in any way during the visit and was required to memorize anything Grievant needed her to do for him.

11. Grievant's main concern in his visit with his sister was to obtain legal counsel and secure his release from jail.

12. Regarding his employment, Grievant asked Ms. Ward to contact Patrick Clark, an attorney for another state agency who worked in the same building as Grievant to notify his employer of the reason for his absence and to request leave. Grievant chose Mr. Clark to assist him because Mr. Clark was an attorney, they were friends, Grievant knew his number, and believed Mr. Clark would know what to do to take care of Grievant's interests.

13. On the same day, Ms. Ward contacted Mr. Clark as Grievant had requested.

14. Mr. Clark immediately attempted to contact Human Resources Director Debbie Hughes, leaving a voice mail requesting to speak with her. Due to the sensitive nature of the charges, Mr. Clark did not want to leave any details on the voice mail message. Ms. Hughes was on vacation but was periodically checking her messages so she received the message the same day and forwarded it to her subordinate, Sheri Richardson, requesting she contact Mr. Clark.

15. Mr. Clark met with Ms. Richardson, Respondent's general counsel, and then Commissioner Allan McVey on July 20, 2018. Mr. Clark relayed that Grievant was in jail, did not have access to a telephone, that he had a preliminary hearing set for that day, and he expected to be released. Ms. Richardson told Mr. Clark that they already knew Grievant was in jail and the nature of the charges.

16. On July 20, 2018, the preliminary hearing was continued and Grievant was not released.

17. Respondent's investigator attended the preliminary hearing on July 20, 2018, and reported to Respondent that the preliminary hearing had not taken place.

18. Based on the report of the investigator, and without contacting Mr. Clark or Grievant's emergency contact to determine when the preliminary hearing would be held or if Grievant would be released on bail, on the same day, July 20, 2018, Respondent terminated Grievant's employment for job abandonment by letter.

19. Grievant was released on bail on July 31, 2018.

20. By order entered June 6, 2019, the criminal charges against Grievant were dismissed.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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 terminated Grievant's employment pursuant to the administrative rules of the Division of Personnel, as follows:

> 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). The administrative rule further defines "job abandonment" as "[t]he absence from work under such conditions as to be synonymous with resignation." W. VA. CODE ST. R. § 143-1-3.48 (2016).

Respondent argues it properly terminated Grievant's employment under this rule as Grievant was absent from work for more than three consecutive workdays without notice or leave. Grievant asserts he did not abandon his job because he was unable to contact his employer personally and had made all reasonable efforts to notify his employer of his whereabouts and protect his job.

Respondent correctly asserts Grievant was absent from his job for three consecutive days without notice and admits it was aware Grievant was incarcerated due to its own investigation. However, Grievant asserts he was prevented from contacting his employer until he did so through an intermediary on the fourth day of his absence. Therefore, a credibility determination is necessary. 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).

Grievant testified that he did not have the ability to use the telephone until July 29, 2018, and that his first contact with the outside world was when his sister and brother visited him on July 19, 2018. In support of this assertion, Grievant provided detailed testimony regarding the circumstances surrounding his booking and housing within the jail and the procedures at the jail whereby inmates may make contact. Grievant testified that inmates cannot make telephone calls until they are assigned a personal identification number and are housed in an area where there is access to a telephone. In addition, an inmate may only make collect calls until money is placed in their account in excess of applicable fees. Grievant testified that due to overcrowding in the jail, his booking process was extended and that he was housed in an interview room for the first several days. Once Grievant was moved into the general population, almost immediately threats were made against his life and he was moved out of the general population.

Grievant was credible. Grievant's demeanor was quiet, calm, and serious. His answers to questions were thoughtful and thorough. He maintained good eye contact throughout his testimony. Grievant's account is both plausible and supported by corroborating evidence. Printouts from the Western Regional Jail show that the first telephone call made from Grievant's account was on July 29, 2018 and that Grievant's

only visitors were his sister and brother on July 19, 2018. Grievant's testimony regarding the overcrowding in the jail and the procedures regarding contact was corroborated by the testimony of Correctional Officer 2 Kayla Stepp. Although Officer Stepp did not recall the specifics of Grievant's incarceration, she testified that inmates are not allowed any free telephone calls, they can only make calls as described by Grievant, that even policy only requires access to a telephone within seventy-two hours, and that she did recall a time during the summer when inmates were spending five or six days in holding.

Therefore, Grievant was prevented from contacting his employer personally to provide notice of his absence and Grievant provided notice to his employer through an intermediary as soon as he was permitted to do so. The legal question that results is whether Respondent is justified in terminating Grievant for job abandonment under those circumstances. "As a general rule, West Virginia law provides that the doctrine of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law." *Williams v. Precision Coil*, 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995). However, 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); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2016).

Unlike an at-will employee, "[a] State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syl. Pt. 4, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977). "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 156, 241 S.E.2d 164, 166 (1977). "The constitutional guarantee of procedural due process requires '"some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729, 730, 356 S.E.2d 483, 484 (1987).

By statute, employees in the classified service are provided certain protections against discharge:

> Discharge or reduction of [employees in the classified service] shall take place only after the person to be discharged or reduced has been presented with the reasons for such discharge or reduction stated in writing, and has been allowed a reasonable time to reply thereto in writing, or upon request to appear personally and reply to the appointing authority or his or her deputy: Provided, That upon an involuntary discharge for cause, the employer may require immediate separation from the workplace, or the employee may elect immediate separation. If separation is required by the employer in lieu of any advance notice of discharge, or if immediate separation is elected by an employee who receives notice of an involuntary discharge for cause, the employee is entitled to receive severance pay attributable to time the employee otherwise would have worked, up to a maximum of fifteen calendar days following separation.

W. VA. CODE § 29-6-10(12).

The administrative rule allowing for the immediate discharge of an employee for job abandonment is an exception to the statutory and constitutional protections afforded to a classified employee and is predicated on the idea that job abandonment is synonymous with resignation. The Grievance Board has refused to uphold terminations for job abandonment under circumstances that were not synonymous with resignation because the grievant was prevented from complying with the employer's policy or when their failure to do so was unintentional. *Hamilton v. Dep't of Health and Human Res.,* Docket No. 2008-1591-DHHR (Nov. 9, 2009) (Grievant whose illness prevented her from calling into work had no intent to abandon her job); *Adkins v. Dep't of Health and Human Res.,* Docket No. 2011-1392-DHHR (Dec. 22, 2011) (Grievant with serious medical condition attempting to extend a medical leave of absence did not intend to abandon her job when employer required her to return to work before the date her doctor stated she could return to work); *Clark v. Dep't of Military Aff. & Public Safety*, Docket No. 99-DJS-428 (Nov. 30, 1999) (Grievant's failure to return to work was not intentional when doctor failed to submit a form Grievant believed had been submitted and Grievant attempted to act in good faith).

In contrast, Respondent cites *Hall v. Dep't of Health and Human Res.,* Docket No. 2014-1713-DHHR (Nov. 9, 2015) in support of its decision to terminate Grievant for job abandonment. The grievant in *Hall* was also incarcerated and was terminated for job abandonment. However, unlike Grievant, Ms. Hall did have access to a telephone but made no attempt to contact her employer either personally or through an intermediary and there was no finding that the employer was aware the grievant was incarcerated. *Hall* is distinguished from this grievance in that Respondent was aware

Grievant was incarcerated, Grievant had no ability to personally notify Respondent of his whereabouts, and Grievant did notify his employer through an intermediary as soon as he was able to do so. This grievance is more similar to *Hamilton* as Grievant had no intent to abandon his job and took reasonable measures to protect his job within his limited ability to do so.

Further, a clear reading of the administrative rule in conjunction with the rule's definition of "job abandonment" does not support termination in this instance. The rule does not require both notice *and* approval of the absence as required by agency policy. The rule states absence without notice "**or**" approved leave. Under this rule, although Grievant was not on approved leave, Grievant could not be terminated for job abandonment if Respondent had notice of the reason for his absence.

In this case, Grievant provided Respondent notice of the reason for his absence on July 20, 2018 through Mr. Clark, although Mr. Clark had attempted to notify Respondent on July 19, 2018, but did not want to leave details on a voicemail message due to the sensitive nature of the information. It is true that Grievant had been absent from work without notice for more than three consecutive workdays when Respondent received this notification. However, Grievant could not provide proper notification as he was under the legal disability of incarceration[1] and Western Regional Jail had failed to allow Grievant any contact with the outside world. Until his sister was allowed to visit him personally on July 19, 2018, Grievant had no ability to notify his employer of the reason for his absence. This contact was further constrained in that the visit was brief,

[1] Incarcerated persons are under a legal disability. *See Quesinberry v. Quesinberry*, 191 W. Va. 65, 70, 443 S.E.2d 222, 227 (1994).

his sister was not permitted to take notes, and Grievant's greatest concern was in defending himself from the criminal charges.

Grievant gave notice to his employer of the reason for his absence as soon as he was able to do so. Given the circumstances, relying on Mr. Clark to provide this notice was not unreasonable. Through Mr. Clark's contact, Respondent knew where Grievant was and that he was attempting to protect his job. Grievant's failure to call in personally when he was under a legal disability and physically prevented from doing so is a mere technical violation of the attendance policy. Nothing about this situation was "synonymous with resignation" and there is no evidence Grievant had any intention of violating policy or abandoning his job. Under these circumstances, Respondent did not have good cause to terminate Grievant for job abandonment.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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*.

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); *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016).

3. The administrative rules of the Division of Personnel, permit the dismissal of an employee for job abandonment as follows:

> 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).

4. The administrative rule further defines "job abandonment" as "[t]he absence from work under such conditions as to be synonymous with resignation." W. VA. CODE ST. R. § 143-1-3.48 (2016).

5. "As a general rule, West Virginia law provides that the doctrine of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal

under state or federal law." *Williams v. Precision Coil*, 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995). However, 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); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2016).

6. Unlike an at-will employee, "[a] State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syl. Pt. 4, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977).

7. "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 156, 241 S.E.2d 164, 166 (1977). "The constitutional guarantee of procedural due process requires '"some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729, 730, 356 S.E.2d 483, 484 (1987).

8. By statute, employees in the classified service are provided certain protections against discharge:

> Discharge or reduction of [employees in the classified service] shall take place only after the person to be

> discharged or reduced has been presented with the reasons for such discharge or reduction stated in writing, and has been allowed a reasonable time to reply thereto in writing, or upon request to appear personally and reply to the appointing authority or his or her deputy: Provided, That upon an involuntary discharge for cause, the employer may require immediate separation from the workplace, or the employee may elect immediate separation. If separation is required by the employer in lieu of any advance notice of discharge, or if immediate separation is elected by an employee who receives notice of an involuntary discharge for cause, the employee is entitled to receive severance pay attributable to time the employee otherwise would have worked, up to a maximum of fifteen calendar days following separation.

W. VA. CODE § 29-6-10(12).

9. Respondent failed to prove it was justified in terminating Grievant's employment for job abandonment when Grievant was prevented from notifying Respondent of his absence and Grievant notified Respondent through an intermediary as soon as was possible of the reason for his absence.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his position and to restore all benefits, including seniority, as if the termination of his employment had never occurred. As Grievant was unavailable to work through July 31, 2018, Grievant is awarded back pay, plus statutory interest, beginning August 1, 2018. From July 16, 2018 through July 31, 2018, Grievant is entitled to use annual leave, if he had any available, for his absence from any scheduled workday, at his discretion. Further, Respondent is **ORDERED** to remove all references to the suspension and dismissal from Grievant's personnel records maintained by Respondent.

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: June 19, 2019

_____

Billie Thacker Catlett
Chief Administrative Law Judge