THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LOVE SABATINI,
Grievant,

v. **Docket No. 2019-0792-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR PUBLIC HEALTH,
Respondent.

DECISION

Grievant, Love Sabatini, was employed by Respondent, Department of Health and Human Resources ("DHHR"), in the Bureau for Public Health. Her position was classified as an Office Assistant 2. Pursuant to W. VA. CODE § 6C-2-4(a)(4), Ms. Sabatini filed a grievance directly to level three dated January 22, 2019, contesting the termination of her employment. As relief she is seeking reinstatement with backpay, interest, and the restoration of her benefits.[1] A level three hearing was held on April 5, 2019, in the Charleston office of the West Virginia Public Employees Grievance Board. Grievant personally appeared *pro se.*[2] Respondent was represented by Mindy M. Parsley, Assistant Attorney General. This matter became mature for decision on May 13, 2019, upon receipt of Respondent's Proposed Findings of Fact and Conclusions of Law.[3]

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[1] A lengthy statement of the grievance detailing certain problems and incidents was attached to the grievance form and is incorporated herein by reference.

[2] "*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.

[3] Grievant elected to not provide a post hearing submission.

Synopsis

Grievant was employed by Respondent as an Office Assistant 2 and was terminated from her employment for job abandonment. Grievant was absent due to her incarceration on criminal charges that were later dismissed. While Grievant was incarcerated, she was initially denied access to a telephone and was then only allowed to make a collect call to her supervisor which was refused. Thus, Grievant was prevented from personally contacting her supervisor. Grievant provided notice of the reason for her absence through her sister as soon as Grievant was permitted to contact her. 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 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. Grievant, Love Sabatini, was employed by Respondent, Department of Health and Human Resources ("DHHR") in the Bureau for Public Health. Her position was classified as an Office Assistant II. She was first employed full-time by Respondent in 2008.

2. On Monday, December 31, 2018, Grievant was arrested and held at the South Central Regional Jail ("Jail").[4]

3. Grievant was scheduled to report to work on Wednesday, January 2, 2019, but she did not show up.

[4] No testimony was offered regarding the offense with which Grievant was charged. Grievant insisted she was falsely accused and asserted that the charges were being dismissed on the same day as the level three hearing.

4. Linda Shaffer has been Grievant's supervisor since 2011. She noted on January 2, 2019, that Grievant failed to come to work and failed to call in. Ms. Shaffer's supervisor informed her on that day that Grievant was in Jail.

5. Grievant was not permitted to make a telephone call from the Jail until January 3, 2019, and was required to pay for the call or call collect and hope the recipient would accept the charges. Grievant made a call to report to her work on that afternoon.

6. Grievant's supervisor, Linda Shaffer, received a telephone call from the Jail on the afternoon of Thursday, January 3, 2019. The operator informed Ms. Shaffer that it was a collect call from Love Sabatini (Grievant) and asked Ms. Shaffer if she would except the charges. Ms. Shafer refused the call.

7. Grievant tried a second time to call her employer to report that she could not come to work on Friday, January 4, 2019. The collect call was again directed to Linda Shaffer and she again refused to accept the collect call.

8. On Monday, January 7, 2019, Grievant's sister called twice and talked with Linda Shaffer. She informed Ms. Shaffer that Grievant was incarcerated and was concerned about losing her job.

9. Supervisor Shaffer contacted the DHHR Office of Human Resource Management for guidance regarding how to handle this situation on January 4, 2019, and was instructed to begin preparing a letter to dismiss Grievant for "job abandonment."

10. While the letter was in the drafting and approval stage Ms. Shaffer considered also including a charge of leave abuse but was ultimately instructed to focus only on leave abuse.

11. The final letter was drafted and dated January 11, 2019, and signed by Catherine C. Stump, MD, MPH, Commissioner for the Bureau for Public Health. The sole reason cited for dismissing the Grievant was Division of Personnel ("DOP") Administrative Rule Section 12.2.c stating that the agency "may dismiss an employee for job abandonment who is absent from work for more than three (3) consecutive work days or scheduled shifts without. . . approval for the absence as required by established agency policy." (Respondent Exhibit 5).

12. Grievant missed the following workdays while she was being held in the Jail: January 2, 3, 4, 7, 8, 9, 10.

13. Grievant came to her worksite on January 11, 2019, the day she was released from the Jail. She found that her security pass had been cancelled denying her access to the DHHR offices.

14. Linda Shaffer was informed that Grievant was at the door inquiring why she did not have access to the building. Ms. Shaffer and Mailee Prichard, Director of Quality Assurance Monitoring, went to the door to meet with Grievant. Ms. Shaffer gave the dismissal letter to Grievant, then asked her to read it and acknowledge that she had received it.

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).

Respondent dismissed Grievant solely for job abandonment as defined in the DOP rule.[5] The DOP administrative rule states:

> 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

[5] Respondent offered evidence to show that Grievant had abused her leave in the past to justify her dismissal for missing additional days without prior approval. Since Respondent did not charge Grievant with leave abuse that evidence is not relevant. Any ruling related to whether Respondent could have dismissed Grievant for leave abuse would amount to an advisory opinion and the Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp*., Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ*., Docket No. 91-35-229/239 (Nov. 27, 1991)." *Priest v. Kanawha County Bd. of Educ*., Docket No. 00-20-144 (Aug. 15, 2000).

> 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).

The basic facts are not in dispute. Grievant did not appear at her workplace for seven consecutive[6] workdays due to her incarceration in the South Central Regional Jail. Respondent was aware that Grievant was in the Jail on January 2, 2019, the first work day after she was arrested.[7] Grievant credibly testified that she was arrested on December 31, 2018, and taken to the Jail. Her undisputed testimony was that she was not permitted to make a call from the Jail until January 3, 2019, and then she was required to make a collect call. Ms. Shaffer credibly testified that she received a collect call from the Jail on that day which identified the caller as Grievant. Ms. Shaffer did not accept the charges and the call was disconnected. The same scenario occurred on January 4, 2019. Additionally, at Grievant's request, her sister called Ms. Shaffer twice on Monday, January 7, 2019, and told Ms. Shaffer where Grievant was and expressed her concern about keeping her job. When Grievant was released from the Jail on January 11, 2019, she went to her workplace to report to work.

[6] *See* FOF 12, *supra* for the specific days Grievant was absent.
[7] Ms. Shaffer's supervisor informed her of Grievant's travails, but it is unclear how the supervisor found out.

The legal question that results is whether Respondent is justified in terminating Grievant for job abandonment under those circumstances. 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).

State classified employees have 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)." *Jensen v. Offices of the Ins. Comm'r,* Docket No. 2019-0220-DOR.

In contrast is the case of *Hall v. Dep't of Health and Human Res.,* Docket No. 2014-1713-DHHR (Nov. 9, 2015) wherein the employer's dismissal of an employee for job abandonment was upheld. 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. Indeed, it is practically identical to *Jensen* where the Grievant also had no intention to abandon his job but was prevented from immediately contacting his employer due to the rules of the regional jail where he was being held.

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 her absence.[8]

[8] Whether Grievant could have been dismissed for other reasons is not relevant since Respondent focused exclusively on "job abandonment."

In this case, Respondent was notified that Grievant was in Jail when Ms. Shaffer received the call from Grievant on the second day, even though she did not accept the charges. Respondent again received notice through Grievant's sister on January 7, 2019. This was the first time Grievant had an opportunity to give such notice. Because the word "and" is used in the policy, Grievant would have to be off work without notice **and** the leave would have to be unexcused for her to be dismissed for job abandonment.

Grievant gave notice to her employer of the reason for her absence as soon as she was able to do so. Given the circumstances, relying on her sister to provide this notice was not unreasonable especially considering her employer was not accepting her collect call.[9] Through Grievant's call and her sister's contact, Respondent knew where Grievant was and that she was attempting to protect her job. Grievant's failure to call in personally when she was 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 her job. Under these circumstances, Respondent did not have good cause to terminate Grievant for job abandonment. Accordingly, the grievance is **GRANTED**.

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.);

[9] It is important to note that Ms. Shaffer believed it is against Agency policy for an employee to accept a collect call on his or her work telephone.

> *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).

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 Division of Personnel administrative rule permits the dismissal of an employee for job abandon met 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. 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. State classified employees have 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).

7. 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).

8. Respondent failed to prove by a preponderance of the evidence, it was justified in dismissing Grievant from employment for job abandonment when Grievant was prevented from immediately giving Respondent notice of the reason for her absence and provided such notice as soon as possible.

Accordingly, the grievance is **GRANTED**.

Respondent is **ORDERED** to reinstate Grievant to her position and to restore all benefits, including seniority, as if the termination of her employment had never occurred. As Grievant was unavailable to work January 2, 2019, through January 10, 2019, Grievant is awarded back pay, plus statutory interest, beginning January 11, 2019. From January 2, 2019, through January 10, 2019, Grievant is entitled to use annual leave, if she had any available, for her absence from any scheduled workday, at her 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* 156 C.S.R. 1 § 6.20 (2018).

DATE: June 26, 2019.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE