THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEREK B. THOMPSON,

Grievant,

v. **Docket No. 2019-0390-DEP**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

DECISION

Grievant, Derek B. Thompson, filed two separate grievances against his employer, Respondent, Department of Environmental Protection ("DEP"). The first grievance is dated July 30, 2018, and states as follows: "[e]mployer held pre-determination conference 7/9/2018 with intent to issue suspension of 3 days for attendance. Period of leave in question covers 11/25-5/11 and not through current date, violating principle of progressive and timely discipline. Absences are supported by doctors' notes. Letter contains incorrect dates of absences" As relief sought, Grievant stated "[b]ecause management failed to abide by Attendance Mgmt & Progressive Discipline Handbooks (incl supported lv, failure to issue action timely, withheld absences from 5/9 to predetermination conf 7/9 for future discipline, and included incorrect dates of absences in charges) all discipline to be expunged, PIP ended and leave paid." Attached to this grievance form were several documents including a letter signed by Grievant, various emails, and screen printouts from the Kronos timekeeping system. This grievance was originally assigned the docket number 2019-0153-DEP.

The second grievance is dated September 21, 2018, and states as follows: "[e]mployer summarily dismissed me from my job on Friday, August 17, 2018, via telephone. The Verbal Dismissal Without Prior Notice violated my Due Process rights.

No predetermination conference was held, and no advance notice of proposed action was given in violation of 12.2.a. of the Administrative Rule of the Div of Personnel . . ." As relief sought, Grievant seeks "[b]ecause management acted improperly and violated my rights illegally discriminating against me for my protected grievance activity, I am seeking the following: 1) dismissal and all previous disciplinary action be expunged from my record, 2) PIP be rescinded, 3) backpay and benefits (including leave) for the 3 days of unpaid Suspension from 7/17/2018-7/19/2018, and the entire period from Friday, August 17, 2018, until return to duty, 4) reassignment to an equivalent position outside the authority, supervision and oversight of Carla Poling, Mike Sheehan, and Rob Rice to ensure further retaliation does not occur."[1] This grievance was assigned the docket number 2019-0389-DEP.

The two grievances were consolidated by Order entered September 26, 2018. A level three hearing was held on January 28, 2019, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared only by his representative, Michael Thompson. Grievant did not appear in person or telephonically. Respondent appeared by counsel, Anthony D. Eates, II, Esquire, Deputy Attorney General. This matter became mature for decision on March 18, 2019, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as an Office Assistant 3 in its Office of Special Reclamation (OSR). Respondent asserts that Grievant was frequently absent

[1] Grievant did not address his claims of discrimination and retaliation/reprisal in his proposed Findings of Fact and Conclusions of Law. Therefore, these claims are deemed abandoned and will not be addressed further herein.

from work which resulted in his use of unauthorized leave. Respondent argues that his frequent absences and unauthorized leave only increased despite its attempts to help correct this problem. Respondent suspended Grievant from employment in July 2018, and later dismissed him in August 2018 for his unacceptable attendance and unauthorized leave use. Grievant denies Respondent's claims and asserts that as he had doctor's slips for many of these absences, such should not have been counted against him when calculating his absence rate or for disciplinary action. Grievant also argues that many of his absences should have been covered by the Family and Medical Leave Act (FMLA) and that Respondent failed to inform him of such. Lastly, Grievant claims that Respondent violated his due process rights by failing to provide him with a predetermination conference before dismissing him, and that his dismissal was improper as it was not issued in writing. Respondent proved its claims by a preponderance of the evidence, and that the disciplinary actions taken were proper and justified. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this 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 was employed by Respondent as an Office Assistant ("OA") 3 in DEP's Office of Special Reclamation in Charleston, West Virginia. Grievant began his employment with Respondent in March 2011. Before becoming an OA 3, Grievant had been employed as a mail runner in DEP's Safety and Administrative Service Section.

2. Carla Poling was employed by Respondent in DEP's Office of Special Reclamation and is stationed in DEP's Philippi, West Virginia, office. Ms. Poling was Grievant's direct supervisor while he was employed as an OA 3. Ms. Poling had been employed by DEP for twenty-seven years.

3. Mike Sheehan is the Assistant Director of DEP's Division of Land Management. Ms. Poling reported to Mr. Sheehan. Ron Rice is the Director of DEP's Division of Land Management.

4. In or about August 2016, Grievant applied for an OA 3 position in DEP's Office of Special Reclamation. While considering him for the position, Ms. Poling contacted Grievant's then-supervisor, Tammy Thornton. Ms. Thornton informed Ms. Poling that Grievant had had attendance problems, but that he was capable of doing the work required of an OA 3.[2] Ms. Poling decided to hire him thinking that perhaps having a position in which he had to apply himself more, like the OA 3 position, would resolve any attendance issues.

5. Grievant transferred to the OA 3 position in January 2017. On or about January 10, 2017, Grievant met with Ms. Poling, at which time they reviewed the job responsibilities, as well as his performance standards and expectations. At that meeting, Ms. Poling gave Grievant an EPA-1 (Employee Performance Appraisal) setting forth in writing Grievant's Responsibilities and Performance Standards and Expectations. One of Grievant's enumerated responsibilities was "adhere to approved work schedule hours

[2] Any attendance issues the Grievant had when he worked as a mail runner are irrelevant to the matter at issue. Neither party has alleged that Grievant's performance as a mail runner had any impact on employment decisions made when he was serving as an OA 3. As such, the evidence presented regarding Grievant's tenure as a mail runner is not being considered herein.

to ensure office coverage for day to day operations and prompt customer service." Grievant and Ms. Poling both signed this document on January 10, 2017.[3]

6. Between January and September 2017, Grievant frequently "called off" work the morning of by texting Ms. Poling. While some of these absences were for an hour or so to go to a doctor's appointment, many more were half or full days. In many of his texts to Ms. Poling, he complains of "not feeling well," "stomach ache," and that he was simply "sick." In several instances, Grievant did not have enough accrued leave to cover these absences.

7. Ms. Poling did an interim evaluation of Grievant in July 2017. On the EPA-2 Form, Ms. Poling rated Grievant as "Good; Meets Expectations," but noted in the "performance development needs" section that Grievant needed to improve on "(#6) from EPA-1-adhere to approved work schedule hours to ensure office coverage for day to day operations and prompt customer service."[4]

8. On September 13, 2017, Ms. Poling met with Grievant about his attendance and leave usage. At this point, Grievant was taking some leave nearly every week. Ms. Poling informed Grievant that as of September 8, 2017, Grievant had a sick leave balance of zero and an annual leave balance of 29.58. Grievant had used 177.25 hours of leave from January 1, 2017, until that date. Of this, 73.83 was annual leave, and 103.42 was sick leave. Given this, Ms. Poling issued Grievant a verbal warning.

9. During her meeting with Grievant, Ms. Poling asked him if there was anything causing his absences, personal or work-related, that she could help him with. She also informed him of the employee assistance program. Grievant did not avail

[3] *See*, Respondent's Exhibit 7, January 10, 2017, EPA-1.
[4] *See*, Respondent's Exhibit 8, EPA-2 signed on July 31, 2017.

himself of either offer of assistance. Grievant informed her that things were better at home and that things were pretty good. He told her that he had been having some problems with anxiety, but that he was taking medication. Grievant did not indicate that his health was affecting his attendance or that the medication was not controlling his anxiety. Ms. Poling informed Grievant that if the absences continued, she would refer the matter to Human Resources and that further action would be taken, likely leave restriction. Grievant said that he would work on doing better. At the end of the meeting Ms. Poling again asked if there was anything she could do or anything else he wanted to discuss, and Grievant answered no.[5]

10. Grievant's attendance did not improve following his meeting with Ms. Poling on September 13, 2017. Grievant continued to frequently text Ms. Poling before 8:00 a.m. reporting that he was sick and would not be in to work. Grievant wound up using all of his accrued sick leave. As he had no more sick leave, annual leave was used to cover the remaining absences. However, by the end of October, Grievant had used all but a few hours of his accrued annual leave.[6]

11. Grievant produced a number of doctor's slips for his absences from July 2017, through October 2017. Grievant was under no formal requirement to get doctor's excuses for absences at this time, except as otherwise required by the Division of Personnel's Administrative Rule. While he may have had doctor's slips to show that he

[5] *See*, Respondent's Exhibit 9, Carla Poling's September 13, 2017, meeting summary; testimony of Carla Poling.

[6] *See*, Respondent's Exhibit 28, leave usage spreadsheet attached to Performance Improvement Plan; Respondent's Exhibit 11, Leave Usage Spreadsheet drafted by Carla Poling; testimony of Carla Poling.

had been seen on the particular days, Grievant did not have enough accrued sick leave hours to cover all the absences.

12. By letter dated November 8, 2017, Mr. Sheehan informed Grievant that he was being placed on a performance improvement plan (PIP) because of his continued absenteeism and set out the terms of the same. The letter stated in part as follows:

> The purpose of this letter is to emphasize the seriousness of your attendance record (absenteeism) with the West Virginia Department of Environmental Protection (DEP) and to confirm in writing your discussion with your supervisor, Carla Poling[,] on September 13, 2017 and again during your 2017 interim EPA dated July 31, 2017. Further, this letter is to establish my expectations, which I have outlined in a Performance Improvement Plan (PIP), to be commenced immediately. I have developed this corrective measure to assist you in bringing your level of attendance as an Office Assistant 3 to an acceptable standard. . .
>
> Your record of frequent absences has placed an undue hardship on the Office of Special Reclamation/Administration section as well as your coworkers who must assume your assigned duties during your absences. Your frequent absences also interfere with your supervisor's ability to appropriately staff the section/unit based on workflow. For these reasons, I am placing you on a PIP.
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> Effective immediately you are being placed on the following restrictions regarding use of annual and sick leave:
>
> 1. No annual leave will be approved unless it is requested at least forty-eight (48) hours in advance of when it is to be taken. If an emergency occurs, contact your supervisor, Carla Poling, by telephone, and she will consider the situation on its merits.
>
> 2. A doctor's excuse must be provided for all sick leave usage, including family sick leave and annual leave used upon exhaustion of sick leave.

3. Failure to request annual leave at least forty-eight (48) hours in advance, and/or failure to present a doctor's excuse for sick leave within two (2) days of your return to work, will be considered unauthorized leave and may result in your pay being docked.

The restrictions outlined in this letter will continue in effect beginning November 9, 2017 through May 9, 2018 to allow you time to demonstrate an acceptable level of attendance and the ability to meet established standards. The continued need for this PIP will be reevaluated after May 9, 2017(sic). . . .[7]

13. Grievant did not grieve being placed on the improvement plan.

14. During the improvement plan period, November 9, 2017, to May 9, 2018, Grievant did not fully comply with the requirements of his improvement plan. At times he failed to request leave in advance and failed to provide doctor's excuses for his absences. Also, during this time Grievant's pay was docked several times for unauthorized leave.

15. Grievant's pay was first docked 2.50 hours for unauthorized leave for his failure to submit a doctor's excuse in violation of his PIP for a December 1, 2017, absence. Grievant was informed of this in a meeting with Ms. Saylor, Mr. Sheehan, and Ms. Poling on December 8, 2017. Grievant also received a letter that same date by hand delivery explaining the unauthorized leave, how his pay would be docked, and how such would affect his pay and leave accrual. This letter detailed his PIP requirements, and stated that "[c]ontinued failure to comply with these restrictions may result in further disciplinary action and/or your pay being docked." The letter also set forth Grievant's appeal rights.[8]

16. Grievant did not grieve his pay being docked for unauthorized leave in December 2017.

[7] *See*, Respondent's Exhibit 28, November 8, 2017, letter.
[8] *See*, Respondent's Exhibit 30, December 8, 2017, letter.

17. On March 22, 2018, Mr. Sheehan met with Grievant about his continued absences and informed him that his use of annual leave would no longer be approved for any reason until further notice. By an email dated and sent on April 11, 2018, Mr. Sheehan confirmed the discussion of March 22, 2018, stating, in part, as follows:

> [p]er our conversation on March 22, 2018 in the Charleston office, I wanted to make sure that you clearly understand that use of your annual leave for any reason will not be approved until further notice. To clarify, this also means that you cannot use your annual leave when your sick leave balance is exhausted. If you do not have adequate sick leave hours to cover your time off, you will be required to enter your Kronos time as unauthorized leave and will go off of payroll.
>
> As we discussed, your continued absences from work places a hardship and additional workload on your co-workers and hinders the functionality of the OSR unit.
>
> In addition, I have advised Carla not to grant permission for you to adjust your schedule to make up any time off. You have an established work schedule from 8 a.m. to 4 p.m. and you are expected to work those hours unless you are on sick leave with valid doctors excuse and have sick leave hours to cover the time used. . . .[9]

18. Grievant continued to be absent from work without having enough sick leave hours to cover his absences. Such is unauthorized leave for which Grievant's pay was docked. Each time his pay was docked, Grievant received a letter informing him which provided the dates of the absences, the hours docked, and the paychecks being docked. Grievant received docking letters dated April 16, 2018, May 4, 2018, May 29, 2018, and June 12, 2018.

19. Grievant's pay was docked for unauthorized leave for his absences occurring on the following dates: April 2, 2018 (docked a partial day as Grievant had 5.5

[9] *See*, Respondent's Exhibit 29, April 11, 2018, email.

hours of accrued sick leave at that time); April 3, 2018; April 23, 2018 (docked a partial day as Grievant had 4.88 hours of accrued sick leave to cover a portion of the absence); May 14, 2018 through May 25, 2018 (Grievant had 0.92 hours of sick leave accrued at the time of his absence on May 14, 2018; therefore, he was not docked for the entire work day); and, May 29, 2018 through June 8, 2018.[10]

20. Grievant had 25.57 hours of accrued annual leave as of May 25, 2018. Mr. Sheehan's directive prevented Grievant from using any of his accruing annual leave hours whether it be for an annual leave day or to cover his absences for illness when he had exhausted his accrued sick leave, as had been allowed previously.

21. By letter dated June 13, 2018, Ms. Saylor provided Grievant a "Medical Leave of Absence" packet that included a "State of West Virginia Application for Leave for Federal Family and Medical Leave, State Parental Leave, and/or Medical Leave of Absence Without Pay," a "State of West Virginia Physician's/Practitioner's Statement," the DEP "Family and Medical Leave Act Policy, and a "WV Division of Personnel Application to Receive Donated Leave." Ms. Saylor informed Grievant that the completed forms had to be returned to her no later than June 28, 2018.[11]

22. In her June 13, 2018, letter to Grievant, Ms. Saylor also informed him that as of the pay period ending May 25, 2018, he had an available accrued annual leave balance of 25.57 hours and an available accrued sick leave balance of 0.52 hours, less than one hour. She further stated, in part, as follows:

> On March 22, 2018, Division of Land Restoration (DLR) Assistant Director Michael Sheehan informed you verbally and via email follow-up, that annual leave, including annual leave used upon the exhaustion of your sick leave, would no

[10] *See*, Respondent's Exhibits 31, 32, 33, and 35, Docking Letters.
[11] *See*, Respondent's Exhibit 36, June 13, 2018, letter.

> longer be approved until further notice due to your continued excessive use of leave. Therefore you have exhausted your available leave balances and are currently on unauthorized leave and off payroll.
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> In accordance with the West Virginia Division of Personnel's Administrative Rule, Section 14, you may apply for a Medical Leave of Absence without pay. You may also be entitled to Family and Medical Leave Act Leave. The DEP is designating that this period of medical leave run concurrently with any Family Medical Leave Act entitlement. This action is being taken in accordance with Section 825.207(d)(1) of the Act. . .
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> To be eligible for leave donation, you must be on an approved unpaid leave of absence for medical reasons and be off payroll for a minimum of 10 consecutive work days. If you receive any leave donation, we will deduct your insurance premiums from your paycheck. If you do not receive leave donation, we will contact you for payment. . .
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> If you do not request or if you are denied approval for a leave of absence without pay, the entire absence will be designated as unauthorized leave and disciplinary action will be imposed. . . .[12]

23. Grievant returned his completed "Application for Leave for Federal Family and Medical Leave, State Parental Leave, and/or Medical Leave of Absence Without Pay," "State of West Virginia Physician's/Practitioner's Statement," and "WV Division of Personnel Application to Receive Donated Leave" forms on or about June 28, 2018. In his application, Grievant sought leave for his personal illness only for the dates April 30, 2018, through June 27, 2018. He also requested that a portion of this leave be paid as 25.57 hours of paid annual leave, and 0.52 hours of paid sick leave.[13]

24. On the "State of West Virginia Physician's/Practitioners Statement," the chiropractor who had been seeing Grievant for back problems stated that Grievant "was

[12] *See*, Respondent's Exhibit 36, June 13, 2018, letter.
[13] *See*, Respondent's Exhibit 37, "Application for Leave for Federal Family and Medical Leave, State Parental Leave, and/or Medical Leave of Absence Without Pay."

or may be able to resume full duty employment, with no restrictions in work activities on June 28, 2018." The chiropractor also indicated on this form that Grievant's condition would not permanently prevent him from performing his duties.[14]

25. On or about July 3, 2018, DEP's Human Resources Office denied Grievant's Application for Leave for Federal Family and Medical Leave, State Parental Leave, and/or Medical Leave of Absence Without Pay because Grievant's chiropractor completed the "physician's/practitioner's statement" certifying Grievant's leave.[15] Lori Saylor, DEP Human Resources Employee Relations, made the decision to deny the application because, pursuant to the federal regulations, a chiropractor may only be considered a "health care provider" who may certify FMLA leave when the chiropractor has taken an x-ray of the back and the x-ray and treatment from the chiropractor must relate to subluxation of the spine.[16] Grievant's chiropractor had not taken an x-ray of Grievant's back.[17] This letter was sent certified mail to Grievant's home mailing address, and it was not returned to DEP as unclaimed.

26. By letter dated July 5, 2018, Respondent informed Grievant of his option to apply for a Personal Leave of Absence Without Pay, and enclosed a copy of the application. This letter was sent certified mail, but returned as "unclaimed."

27. By letter dated July 6, 2018, Chad Bailey, DEP Human Resources Manager, notified Grievant that a predetermination conference had been scheduled to be held on

[14] *See* Respondent's Exhibit 37, completed leave application forms.
[15] *See*, Respondent's Exhibit 38, July 3, 2018 letter from Saylor.
[16] *See*, Respondent's Exhibit 39, 29 C.F.R. § 825.125 (2018), and article "Can a Chiropractor Certify FMLA Lave for the Chronic Bad Back? And Are There Limits?" from the Society for Human Resource Management.
[17] *See*, Respondent's Exhibit 38, "Supplemental Physician's/Practitioner's Statement CHIROPRACTOR."

Monday, July 9, 2018, at 2:00 p.m. Mr. Bailey further stated that "[t]he purpose of his conference is to determine if disciplinary action is appropriate and give you the opportunity to provide input into the determination process. . . This meeting has become necessary as a result of your unacceptable attendance including leave abuse and unapproved leave." This letter was sent to Grievant by electronic mail.[18]

28. Grievant attended the predetermination conference with Director Rice and HR Manager Bailey on July 9, 2018, at which time Grievant's attendance issues were discussed.

29. By letter dated July 9, 2018, Director Rice informed Grievant that he was suspended without pay for three working days due to his "continued frequent unscheduled absences." The letter further states as follows:

> So that you may understand why I have determined that your attendance is unsatisfactory, I offer the following occurrences that demonstrate your failure to meet this agency's work and professional conduct expectations:
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> - On October 25, 2017 (sic),[19] you were placed on a Performance Improvement Plan (PIP) due to your unacceptable level of attendance and leave balances.
>
> - In the pay period beginning November 25, 2017, you failed to provide a doctor's excuse for a 2.50-hour sick leave absence, resulting in unauthorized leave and your pay being docked.
>
> - On March 22, 2018, Division of Land Restoration (DLR) Deputy Director Mike Sheehan informed you that because of your continued frequent absences and low leave balances[,] annual leave, including emergency annual leave when you have exhausted

[18] *See*, Respondent's Exhibit 48, July 6, 2018, letter.
[19] This is a typographical error. The date Respondent placed Grievant on the PIP was November 8, 2017. Neither party disputes that Respondent placed Grievant on the PIP.

your sick leave balance, would no longer be approved until further notice.

- In the pay period beginning March 31, 2018, you did not have enough sick leave to cover your April 2, 2018 and April 3, 2018 absences, resulting in 9.45 hours of unauthorized leave and your pay being docked.

- In the pay period beginning April 14, 2018, you did not have enough sick leave to cover your April 16, 2018 (sic)[20] absence, resulting in 3.12 hours of unauthorized leave and your pay being docked.

- In the pay period beginning April 28, 2018, you did not have enough sick leave to cover your April 30, 2018 through May 4, 2018 absences and your May 9, 2018 through May 11, 2018 absences. Additionally, because you were on unauthorized leave May 9, 2018, you were not eligible to receive paid holiday leave for May 8, 2018 (Primary Election Day), per the *Administrative Rule* of the West Virginia Division of Personnel, W. Va. CODE R. § 143-1-1 *et seq.*, subsection 14.1—Official Holidays, which states:

> To receive pay for any holiday, an employee must, at a minimum, work or be on approved paid leave for his or her full scheduled workday immediately preceding and following the holiday.

These absences resulted in your pay being docked 66.67 hours.[21]

30. The letter dated July 9, 2018, also served as a written reprimand to Grievant for his unacceptable attendance as Mr. Rice determined that he "had not met a reasonable standard of performance." Mr. Rice informed Grievant therein that his suspension would begin on July 17, 2018, and end on Thursday, July 19, 2018, and that

[20] This is a typographical error. The date of the absence was April 23, 2018. Neither party disputes that Grievant was at work on April 14, 2018, and absent on April 23, 2018.
[21] *See*, Respondent's Exhibit 41, July 9, 2018, letter.

he was expected to return to work on July 20, 2018. Mr. Rice also noted that Grievant's PIP was extended for an additional 60-day period and noted that the same would be re-evaluated after September 8, 2018.

31. In a letter dated July 12, 2018, Grievant responded to Mr. Rice's July 9, 2018, disciplinary letter, challenging the charges made against him and asking that the suspension be rescinded. Grievant pointed out that one of the dates were listed as an absence, April 16, 2018, was incorrect as he worked that day, that this action was not timely, that the PIP requiring doctor's excuses negatively impacted his property interest, and that as his absences were supported by doctor's excuses, such should not be held against him or result in his pay being docked. Grievant noted that he was relying on the West Virginia "Division of Personnel's Handbook, 'Supervisor's Guide to Progressive Corrective and Disciplinary Action."[22]

32. By letter dated July 16, 2018, Mr. Rice responded in detail to each of the challenges Grievant raised in his July 12, 2018, letter. Mr. Rice acknowledged the date error Grievant pointed out, and explained that the correct information is in the time/payroll computer system, but otherwise stood by its decision to suspend him. Further, Mr. Rice explained that disciplinary action up to and including suspension was being considered as early as April 27, 2018, prior to Grievant's extended absence. However, he explained that Respondent could not schedule a predetermination conference to address the same because of Grievant's absence that began on April 30, 2018, and his return dates were not known in time for it to take the required actions.

[22] *See*, Respondent's Exhibit 44, July 12, 2018, letter.

33. In response to Grievant's claim that the "agency's decision to place [him] on a PIP, requiring doctor's notes for every absence, resulted in significant negative impact to my property interest," Mr. Rice responded as follows:

> Although a doctor's excuse is required as part of a PIP to cover each day of an absence, it does not mean a trip to the doctor is required for each day. For example, if you go to an urgent care facility and are diagnosed with the flu, the doctor's excuse for work, you will be given an excuse to cover the entire time you are recommended to be off work. You would not have to return to the facility each day of your work absence for a new note. With an illness or injury that causes you to remain off work for an extended period of time, one excuse stating so and listing an expected return date is sufficient.
>
> Of all the doctor's excuses you submitted during the period reviewed (with the exception of the FMLA paperwork), none of them stated that you were unable to return to work for more than 2-3 days at a time. In most cases, the notes submitted stated only that you "had an appointment today."[23]

34. The West Virginia Division of Personnel "Supervisor's Guide to Progressive Corrective and Disciplinary Action" and "Supervisor's Guide to Attendance Management" are not policy, law, or part of the Administrative Rule. They are merely guides. Further, the guides' disclaimers on "page ii" of each distinguish the guides from policy, rules, and regulations, and state that they are intended to be a "reference and a procedural guide."[24]

35. Grievant served his suspension on July 17, 2018, July 18, 2018, and July 19, 2018. Grievant reported to work on July 20, 2018, and worked his designated shift. However, Grievant texted Ms. Poling each morning before his shift from Monday, July 23, 2018, through Friday, August 17, 2018, indicating that he was ill and would not be in. On July 27, 2018, Grievant again exhausted all of his accrued sick leave; therefore, all of his

[23] *See*, Respondent's Exhibit 45, July 16, 2018, letter.
[24] *See*, Grievant's Exhibit 2, West Virginia Division of Personnel "Supervisor's Guide to Progressive Corrective and Disciplinary Action."

absences from that day forward were considered unauthorized leave. Grievant provided no medical excuses for these absences.

36. On August 13, 2018, Ms. Saylor emailed Grievant a letter from Mr. Bailey, at Grievant's personal email address, notifying him that a predetermination conference was scheduled for Friday, August 17, 2018, at 9:00 a.m. This email notice further stated that "[t]he purpose of this conference is to determine if disciplinary action is appropriate and give [Grievant] the opportunity to provide input into the determination process," and that "[t]his meeting has become necessary as a result of your unacceptable attendance including leave abuse and unapproved leave." The letter informed Grievant of the time and location of the conference, and that he could bring a representative with him if he wished and that the representative could attend the conference in person or telephonically. The letter cautioned, ". . . should you fail to participate in the conference, consideration of the circumstances and the need for disciplinary action will proceed, absent your input." Respondent sent the same letter, also dated August 13, 2018, to Grievant's home address via certified mail.[25]

37. The email address Respondent used as Grievant's personal email address is the same as that provided by Grievant to the Grievance Board on his original grievance forms. Ms. Saylor's email to Grievant at this address was not returned to her as undeliverable.

38. The August 13, 2018, letter sent to Grievant's home address was unclaimed, and eventually returned to Respondent on or about September 5, 2018. It appears from the U.S. Postal Service tracking records that delivery was attempted and

[25] *See*, Respondent's Exhibit 46, August 13, 2018, email.

that notice was left at the home because there was "no authorized recipient available."[26] Respondent sent this letter to the address it had in its records as being Grievant's home address. Such is the same address Grievant provided to the Grievance Board on his original grievance forms dated July 30, 2018, and September 21, 2018, and the Grievance Board has sent all of its notices and other correspondence to this address.

39. Grievant did not appear in person or by representative at the August 17, 2018, predetermination conference.

40. By letter dated August 17, 2018, Director Rice informed Grievant of his decision to dismiss him from employment ". . . due to [Grievant's] continued frequent unscheduled absences and your failure to submit a request for a Personal Leave of Absence or Medical Leave of Absence by the August 11, 2018[,] deadline." This letter also contained the following paragraph:

> All property belonging to the State of West Virginia that you have under your control or in your possession must be returned to the agency immediately or at a mutually agreed upon date, time, and location by delivering same to your supervisor, Carla Poling. Such property includes, but is not limited to: keys to any State offices, access cards, and identification cards. You are to clear your office and desk of all personal effects by 3:30 P.M. today. You are not to enter nonpublic areas of the DEP offices without prior authorization from me or my designee.[27]

41. The dismissal letter also provided in detail information as to specific absences, his numerous text-ins to Ms. Poling, the instances his pay was docked and the hours docked each time, and the reasoning for Director Rice's decision to dismiss Grievant.

[26] *See*, Respondent's Exhibit 49, postal records.
[27] *See*, Respondent's Exhibit 46, copy of email and dismissal letter.

42. The August 17, 2018, dismissal letter was sent to Grievant by email to both his work and personal email addresses at 9:45 a.m., and by certified mail to Grievant's same home address on file with Respondent. Grievant had not requested any changes to his home mailing address.[28]

43. Grievant appeared at DEP on August 17, 2018, and collected his personal effects and returned his state-issued items, as directed by the dismissal letter emailed to him that morning. Such indicates that Grievant received the dismissal letter on August 17, 2018, by email.

44. Grievant did not grieve any of the instances his pay was docked for unauthorized leave. Grievant did not contest, or challenge, the denial of his FMLA leave request.

45. Grievant was not present at the level three hearing and his representative called no witnesses to testify. Grievant's representative questioned each of the witnesses called by Respondent.

46. At the times relevant herein, Grievant had access to view his leave accrual balances, as well as his attendance records.

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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May

[28] *See*, Respondent's Exhibit 46, copy of email and dismissal letter.

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 employer has not met its burden. *Id*.

Respondent asserts that it properly suspended, and subsequently terminated, Grievant's employment for his frequent absenteeism and unauthorized leave which rendered Grievant's service unreliable and caused hardship on his coworkers and work unit. Grievant denies Respondent's claims, and asserts that his absences were for illnesses that were covered by doctor's excuses, and that these absences should not been considered when Respondent contemplated discipline. Grievant also asserts that at least some of these absences should have been covered by FMLA, but Respondent failed to timely inform Grievant about his FMLA rights. Grievant also argues that he was denied due process in his dismissal as he was not given a proper predetermination conference.

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. § 143-1-12.2.a. (2016). "'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*).

The evidence presented demonstrated that Grievant missed a significant amount of work during his time at Office of Special Reclamation between his start date in January 2017 and August 17, 2018. Grievant exhausted all of his accrued sick leave several times. Management placed Grievant on a PIP to address his attendance issues in November 2017, but his attendance did not improve. Grievant's continued frequent absences resulted in him again exhausting his accrued sick leave, going off payroll, and his pay being docked several times before his July 2018, suspension. Respondent asserts the same constitutes unauthorized leave. Grievant argues that as he had doctor's slips, as required by the PIP, for many of his absences such were "supported sick leave" and should not have been counted in the calculation of his absenteeism rate or for discipline. Grievant cites as authority for his position the DOP "Supervisor's Guide to Attendance Management." Further, Grievant argued that many of his absences should have been covered by FMLA. It is noted that Grievant did not apply for FMLA until on or about June 28, 2018, and that application was only for the dates April 30, 2018, through June 27, 2018.

The DOP "Supervisor's Guide to Attendance Management" and "Supervisor's Guide to Attendance Management" are not policy. As stated in each, they are intended to be used only as reference and procedural guides. In each, a "disclaimer" is printed on the very first page which distinguishes the guides from law, rule, and policy. As to the issue of sick leave, the DOP Administrative Rule provides, in part, as follows:

> 14.4.f. Requesting, Granting. -- Sick leave may not be granted in advance of the employee's accrual of the leave . . . Employees shall request sick leave in advance of taking the leave when requesting leave for routine dental and medical appointments. For unplanned sick leave, the employee must submit the leave request immediately upon return to work or,

> in cases of extended periods of leave, as directed by the appointing authority. Appointing authorities shall grant accrued sick leave requested by employees for the following reasons:
>
> 14.4.f.1. Illness. -- Sick leave shall be granted in the event of an employee's illness or injury which incapacitates him or her from performing his or her duties. . .
>
> 14.4.f.5. Routine Dental and Medical Appointments - Employee. -- Routine dental and medical appointments for treatment or examination of the employee shall be charged to sick leave. Reasonable travel time in addition to the time for the routine appointments may also be charged to sick leave;
>
> 14.4.f.6. Illness and/or Routine Dental and Medical Appointments - Immediate Family. -- Employees may use up to eighty (80) hours of accrued sick leave per calendar year to provide care to an immediate family member, as defined in this rule, who is incapacitated due to illness or injury or to accompany an immediate family member to routine healthcare appointments; provided such time is prorated for part-time employees. Reasonable travel time in addition to the time for the routine appointments may also be charged to sick leave. . . .

W.VA. CODE ST. R. § 143-1-14.4.f. (2016); W.VA. CODE ST. R. § 143-1-14.4.f.1 (2016); W.VA. CODE ST. R. § 143-1-14.4.f.5 (2016); W.VA. CODE ST. R. § 143-1-14.4.f.6. (2016).

Grievant frequently texted Ms. Poling before his shifts to report-in sick during the months before Respondent suspended him without pay. In his texts to Ms. Poling, Grievant gave various reasons for his absences from illnesses to medical appointments. Grievant did not request sick leave in advance for medical appointments, he simply texted Ms. Poling before his shift started and informed her he would not be in because of a medical appointment. He also regularly took the entire day off for these appointments contrary to the Administrative Rule. As a permanent state employee, Grievant accrued sick leave each pay period, but with his frequent unplanned absences, his sick leave

accrual balances remained low. Eventually, Grievant ran out of accrued leave to cover his absences. Nonetheless, Grievant would still text-in sick and miss full days of work. As sick leave may not be granted in advance of the employee's accrual of the leave pursuant to the Administrative Rule, Respondent could not authorize Grievant's continued use of sick leave when he had exhausted all of his accrued sick leave hours. The Administrative Rule further states as follows:

> 14.6. Unauthorized Leave. -- When an employee is absent from work without authorization for sick or annual leave, the appointing authority shall dock the employee's pay for an equal amount of time paid during which no work was performed. The appointing authority shall notify the employee in writing that his or her pay is being docked and that the unauthorized leave is misconduct for which discipline is being imposed. The appointing authority shall use unauthorized leave only in cases when the employee fails to obtain the appropriate approval, according to agency policy, for the absence. The appointing authority shall transmit notice of the action in writing to the Director.

W.VA. CODE ST. R. § 143-1-14.6 (2016). As such, all of those days on which Grievant texted-in sick, but did not have enough sick leave to cover the hours of those absences, were unauthorized leave. With respect to leave usage, it did not matter that Grievant had doctor's slips for those absences because he did not have any sick leave to use.[29] While the doctor's slips were required under his PIP, his use of this sick leave was unauthorized. Unauthorized leave is considered misconduct, and Grievant's pay was docked several times in between December 2017 and May 2018 for unauthorized leave. Grievant did not grieve the imposition of the PIP or the docking of his pay. "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources,*

[29] *See*, Grievant's PIP required him to have a doctor's slip for all sick leave absences.

Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), ***aff'd***, Monongalia Cnty. Cir. Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), *appeal refused*, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000). Therefore, Grievant's argument that these absences should not have been considered in the calculation of his absenteeism rate or for discipline fails.

Grievant further argues that his frequent absences going back to September 2017 should have been covered by FMLA as he suffered "serious medical conditions," and should not be considered for discipline. In enacting the Family and Medical Leave Act of 1993 ("FMLA"), Congress found that "there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(4). The purpose of the FMLA was "to entitle employees to take reasonable leave for medical reasons. . ." 29 U.S.C. § 2601(b)(2). "It [is] unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the Act]." 29 U.S.C. § 2615(a)(1). "The FMLA's provision that it is unlawful for an employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under the FMLA is a substantial public policy." *Mahmoud v. Dep't of Health & Human Res*., Docket No. 2014-0303-DHHR (Mar. 20, 2017) , ***aff'd***, Kan Cnty. Cir. Ct. Docket No. 17-AA-32 (Mar. 5, 2018).

The evidence presented demonstrated that over the course of his time with OSR, Grievant texted-in sick to Ms. Poling for a variety of reasons. Grievant, by and through his representative, did not dispute this. It is noted that a small portion of his personal sick leave hours was used for family sick leave for family members. Such is not disputed, and he was not disciplined for the same. However, Grievant had to have enough sick leave hours accrued to take that time off as authorized leave with pay.

Looking at Grievant's sick leave usage from January 2017 until August 2018, his tenure at OSR, he reported the following reasons for his absences (not in chronological order): "not feeling well;" "stomach ache;" "sick;" "flu;" "shingles;" "reaction to medication;" "stomach sick;" "sick to my stomach;" "sick and running a fever;" "cysts on spine;" "still sick;" "migraine;" "dizzy and nauseous;" "vertigo;" "sick to stomach and anxiety;" "doctor's appointment;" "physical therapy;" "pain;" "throwing up and migraine headaches;" "woke up sick;" "shots in back;" "anxiety attacks;" and, "ill." In some of his text-ins to Ms. Poling, Grievant only stated that he was still sick, or that he would not be in that day, but would have a doctor's note. Sometimes, he simply stated that he would be out that day and did not mention a doctor's note. At other times, Grievant would state that he would be out that day for a doctor's appointment. Grievant was not known to have a chronic or lasting medical condition that had the potential of rendering him incapacitated and unable to perform his work duties. Grievant's text-in excuses varied by the day until in or about late April 2018 when Grievant reportedly aggravated a previous back injury. While Grievant did not tell anyone about his back injury to start with, his text-in reasons in May 2018 mostly concerned problems with his back.

Grievant, by and through his representative, argues that Respondent should have approached him as in September 2017 with information as to how to apply for FMLA leave because that was the first time Grievant informed Ms. Poling that he had anxiety, but was taking medication for it, because anxiety is a "potentially serious medical condition." In only two of his text-ins did Grievant mention anxiety. Most of his text-in reasons were regarding nonspecific stomach sickness. Also, Grievant argues that Respondent should have approached Grievant about applying for FMLA when he called in for the flu and shingles because they are also "potentially serious medical conditions." There were only a few absences attributed to those illnesses. For Grievant in this particular matter, these were not serious medical conditions as contemplated under the FMLA. Further, Grievant's list of alternating illnesses does not suggested a serious, chronic or lasting medical condition. According to the evidence presented, at no time did a doctor order Grievant off work for more that two or three days at a time. Instead, most all of Grievant's doctor's notes only stated that he had had an appointment that day. At no time did Grievant approach Ms. Poling, management, or human resources and inquire about FMLA leave or how to apply for the same before June 2018. When Grievant's representative asked Ms. Saylor why she did not approach Grievant about FMLA back in September or October 2017, Ms. Saylor explained that his daily excuses were something to the effect of "all over the place," and there was nothing to indicate he had a serious medical condition.

The FMLA establishes a right to at least twelve weeks of unpaid leave per twelve months for employees who meet certain conditions. The FMLA provides job protection for those employees. FMLA leave is not free time off, and the FMLA does not grant an

employee more paid time off than he or she has earned. Grievant's understanding of the FMLA and how it works is incorrect. Respondent properly sent Grievant FMLA and other unpaid leave application forms after he had informed Ms. Saylor of his back problems in June 2018 and when he had exhausted all of his paid accrued leave hours. Grievant completed the forms and had his chiropractor complete the required physician's statement. Grievant applied for FMLA leave for only April 30, 2018, through June 27, 2018, not for the entire time period discussed herein. Grievant's FMLA application was denied because under the FMLA regulations, a chiropractor is considered a health care provider only when certain conditions are met, one of which being when treatment involves an x-ray being taken. Grievant's chiropractor did not take any x-rays during the time he saw Grievant for his back problem.

Two days after Grievant's FMLA application was denied, Ms. Saylor sent Grievant a letter dated July 5, 2018, to inform him that he had the option to apply for a Personal Leave of Absence without pay, pursuant to the Administrative Rule, and enclosed the necessary applications. This letter was again returned to DEP as unclaimed, despite it being sent to Grievant's correct home mailing address. Grievant never submitted the application for a leave of absence without pay. Accordingly, Grievant's arguments regarding the FMLA fail.

Grievant was absent from work most days between April 30, 2018, and August 17, 2018. For instance, Grievant was absent from work from April 30, 2018, through May 4, 2018, which was unauthorized leave without pay as he had no accrued leave to cover these absences. Grievant reported to work on Monday, May 7, 2018. He then texted-in sick on May 9, 2018, reporting that he woke up very sick and would not be in. This was

also unauthorized leave as he had no accrued leave. Grievant remained absent from May 10, 2018, through May 24, 2018, with back issues. Grievant reported to work on May 25, 2018. He texted-in sick on May 29, 2018, reporting that he did not feel well and would be out that day. Grievant texted-in the next day, May 30, 2018, reporting migraines and throwing up, and was out continuously through July 5, 2018. However, he texted-in each day of this absence with varying illnesses, as well as telling Ms. Poling on several days, simply, that he would be out that day. All of these absences were considered unauthorized leave as Grievant had no accrued leave hours to cover any of this time.

Grievant reported to work on July 6, 2018. On that day, Mr. Bailey informed him that a predetermination conference had been scheduled for July 9, 2018, to discuss possible discipline for his unacceptable attendance. Grievant worked each business day from July 6, 2018, until July 16, 2018. He then served his unpaid suspension from July 17, 2018, through July 19, 2018. Grievant again reported to work on Friday, July 20, 2018, and worked his full shift. However, Grievant texted-in sick on Monday, July 23, 2018, and never returned to work after that date. Grievant continued to text-in each morning to Ms. Poling reporting that he was unable to make it in to work for illness, doctor's appointments, evaluations. On some of those days, he did not provide any reason for his absence. Grievant provided no doctor's excuses or directives pertaining to his absences during this time. Respondent dismissed Grievant from employment on August 17, 2018.

The issue becomes, whether Respondent's actions in suspending Grievant and later dismissing him from employment were arbitrary and capricious. 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).

From the evidence presented, Grievant's attendance was sporadic, and his frequent text-ins on the morning of his absences, even for doctor's appointments, placed a hardship on Ms. Poling, his coworkers, and the OSR. Grievant's poor attendance rendered him unreliable. At one time, management had even considered hiring a temporary worker to do Grievant's work because the work had to be done and he was so unreliable. Ms. Poling had spoken to Grievant about his leave usage, and told him that he needed to improve. He was later placed on a PIP to improve his attendance, but Grievant's absenteeism continued resulting in his use of unauthorized leave and his pay being docked several times. Respondent properly provided Grievant an FLMA leave application once his back issues were known and his leave had been exhausted, but it was not approved pursuant to FMLA regulations. Respondent attempted to provide Grievant with a personal leave of absence application, but Grievant did not claim the certified mail sent to his home. After serving his suspension, Grievant worked only one day, then never reported to work again. Grievant presented no doctor's order or excuse placing him off work during this time period. Respondent had made efforts to help Grievant improve his attendance, but Grievant continued missing work. After July 23, 2018, Grievant just stopped coming to work.

Respondent proved by a preponderance of the evidence that Grievant's frequent unauthorized absences in violation of the Administrative Rule rendered him unreliable to perform his duties and caused Respondent undue hardship justifying disciplinary action. Respondent's decision to suspend Grievant in July 2018 was not arbitrary and capricious. Further, Respondent proved by a preponderance of the evidence that Grievant's

continued absences in July and August 2018, along with his history of poor attendance, constituted good cause for Grievant's dismissal.

Lastly, Grievant, by and through his representative, argued that Grievant was not provided a predetermination conference before he was dismissed from employment, thereby violating his due process. Grievant asserts that he did not receive the notice of the predetermination emailed to him at his personal email address and sent to his home certified mail. Also, he asserts that he did not receive the dismissal letter that was again emailed and sent to his home address by certified mail on August 17, 2018, and that he was instead verbally dismissed on that day when he came to the office.

"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, 241 S.E.2d 164 (1977), *overruled in part on other grounds by W. Va. Dep't of Educ. v. McGraw,* 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). "A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment." *Id*. at Syl. Pt. 4. "'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 Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). "The pretermination hearing does not need to be elaborate or constitute a full evidentiary hearing. The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges

against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Id. at 732,* 356 S.E.2d at 486*.*

The evidence establishes that it is more likely than not that Grievant received the August 13, 2018, email providing him with notice of the August 17, 2018, predetermination conference. The letter sent to his correct home mailing address, the same one he supplied on both of his grievance forms and used throughout the grievance process for correspondence. Also, Ms. Saylor testified that the email she sent was not returned to her. This was also the same email address Grievant supplied just days later on his dismissal grievance form. The email sent to Grievant's personal email address notifying him of the predetermination conference on August 17, 2018, was sufficient notice. The evidence presented also establishes that Grievant received the dismissal letter that was also sent on August 17, 2018, to the same personal email and home address. Again, the email was not returned. However, most importantly, the dismissal letter informed Grievant to report to the office that day before 3:30 p.m. to collect his personal effects from his office and to turn in his keys, state employee ID card, and any access card. Grievant appeared at the office just as he had been directed in the dismissal letter. He gathered his personal effects from him office and turned in his state-issued items. This was no coincidence. Grievant received the dismissal letter, was aware he was dismissed and why, then reported to his office to collect his things as he had been directed in that letter. Respondent followed the proper procedure in dismissing Grievant from employment, and did not violate his due process. Therefore, this grievance is denied.

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. 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 employer has not met its burden. *Id*.

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. § 143-1-12.2.a. (2016). "'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*).

3. 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).

4. "'[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).

5. Respondent proved by a preponderance of the evidence that Grievant's frequent unauthorized absences in violation of the Administrative Rule rendered him unreliable to perform his duties and caused Respondent undue hardship justifying disciplinary action. Respondent's decision to suspend Grievant in July 2018 was not

arbitrary and capricious. Further, Respondent proved by a preponderance of the evidence that Grievant's continued absences in July and August 2018, along with his history of poor attendance, constituted good cause for Grievant's dismissal.

6. "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, 241 S.E.2d 164 (1977), *overruled in part on other grounds by W. Va. Dep't of Educ. v. McGraw,* 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). "A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment." *Id*. at Syl. Pt. 4. "'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 Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). "The pretermination hearing does not need to be elaborate or constitute a full evidentiary hearing. The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Id. at 732,* 356 S.E.2d at 486.

7. Respondent did not violate Grievant's due process rights when it dismissed Grievant from employment on August 17, 2018.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The civil action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: April 29, 2019.

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Carrie H. LeFevre
Administrative Law Judge