THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ERICA L. GREEN,
Grievant,

v. **Docket No. 2020-1513-WVUIT**

WEST VIRGINIA UNIVERSITY INSTITUTE OF TECHNOLOGY,
Respondent.

DECISION

Grievant, Erica L. Green, is employed by Respondent, West Virginia University Institute of Technology. On June 12, 2020, Grievant filed this grievance against Respondent stating,

> I felt [wrongfully] terminated, because they never sent any paperwork to me to fill out to return to work. I was informed from supervisor Lenny and Bret that I had two weeks after my 6 week maternity leave of paid time sick time, and that I was put back on payroll, and that I was full time. I reached out to HR, by phone and email, letting them know I was coming back, but was in process of finding a place in Beckley when the outbreak of coronavirus happened. I was told everything was put on freeze but I quit getting my last 2 checks in May and not once did they reach out to me.

In her grievance filing, Grievant did not state what relief she sought.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on September 24, 2020, before Administrative Law Judge Landon R. Brown[1] at the Grievance Board's Charleston, West Virginia office via video conference. Grievant was represented by by counsel, Paul W. Roop, II, Roop Law Office, LC. Respondent was represented by counsel, Dawn E. George, Assistant Attorney General. This matter became mature for decision on October

[1] This case was assigned to the undersigned Administrative Law Judge on November 6, 2020, for administrative purposes.

22, 2020, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Campus Service Worker. Grievant took leave for the birth of her child. Grievant failed to provide required medical documentation, failed to communicate with Respondent, and failed to return to work following the expiration of her leave. Respondent terminated Grievant's employment for gross misconduct for job abandonment. Respondent proved it was justified in terminating Grievant's employment for job abandonment. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as a Campus Service Worker and had been so employed since October 2018.

2. Grievant's direct supervisor was Brett Keys and her next-level supervisor was Alan Garner, Facilities Manager.

3. In February 2020, Grievant notified Respondent of her upcoming need to take maternity leave.

4. At that time, Alan Garner, Facilities Manager and Karen Amey, Human Resources Representative, met with Grievant regarding her request for leave. They notified Grievant of the availability of leave under The Family Medical Leave Act of 1993 (FMLA) for her maternity leave. They did not discuss with her The Parental Leave Act ("PLA"), a state law that also allows for leave following the birth of a child.

5. Leave for Respondent's employees is governed by Respondent's policy, the Board of Governors Rule, BOG Talent and Culture Rule 3.5 Employee Leave.

6. Under this policy, disability "caused or contributed to" by pregnancy, childbirth, or recovery therefrom are considered temporary disabilities for purposes of medical leave. The policy requires the employee to provide medical evidence of the inability to work and an expected return-to-work date. Medical leave is with pay until all paid leave is exhausted.

7. The policy requires that the employee return to work on the first day following the expiration of the disability period and the employee, prior to returning to work, must provide a statement of medical clearance to Talent and Culture.

8. The policy, in section 5.3.1 provides that "[f]ailure of the employee to report promptly at the expiration of a medical leave of absence without pay, except for satisfactory reasons submitted in advance, shall be cause for termination of employment by the institution."

9. The policy also makes available up to twelve weeks of parental leave, which is unpaid and requires that all annual leave be exhausted before parental leave may begin.

10. Respondent's Division of Human Resources Administrative Procedure, Procedure 2.1, Family Medical Leave Act (FMLA) outlines how Respondent will process requests for leave under the FMLA. The procedure states, "When both the FMLA and the West Virginia Parental Leave Act apply to the qualifying reason or condition, the requirements that are more favorable to the employee will be used."

11. Medical leave is administered by the Medical Management unit of Respondent's Division of Human Resources.

12. By letter dated February 11, 2020, Tricia M. Moran, RN, Medical Management Case Manager, mailed a letter to Grievant's address on record. The letter appears to state Grievant would be eligible for "consecutive leave" beginning March 6, 2020, although there is a typographical error in the letter which states only, "your need for consecutive leave is expected approximately, March 6, 2020." The letter explains that, based on the medical documentation, Grievant would qualify for FMLA leave, which would run concurrently with the medical leave provided by Respondent, and would be paid or unpaid based on Grievant's leave balances. The letter states that any work missed due to Grievant's condition prior to the onset of consecutive leave would count as intermittent FMLA leave, and Grievant would be responsible for informing her department that the leave was due to her FMLA condition if calling off work. The letter further states in bold font: "At the onset of your consecutive leave, please request that you physician fax a script with the date and nature of your condition to our office at (304) 293-2644. Upon receipt of this information, we will prepare the appropriate medical leave letter for your absence." It further reminded Grievant that it was her responsibility to keep her department informed of the status of her leave.

13. On February 26, 2020, Grievant experienced complications with her pregnancy which required her immediate hospitalization for early delivery.

14. Grievant's child was born February 29, 2020, and she was released from the hospital on March 2, 2020.

15. Immediately after her release, Grievant moved to Virginia to stay with her mother. Grievant did not intend to return to live in West Virginia. Grievant did not provide Respondent with her new address.

16. At the time Grievant began her leave, she understood that her leave would be for six weeks and would be paid through use of her sick and annual leave balances. By this count, Grievant would have returned to work on April 8, 2020.

17. By letter dated March 13, 2020, Ms. Moran informed Grievant that she had not received the information from Grievant's doctor that Grievant was told to provide in the February 11, 2020 FMLA notification letter. Ms. Moran informed Grievant that she must receive the doctor's information by March 20, 2020. Ms. Moran also reminded Grievant that she would need a release to return to work after she recovered.

18. Ms. Moran also made several attempts to reach Grievant by telephone without success.

19. Grievant did not respond to the letter.

20. On March 25, 2020, Ms. Moran emailed Alan Garner, Operations Manager to confirm that the number was correct and to inquire if Mr. Garner had an alternate means of contacting Grievant.

21. Mr. Garner responded to the email on March 26, 2020, stating that his office had also attempted to contact Grievant without success, that they had not heard from her since her last day worked, and that he had no alternate contact number.

22. As she had been unable to contact Grievant, Ms. Moran contacted Grievant's doctor directly to obtain the necessary medical documentation to approve her medical leave.

23. In late March 2020, due to the coronavirus pandemic, all but a few Campus Service Workers were placed on work from home. Although Respondent's witnesses did not make it clear, it appears this meant that Campus Service Workers were not reporting for duty but were still being paid.

24. By letter dated April 1, 2020, Ms. Moran informed Grievant that her leave had been approved from February 29, 2020 through April 23, 2020. In bold, the letter stated that Grievant would be required to provide a release from her physician at the expiration of the leave period and suggested that Grievant request the same at her regular post-partum appointment. The letter further explained that the leave qualified as both WVU leave and FMLA leave.

25. Grievant ran out of paid leave on April 3, 2020, and was removed from payroll.

26. Grievant did not return to work at the expiration of her leave on April 23, 2020.

27. Grievant did not attempt to contact Respondent prior to or at the expiration of her leave.

28. Ms. Moran left Grievant a voicemail message on April 28, 2020, to which Grievant did not respond.

29. By letter dated April 30, 2020, Ms. Moran informed Grievant that she had not received the required medical documentation and that Grievant had not responded to several attempts to contact her. Grievant was directed to send her medical documentation by May 7, 2020, and that failure to do so may result in disciplinary action.

The letter provided Ms. Moran's telephone number and extension and stated Grievant should call her if she had any questions or concerns.

30. Grievant failed to contact Ms. Moran or provide her the required medical documentation.

31. The father of Grievant's child was also employed by Respondent. On several occasions, Grievant's supervisor, Mr. Keyes, asked the father if Grievant intended to return to work, which the father relayed to Grievant.

32. Although Grievant knew her supervisor was questioning whether she intended to return to West Virginia and resume her job, she made no attempt to contact him.

33. Sometime in early May 2020, Respondent determined that staff, including most Campus Service Workers, must be furloughed.

34. Grievant did not receive a paycheck on May 7, 2020.

35. Grievant texted Mr. Keyes to ask why she had not been paid and he told her to call Mr. Garner, which Grievant then did.

36. On May 11, 2020, Grievant sent the following email to the human resources general mailbox and a similar email to the medical management general mailbox:

> To whom this may concern, my name is Erica [G]reen I was trying to reach someone at WVU HR regarding me returning to work. I'm currently still in VA at the moment and I have been trying to find a place to live back in Beckley. I plan on returning to work, and I received papers that I needed to send to my doctor to return to work. I will have those turned in ASAP. I'm also writing this to inform whoever that I do plan to come back to work, if everything works out. I didn't receive a paycheck last Friday, and I was told I was put back on payroll.

37. The May 11, 2020 email also provided a telephone number at which Grievant could be reached, which was the same telephone number Ms. Moran and Mr. Garner had repeatedly called with no answer or return call.

38. On the same date, Kevin Lawhon, Director of the Division of Human Resources, emailed Marsha Payton, Assistant Director, Medical Management, to inquire whether Grievant was out on approved medical leave as Grievant was "slated to be furloughed."

39. Ms. Payton responded that Grievant's leave had expired and she had not provided her medical documentation and forwarded to Mr. Lawhon Grievant's May 11, 2020 email. Ms. Payton further stated that she would ordinarily contact Employee Relations to discuss unauthorized leave.

40. On May 13, 2020, Mr. Lawhon emailed various involved staff for a timeline and facts regarding Grievant's leave and unauthorized absence.

41. By letter dated May 20, 2020, Mr. Garner notified Grievant of his intent to terminate her employment due to unauthorized leave and job abandonment.

42. By email May 20, 2020, at 4:45 p.m., Ms. Moran notified Mr. Garner, Mr. Lawhorn, and others that she had that day received Grievant's medical documentation, which stated that Grievant could return to work without restrictions on April 25, 2020.

43. Mr. Garner met with Grievant on May 27, 2020, for a predetermination conference. Grievant acknowledged she had not completed her paperwork and said that she did not do it because she did not know if she was returning to West Virginia.

44. By letter dated May 27, 2020, Grievant was notified her employment was terminated effective that date.

45. Grievant's stated reason for her failure to communicate with Respondent was she was busy and "didn't get around to it."

46. Grievant did not apply for Unemployment Compensation Benefits because her mother told her she would not qualify because she was terminated from her position.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

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).

Respondent argues Grievant's employment was properly terminated due to her failure to return from authorized leave and failure to appropriately communicate with Respondent regarding her return to work. Grievant admits she failed to communicate with Respondent regarding her leave prior to May 11, 2020, but argues that her termination from employment was wrongful because Grievant was denied the opportunity

to choose between The Parental Leave Act ("PLA") leave and The Family Medical Leave Act of 1993 (FMLA) leave, because it was improper for Respondent to require a medical release to return to work, because there was no job for Grievant to return to at that time, and because Respondent's motivation was to contravene a substantial public policy.

The PLA is a state law that provides, in relevant part, as follows: "An employee shall be entitled to a total of twelve weeks of unpaid family leave, following the exhaustion of all his or her annual and personal leave, during any twelve-month period: (1) Because of the birth of a son or daughter of the employee. . . ." W.VA. CODE § 21-5D-4(a). FMLA is a federal law that also entitles eligible employees to twelve weeks of leave for the birth of a child. 29 U.S.C. § 2612(a)(1)(A). Unlike the PLA, the FMLA allows employees to be paid during their leave through the use of accrued leave. 29 U.S.C. § 2612(c) & (d). Respondent's policy and procedure as discussed in the finding of facts above implement the requirements of these two statutes and provide additional leave specific to Respondent.

Respondent's policy clearly requires an employee to follow certain procedures surrounding such leave, which Grievant failed to follow. In addition, Respondent repeatedly reached out to Grievant to request the necessary information. Respondent has proven, both by its evidence and through admission, that Grievant failed to keep Respondent informed regarding her leave, failed to respond to Respondent's numerous attempts to contact her, failed to return to work at the expiration of her leave, and failed to timely provide medical documentation. Under its policy, Respondent would be justified in terminating Grievant's employment for failure to return to duty following the expiration of her leave.

Grievant argues that Respondent improperly terminated Grievant's employment because Grievant qualified for leave under both the PLA and the FMLA and Respondent denied her the opportunity to choose between the two. Grievant asserts this is relevant because the PLA does not require a medical release to return to work and it provides twelve weeks of unpaid leave, which had not yet expired at the time of Grievant's termination from employment. Grievant also argues that, even if FMLA was the correct leave, Respondent's procedure negates the requirement to provide a medical release to return to work.

It is specious to assert that Grievant would choose to take unpaid leave when paid leave was available. Grievant's own testimony was that she intended her leave to be paid. Grievant had both annual and sick leave balances, which she was permitted to use under the FMLA, which can be either paid or unpaid, but cannot be used for PLA leave. It is further incorrect to assert Respondent had a duty to inform Grievant in their meeting of the availability of the leave available under the PLA. Under the statute, there is no such affirmative duty, only the requirement for Respondent to post a notice in the workplace regarding the availability of parental leave. W.VA. CODE § 21-5D-9 Grievant made no assertion that a written notice was not posted, only that Mr. Garner failed to orally inform Grievant of the availability of PLA leave during their meeting.

While the FMLA and the PLA both allow for up to twelve weeks of job-protected leave, Grievant admitted in her testimony she intended to only take six weeks of leave. When Grievant went off on paid leave, she believed she was taking six weeks of leave and was supposed to return on April 8, 2020. She failed to provide the necessary documentation to request the specific amount of leave, which she was aware was

required pursuant to Ms. Moran's February 11, 2020 letter. Ms. Moran is the one who contacted Grievant's doctor to determine the period of leave required, which was until April 23, 2020. This gave Grievant an additional two weeks of leave beyond when she originally thought she was supposed to return. There was no misunderstanding regarding the end of her leave. Grievant knew her leave ended on April 23, 2020, yet Grievant made no attempt to contact Respondent to extend her leave.

Even if Grievant's reading of Respondent's policy is correct that Respondent was not permitted to require a medical return to work that is ultimately irrelevant. Grievant was not prevented from returning to work because of the failure to provide a medical release, which she did eventually provide. She did not attempt to contact Respondent or return to work at the expiration of her leave at all. She made no attempt to return to work until almost a month after the expiration of her leave. Grievant abandoned her job and the evidence shows it was because she had no intention of moving back to West Virginia and returning to her job until she supposedly changed her mind in May. In fact, when Grievant finally contacted Respondent on May 11, 2020, she stated that she was still living in Virginia, looking for a place to live in Beckley, and only planned to return to work "if everything works out."

Therefore, the question remaining is whether Respondent had good cause to terminate Grievant's employment under the circumstances. Grievant asserts that she should not have been terminated because there was no work for Grievant due to the pandemic and Respondent's decision to furlough employees. Grievant further asserts that Respondent terminated Grievant to avoid paying her unemployment, in contravention of substantial public policy.

"It is well established that job abandonment is a valid ground for termination, even when the employee expresses a desire to eventually return to his position." *Conley v. W. Va. Div. of Highways*, Docket No. 2010-1123-DOT (Dec. 27, 2010) (citing *Wolfe v. Dep't of Health & Human Ser.*, Docket No. 2008-1863-CONS (Mar. 4, 2010); *Bachman v. Potomac State Coll. of W. Va. Univ.*, Docket No. 07-HE-198 (Jan. 17, 2008); *Chapman v. Dep't of Health and Human Res.*, Docket No. 06-HHR-277 (Oct. 31, 2006)). Grievant's continual failure to communicate with Respondent and her failure to return after the expiration of her leave are not trivial or technical violations of her duty. Although Grievant was given multiple opportunities during the level three hearing to explain her failure to communicate with Respondent over the course of two and a half months, Grievant's only answer was that she was busy and "didn't get around to it." Therefore, Grievant's failure was not due to incapacity or misunderstanding. In fact, it appears more likely than not that Grievant failed to communicate with Respondent because she had no intention of returning to her job.

Grievant's argument that Respondent could not be justified in terminating Grievant's employment for job abandonment when there was no work available appears compelling at first impression. However, essentially that argument means that Respondent should have retained Grievant as an employee to furlough her so that she could receive unemployment compensation benefits, even when she had failed to communicate with Respondent for two and a half months, she no longer resided in West Virginia, and she only intended to return to her job "if everything works out." Grievant abandoned her job. For Respondent to retain Grievant in the face of her clear abandonment of her job so she could claim unemployment compensation benefits to

which she would otherwise not be entitled would be against the public's interest. While the undersigned is not unsympathetic to the financial needs of a single mother, assistance would have been available to her in the state in which she actually resided in the form of Temporary Assistance for Needy Families.

Respondent's actions were not motivated to contravene a substantial public policy. There is no evidence of any ill intent towards Grievant; in fact, it appears Respondent took more actions than were necessary to protect Grievant's interests. Although Grievant intended to be paid for her leave, due to her failure to present her medical documentation, she would have had an interruption in pay but for Ms. Moran's action in contacting Grievant's doctor herself when Grievant failed to do so. Mr. Lawhon's actions to attempt to ascertain Grievant's leave status and request for a timeline are not proof of any attempt to interfere with unemployment benefits but are normal actions taken in the course of business in preparing to furlough employees. The decision to terminate Grievant's employment was simply the application of Respondent's policy which called for the termination of employment under these circumstances.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-

486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. "It is well established that job abandonment is a valid ground for termination, even when the employee expresses a desire to eventually return to his position." *Conley v. W. Va. Div. of Highways*, Docket No. 2010-1123-DOT (Dec. 27, 2010) (citing *Wolfe v. Dep't of Health & Human Ser.*, Docket No. 2008-1863-CONS (Mar. 4, 2010); *Bachman v. Potomac State Coll. of W. Va. Univ.*, Docket No. 07-HE-198 (Jan. 17, 2008); *Chapman v. Dep't of Health and Human Res.*, Docket No. 06-HHR-277 (Oct. 31, 2006)).

4. Respondent proved it was justified in terminating Grievant's employment for job abandonment.

Accordingly, the grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of

the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: December 9, 2020

_____

Billie Thacker Catlett
Chief Administrative Law Judge