WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARK PAULEY,
Grievant,

v. **Docket No. 2021-2285-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Mark Pauley, Grievant, filed this grievance against his employer the West Virginia Department of Transportation, Division of Highways (DOH), Respondent, protesting his dismissal from employment. The original grievance was filed on March 11, 2021. The grievance statement provides: "I was off work under doctor's care and a doctor's excuse, and I was fired for job abandonment." The relief requested was, "[t]o have my job back."

As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process. A level three hearing was held before the undersigned Administrative Law Judge on June 3, 2021, at the Grievance Board's Charleston office. Grievant appeared *pro se*[1] Respondent appeared by Employee Relation's Manager, Kathryn Hill and was represented by counsel Jennifer J. Meeks. At the conclusion of the level three hearing, the parties were invited to submit written proposed findings of fact and conclusions of law arguments. This matter became mature for decision on or about July 12, 2021, the established post mark date for the filing of proposed fact/law proposals.

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[1] "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary,* 8th Edition, 2004 Thompson/West, page 1258

Synopsis

Grievant challenges his dismissal. Grievant is aware there are rules and regulations governing attendance and absences from the workplace. Unauthorized leave from the workplace is sanctionable conduct. The employing state agency, Respondent, had discretion within the contexts of this grievance. Nevertheless, applicable policies permit the actions exercised by Respondent. The undersigned does not conclude, in the circumstances of this matter, that Respondent's actions were unlawful. Respondent established that Grievant failed to maintain reasonable communication with his employer, that Grievant failed to timely update information pertaining to his absence and failed to report to work at the expiration of recognized leave. Grievant's failed to report to work as required by established and applicable policy. Respondent established good cause for terminating Grievant's employment. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Mark C. Pauley, Grievant, was employed by Division of Highways ("DOH"), Respondent, as a Transportation Worker 2 Equipment Operator and had commenced employment with DOH starting in October 2017.

2. Grievant signed an orientation form which shows DOH policies were explained to him, including personal and medical leave of absence, unauthorized leave, and discipline/discharge policy, and that he received an employee handbook covering

these topics. *See* R Ex 6, Orientation Check Sheet and Employee Acknowledgement of receipt of Employee Handbook. *Also see*, R Ex 3, WVDOT Employee Handbook.

3. The West Virginia Division of Personnel Administrative Rule, 143 CSR 1, § 12.2.c, provides that:

> An appointing authority may dismiss an employee for job abandonment who is absent from work for more than three (3) consecutive workdays or scheduled shifts without notice to the appointing authority of the reason for the absence or approval for the absence as required by established agency policy.
>
> ...
>
> The dismissal is effective fifteen (15) days after the appointing authority notifies the employee of the dismissal. Whereas job abandonment is synonymous with the term resignation, a predetermination conference is not required, and an employee dismissed for job abandonment is not eligible for severance pay.

R Ex 1, pg. 34.

4. WVDOH Administrative Operating Procedures Section III, Chapter 6, Disciplinary Action policy, at Section III.B.5 provides that:

> An employee may be dismissed for cause, which requires that it be based on something of a substantial nature directly affecti[ng] the rights and interests of the public rather than trivial violations of statute or official duty without wrongful intention.
> Examples of poor performance or misconduct that may warrant dismissal in response to a single performance issue or instance of misconduct include but are not limited to . . . the following:
>
> ...
>
> b. Job abandonment.

R Ex 2, pg. 5.

5. Grievant does not deny he is and was aware that there exist rules and regulations governing attendance and absences from the workplace.

6. On September 10, 2019, Grievant submitted a Physician's Note to Shari Parsons at the WVDOH District 1 Human Resources Office, stating that he had been under the care of Dr. Crystal H. Bastin, M.D. at THSPP South Charleston Family Care and would not be able to return to work until a later date that had yet to be determined. R Ex 9 The note included a signature caption, and was signed by Rebecca Donohoe FNP-BC who is a Board-Certified Family Nurse Practitioner. *Id.*

7. On September 25, 2019, Grievant submitted three subsequent Physician's Notes to Shari Parsons in the WVDOH District 1 Human Resources office. R Exs 10-12; *See* Testimony of Kathryn Hill, WVDOT Employee Relations Manager. The note dated September 10, 2019, stated that Grievant would be able to return to work on September 16, 2019. R Ex 10

8. The second note, dated September 16, 2019, stated that he would be able to return to work on September 23, 2019. R Ex 11

9. The third note, dated September 23, 2019, stated that he would be able to return to work on September 30, 2019. R Ex 12

10. On September 27, 2019, Grievant submitted another Physician's Note to Shari Parsons in the WVDOH District 1 Human Resources office, dated September 23, 2019, stating that he would be able to return to work on October 7, 2019. R Ex 13 The note was signed by Rebecca Donohoe FNP-BC. R Ex 13; Hill Testimony

11. Grievant did not return to work on October 7, 2019, and further failed to provide DOH with any further information about his medical status. *Id*

12. On May 20, 2020, Respondent mailed a letter via certified mail to the address on file for Grievant, notifying him that his last doctor's excuse had expired and warning him that if no further medical excuse was provided and he did not return to work, he may be dismissed from his position with DOH. R Ex 14 The letter also included a blank "Physician/Practitioner's Statement" form to be filled out by Grievant' s doctor. R Ex 15 The letter was returned to sender, unclaimed. R Ex 14; Hill Testimony

13. Grievant did not receive the May 20, 2020 letter, nor did he return the completed "Physician/Practitioner's Statement" form; however, he stated the address used was still his active address.

14. Throughout the time span of the relevant events of this matter, Respondent sent various correspondences and notices to the address provided to them by Grievant. Grievant never changed his residential address supplied to DOH. At the level three hearing Grievant affirmed the address used was still his active address. L3 testimony

15. Grievant was sent an RL-544 to the address on file for Grievant on January 12, 2021, recommending dismissal due to failing to return to work after the doctor's excuse said he could return on October 7, 2019. R Ex 16 The document invited Grievant to respond. The RL-544 was returned unclaimed. *Id*

16. The RL-544 was never picked up by Grievant, and no response was received. R Ex 17

17. On February 24, 2021, DOH sent Grievant a formal letter notifying him that his position within the agency had been terminated for job abandonment. R Ex 18 The

letter contained an error, in that it should have stated that he had been on unapproved leave since October 7, 2019. This letter was returned unclaimed. Hill testimony

18. On March 7, 2021, Grievant called Respondent. Grievant spoke with Kathryn Hill, Respondent's Employee Relations Manager and indicated he was on medical leave and said he was under the understanding that he had been dismissed for job abandonment. Hill confirmed that Grievant was dismissed for job abandonment in accordance with administrative rule.

19. Grievant failed to claim multiple official correspondences sent to his official, valid address, warning him that his job was at risk. There is more than a year between October 7, 2019, return to work date and the February 24, 2021 letter notifying Grievant that his position within the agency had been terminated for job abandonment.

20. On March 10, 2021 DOH sent another letter to Grievant correcting the February 24, 2021 letter notifying him of his dismissal.[2] R Ex 19 Grievant claimed the March 10, 2021 correspondence.

21. Initially, Grievant ensured that doctor's notes went to Shari Parsons, the human resources manager at the District office, throughout September of 2019. Grievant also contends that he had spoken to his crew chief/foreman during his absence, and he believed those conversations should to some degree be counted as updated notification of his absence. Grievant testimony

[2] There was an error in the correction letter, as the correct date should have been October 7, 2019. L3 Hill Testimony

22. The last doctor's note preceding termination of Grievant's employment, was received by DOH on September 27, 2019 and explained that Grievant could return to work October 7, 2019. R Ex 13 DOH contends that it is standard practice to view the most recent doctor's note provided by an employee on medical leave as superseding all other previously provided notes. L3 Testimony

23. Prior to his discharge, Grievant did not provide any update or follow up information regarding his absence from work to a responsible agent of Respondent after his prior identified and recognized return to work date.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievant. In disciplinary matters, the employer bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018). "[T]he 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 party bearing the burden has not met its burden. *Id.*

Grievant challenges his dismissal. Grievant is aware there are rules and regulations governing attendance and absences from the workplace. Grievant does not deny, he is and was aware. Grievant tends to rebut Respondent's actions by highlighting he complied with known regulations and was unaware that any additional action was

needed on his part. This contention is thought provoking but does not withstand reasonable scrutiny. Grievant contends that because one of the doctor's notes he provided on September 10, 2019 said he could not come back to work until a later and unspecified date, his absence from work should have been covered in perpetuity, regardless of the contents of the later doctor's notes he provided.[3] While Grievant may believe this is proper justification for his action, it is without legal merit. Further, Grievant's explanation for his inaction did not motivate Respondent to mitigate Grievant's dismissal.

Applicable DOP's Legislative Rule, related to the dismissal of a state classified employee states the following:

> An appointing authority may dismiss an employee for job abandonment who is absent from work for more than three consecutive workdays without notice to the appointing authority of the reason for the absence as required by established agency policy. The dismissal is effective fifteen calendar days after the appointing authority notifies the employee of the dismissal. Under circumstances in which the term job abandonment becomes synonymous with the term resignation, an employee dismissed for job abandonment is not eligible for severance pay.

143 C.S.R. 1 § 12.2 (c). Further, "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. *See Wolfe v. Dep't of Health & Human Resources,* 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-

[3] Medical slips provided by Grievant's medical care givers subsequent to the one Grievant cites provided end dates for Grievant's medical release/excuse.

HHR-277(Oct. 31, 2006)." *Conley v. W. Va. Div. of Highways,* Docket No. 2010-1123-DOT (Dec. 27, 2010).

Grievant demonstrated his understanding of the proper procedure and persons to contact in communicating any inability to return to work. He filed five different doctor's excuses, by having them sent to Shari Parsons at the District 1 Human Resources office. The last such excuse gave a date certain for his return to work without restrictions, October 7, 2019. Prior to his discharge, no further forms or excuses were provided to the District 1 Human Resources office. DOH contends that it is standard practice to view the most recent doctor's note provided by an employee on medical leave as superseding all other previously provided notes. L3 Testimony Respondent is justified in recognizing October 7, 2019, as the last day of Grievant's authorized medical leave.

Grievant failed to claim multiple official correspondences sent to his official, valid address, warning him that his job was at risk. Respondent took reasonable steps to communicate with Grievant. It is noted that Grievant's home address has not changed. Grievant offered no plausible explanation for not taking delivery of several correspondence by Respondent. Respondent attempted to contact Grievant at the address provided, by Grievant. Prior to his discharge, Grievant did not provide any update or follow up information regarding his absence from work to a responsible agent of Respondent post the identified and duly recognized return to work date. There is more than a year between October 7, 2019, return to work date and the February 24, 2021 letter notifying Grievant that his position within the agency was being terminated for job abandonment.

Respondent established that Grievant failed to maintain reasonable communication with his employer. Respondent established that Grievant failed to timely update information pertaining to his absence and failed to report to work at the expiration of a leave of absence. The undersigned, trier of fact, does not find that Respondent's actions were arbitrary or clearly wrong. The "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. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "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 his judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

This Grievance Board has held that mitigation of the punishment imposed by an employer is extraordinary relief and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). The circumstance of this matter was not discounted or taken lightly. Grievant was provided with numerous opportunities to supply sufficient justification for mitigation. Grievant is a nice person and perceived by this ALJ as an individual experiencing some difficulties. Nevertheless, he

fails to establish sufficient factual or legal justification to warrant mitigation of Respondent's action.

Respondent had less restrictive means to punish Grievant but elected to terminate his employment. Grievant's actions are recognized as a dischargeable offense. This ALJ does not conclude that dismissal is clearly excessive, an abuse of agency discretion, or that there exists an inherent disproportion between the offense and the personnel action. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997). *Meadows, supra.*

The following conclusions of law are appropriate in this matter:

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. Procedural Rules of the Public Employees Grievance Board, 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 party bearing the burden has not met its burden. *Id.*

2. The West Virginia Division of Personnel Administrative Rule, 143 C.S.R. 1 § 12.2(c), authorizes an agency to terminate an employee who fails to follow established agency policy for accounting for an absence from employment.

3. 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).

4. "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. *See Wolfe v. Dep't of Health & Human Resources,* 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)." *Conley v. W. Va. Div. of Highways,* Docket No. 2010-1123-DOT (Dec. 27, 2010).

5. The fact an employee produces a physician's excuse is not, in and of itself, dispositive of the issue of whether an employee abused his leave. *Parker v. W. Va. Dep't of Health & Human Res.*, Docket No. 97-HHR-042B (Sept. 30, 1997); *Lynge v. Dep't of Health & Human Res.*, Docket No. 00-HHR-258 (Dec. 15, 2000).

6. Applicable DOP's Legislative Rule, related to the dismissal of a state classified employee states the following:

> An appointing authority may dismiss an employee for job abandonment who is absent from work for more than three consecutive workdays without notice to the appointing authority of the reason for the absence as required by established agency policy. The dismissal is effective fifteen calendar days after the appointing authority notifies the employee of the dismissal. Under circumstances in which the term job abandonment becomes synonymous with the term resignation, an employee dismissed for job abandonment is not eligible for severance pay.

143 C.S.R. 1 § 12.2 (c).

7. Division of Personnel's Legislative Rules provide at 143 C.S.R 1 § 12.2(c) "that an appointing authority may dismiss an employee who is absent from work for three consecutive days without notice, but it certainly does not require such dismissal. The rule does not eliminate consideration of other factors such as the employee's work record and the circumstances surrounding the incident that must be considered in a good cause determination. *See Conley v. Div. of Corrections,* Docket No. 00-CORR-109 (June 30, 2000); *Ferrell v. W.Va. Dep't of Transp./Div. of Highways,* Docket No. 00-DOH-237 (Dec. 22, 2000) *rev'd on other grounds, W.Va. Dep't of Transp./Div. of Highways v. Ferrell*, Kanawha County Circuit Court Civil Action No. 01-AA-6 (May 30, 2002)." *Adkins v. W. Va. Dep't of Health and Human Res.*, Docket No. 2011-1392-DHHR (Dec. 22, 2011).

8. A technical violation of DOP policy, 143 C.S.R. 1 §12.2, does not necessarily amount to good cause for dismissal of a permanent public employee. *See Sloan v. Dep't of Health & and Human Res.*, 215 West Virginia 657, 661, 600 S.E.2d 554, 558 (2004) (*Per curiam).* "'Good cause' for dismissal will be found when the employee's conduct shows a gross disregard for professional responsibilities or the public safety."

Drown v. W. Va. Civil Service Commission, 180 W. Virginia 143, 145, 375 S.E.2d 775, 777 (1988).

9. Respondent established that Grievant failed to maintain reasonable communication with his employer. Respondent established that Grievant failed to timely update information pertaining to his absence and failed to report to work at the recognized expiration of a leave of absence.

10. Respondent established a valid basis for terminating Grievant's employment. An employee's failure to return to duty following expiration of a medical leave of absence may provide a proper basis for the employee's dismissal from employment. *Lewis v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-1146 (Apr. 25, 1995).

11. Respondent established by a preponderance of the evidence that Grievant's failure to report to work as required by established and applicable policy, in the fact pattern of this matter, was good cause for termination.

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* 156 C.S.R. 1 § 6.20 (2018).

Date: August 6, 2021

Landon R. Brown
Administrative Law Judge