

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**AARON RYAN,**  
**Grievant,**

**v.**

**Docket No. 2021-0039-DHHR**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/  
WILLIAM R. SHARPE, JR. HOSPITAL,**  
**Respondent.**

**DECISION**

Grievant, Aaron Ryan, filed this action on July 22, 2020, directly to level three, after being dismissed from employment at the William R. Sharpe, Jr. Hospital due to job abandonment. Grievant asserts that he was dismissed from employment without just cause. Grievant seeks to return to work, removal of dismissal from his personnel file, and back pay including any applicable benefits. A level three evidentiary hearing was conducted before the undersigned on December 10, 2020, via Zoom video conference. Grievant appeared in person and by his representative, Gary DeLuke, U.E. Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Brandolyn N. Felton-Ernest, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on February 23, 2021.

**Synopsis**

Grievant worked at Sharpe Hospital as a Health Service Worker. Grievant was dismissed from employment following his return from annual leave for job abandonment. The record established that Grievant's failure to return to work was due to an unknown

policy change concerning quarantine during the pandemic and confusion related to the Respondent's work schedule. Respondent failed to prove by a preponderance of the evidence that Grievant engaged in job abandonment. This grievance is granted.

The following Findings of Fact are based on the record of this case.

### **Findings of Fact**

1. Grievant worked at Sharpe Hospital as a Health Service Worker and he was also part of the transport team. Grievant was a good employee.
2. Grievant's usual work schedule was to work Tuesday through Friday; working eight hour shifts on Tuesday and Thursday and twelve hour shifts Wednesday and Friday for a total of forty-hour work weeks.
3. Grievant's usual work schedule reflects that he was expected to work his set schedule Tuesday through Friday every week for the month of July.
4. Grievant was on approved annual leave from June 20, 2020, through June 27, 2020. At the time his annual leave was approved and at the time his annual leave began, Respondent had a policy regarding an employee's return to work criteria for healthcare personnel due to the pandemic. In regard to the return to work for healthcare personnel completing non-essential travel would be expected to self-quarantine for fourteen days following the return from travel and also have a COVID-19 test completed after the quarantine.
5. When Grievant took his annual leave, it was the policy of the facility and was Grievant's understanding that he was expected to self-quarantine for fourteen days following his return from greater than 75 miles of travel.

6. After Grievant's annual leave and during his fourteen day quarantine, the policy regarding the return to work for healthcare personnel who had completed non-essential travel changed.

7. Respondent sent staff an email on July 1, 2020, notifying employees of the change. Any healthcare personnel completing non-essential travel out of state or to an area considered a "High Alert" by the CDC or State Health Department and any healthcare personnel traveling greater than 75 miles out of state would be expected to wear full Personal Protective Equipment (PPE) for fourteen days upon returning to work.

8. The policy changed while Grievant was off work. Debra Bennett, Grievant's supervisor, reached out to Grievant to let him know about the change in policy. Ms. Bennett tried to contact Grievant because she wanted to update him on the policy and wanted to update him to let him know that he did not have to be off work.

9. Ms. Bennett did not talk to Grievant when she called him and she left a voice mail message some time around July 1, 2020. When she was unable to reach Grievant, she changed positions at Sharpe Hospital and Randall McDaniels took over the responsibilities of the transport team.

10. The scheduling application that Sharpe Hospital employees are required to use displayed that Grievant could not return to work until July 14, 2020.

11. Grievant spoke with Interim Director of Nursing Randall McDaniels on July 2, 2020, and was informed that he should return to work on July 7, 2020.

12. Grievant called off sick on July 3, 2020, and spoke with night shift Nurse Clinical Coordinator Charles McCrary. Mr. McCrary supervised Grievant.

13. Mr. McCrary checked the schedule and informed Grievant that he could not return to work until July 14, 2020, which was the date displayed on the Respondent's scheduling application.

14. Mr. McCrary was the last management personnel that Grievant spoke with prior to returning to work on July 14, 2020, only to be sent home.

15. Grievant did not receive notification of any policy change while he was away from work.

16. While away from work, Grievant did not have access to any schedule other than Respondent's schedule application, which Grievant checked twice during the early part of July.

17. Patrick Ryan, Chief Executive Officer, acknowledged that there could easily have been confusion regarding the policy changes. Mr. Ryan also acknowledged that there were several policy changes on return to work following travel, and there had been an issue with the scheduling application.

18. Respondent issued a "Notice of Job Abandonment" to Grievant on July 13, 2020, citing unapproved absences on July 7, 2020, July 8, 2020, July 9, 2020, and July 10, 2020. The effective date of Grievant's dismissal from employment was July 29, 2020.

### **Discussion**

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). The generally accepted meaning of preponderance of the

evidence is “more likely than not.” *Riggs v. Dep’t of Transp.*, Docket No. 2009-0005-DOT (Aug. 4, 2009) citing *Jackson v. State Farm Mut. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). See *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. *Leichliter, supra*.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm’n*, 181 W. Va. 49, 51, 380 S.E.2d 216, 218 (1989). The judicial standard in West Virginia requires that “dismissal of a civil service employee be 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. 2, *Buskirk v. Civil Service Comm’n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). See *Guine v. Civil Service Comm’n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965); *Smith v. Clay County Health Dep’t*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012).

The Administrative Rule of the West Virginia Division of Personnel authorizes dismissal of an employee for job abandonment as follows:

An appointing authority may dismiss an employee for job abandonment who is absent from work for more than three 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) (2016) (emphasis added).

When the employing agency establishes that an employee has engaged in job abandonment, as defined by the Division of Personnel, such circumstance will provide good cause for that employee's termination. See *Toler v. Dep't of Health & Human Res.*, Docket No. 2012-0189-DHHR (July 31, 2012); *Cook v. W. Va. Dep't of Health & Human Res.*, Docket No. 99-HHR-298 (Nov. 30, 1999); *Hayden v. Dep't of Health & Human Res.*, Docket No. 98-HHR-133 (Nov. 30, 1999). However,

143 C.S.R. 1 § 12.2(c) provides 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. Further, 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).

The situation presented in this grievance does not constitute what would ordinarily be recognized as job abandonment. See *Koblinsky v. Putnam County Health Dep't*, Docket No. 2011-1772-CONS (Oct. 23, 2012), *aff'd*, Cir. Ct. of Kanawha County (July 24, 2013). The undersigned does not question the veracity of the witnesses that testified at the level three hearing; however, this case does present a perfect storm of confusion and miscommunication.

The relatively undisputed facts in this case demonstrate that Grievant followed quarantine instructions pursuant to the applicable policy in place prior to taking annual

leave. The record of this case did not demonstrate that Grievant displayed any intent or willfulness in missing shifts in which the Respondent wanted him to work. In addition, the record did not offer the undersigned any evidence suggesting that Grievant willfully neglected to return to work.

Respondent, through its Chief Executive Officer and Grievant's supervisor at the relevant time, acknowledged that there was confusion during the height of the pandemic, and that all of the policy changes concerning quarantine occurred while Grievant was off work. Grievant returned to work on the shift indicated on Respondent's scheduling app, which was also the date the night-shift supervisor told him to return. The policy changes having occurred while Grievant was away from work on approved leave, Respondent could have easily chosen to fill Grievant's vacant shifts in the manner initially planned when he first left on annual leave. It is clear from the documents placed into the records in this case that Respondent took inconsistent actions in this matter concerning Grievant's return to work following his annual leave.

Grievant did not intend to abandon his position. He took steps to request annual leave and believed that he would need to quarantine for two weeks after he returned from travel greater than seventy-five miles from home. The scheduling app that Sharpe Hospital employees are required to use displayed that Grievant was to return to work on July 14, 2020. Grievant spoke to the Night Shift Clinical Coordinator and was informed that he could not return to work until July 14, 2020. This is an unfortunate situation, but it is due to confusion and a rapidly changing pandemic policy, and not the result of Grievant abandoning his employment.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 51, 380 S.E.2d 216, 218 (1989). The judicial standard in West Virginia requires that "dismissal of a civil service employee be 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. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). See *Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965); *Smith v. Clay County Health Dep't*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012).

3. 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. *See Toler v. Dep't of Health & Human Res.*, Docket No. 2012-0189-DHHR (July 31, 2012).

4. Respondent failed to prove by a preponderance of the evidence that Grievant engaged in job abandonment as that term is used in 143 C.S.R. 1 § 12.2(c). Thus, Respondent did not establish a valid basis for terminating Grievant's employment.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his position as a Health Service Worker at Sharpe Hospital effective July 29, 2020, and to pay him back pay to that date, and reinstate all other benefits to which he would have otherwise been entitled, effective that date.

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: April 5, 2021**

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**Ronald L. Reece**  
**Administrative Law Judge**