

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**S.M.A.,<sup>1</sup>**

**Grievant,**

**v.**

**Docket No. 2022-0146-DHHR**

**DEPARTMENT OF HEALTH AND  
HUMAN RESOURCES/BUREAU FOR  
CHILDREN AND FAMILIES,  
Respondent.**

## **DECISION**

S.M.A. ("Grievant") filed an expedited grievance form at level three contesting the termination of her employment.<sup>2</sup> Specifically, Grievant alleges that she did not receive notice that her leave was exhausted, and that she provided a requested DOP-L3 within four days. For relief, Grievant seeks: "reinstatement and all back pay since June 2 restored." A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on November 12, 2021. Grievant personally appeared and was represented by Andy Radcliffe.<sup>3</sup> Respondent, Department of Health and Human Resources ("DHHR") appeared in the person of Regional Director Lance Whaley and was represented by James "Jake" Wegman, Assistant Attorney General. This

---

<sup>1</sup> The undersigned has elected to use initials instead of the name of the grievant because it is necessary to discuss personal medical information in this decision. Grievant disclosed the medical information in testimony and did not ask that initials be used. However, when serious privacy issues are concerned, the Grievance Board has attempted to protect those issues when possible. *See for example In Re, Jonathon P.* 182 W. Va. 303 n. 1, 387 S.E. 2d 537, 538 n. 1 (1989).

<sup>2</sup> See W. Va. Code § 6C-2-4(a)(4) for circumstances when Grievants may file directly to level three of the Grievance Procedure.

<sup>3</sup> Mr. Radcliffe is in a managerial position with the DHHR but is not Grievant's supervisor.

matter became mature for decision on December 17, 2021, upon receipt of the post-hearing written submissions of the parties.

### **Synopsis**

Grievant was a successful and valued employee who is liked and respected by her coworkers. She became extremely ill and was not able to work. Respondent's agents helped Grievant utilized all the leave she had accumulated as well as unpaid leave under the Family and Medical Leave Act. Grievant's medical condition took a severe turn for the worse rendering her unable to return to work. Respondent's agents helped Grievant apply for and receive unpaid personal leaves of absence while she struggled with her medical issues. Additionally, many employees donated leave so Grievant could receive pay while she was on unpaid leave.

Ultimately, Respondent sent a letter to Grievant advising her that her leave had expired on an earlier date and asked if she intended to return to work. Respondent set a date for Grievant to return to work or she would be dismissed. Grievant was unable to return to work and her employment was terminated. Grievant argues that Respondent's agents had helped her navigate her leave applications throughout the process but stopped assisting her when a decision was made to dismiss her. She was not specifically notified that she was out of leave nor that she could apply for another discretionary leave of absence. Respondent provided Grievant with all the leave opportunities to which she was entitled. Grievant notes that she had donated leave available at the time she was dismissed and should have been paid until that leave ran out. However, the eligibility for donated leave payments ends when an employee is no longer employed.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Grievant was employed by Respondent DHHR in February 2018. She was assigned to the Bureau for Children and Families as an Economic Service Worker ("ESW").

2. The Grievant was a capable and competent employee who was liked and respected by her coworkers and valued by her supervisors. She effectively helped the unit through a period when they were very short staffed.

3. Grievant had suffered from cancer in 2005 but, after aggressive treatment, seemed to have recovered.

4. In early August 2019, Grievant was diagnosed with a new form of cancer and was immediately admitted to a medical center at Ohio State University. She was released from the facility in October 2019. A new treatment regimen was being considered but was delayed with the onset of the COVID-19 pandemic.

5. She was readmitted to the hospital in April 2020 and underwent a very difficult treatment which required her to remain in the hospital for 100 days.

6. Following the treatment, Grievant suffered from a near fatal complication which was a side effect of her treatment. This required her to be readmitted to the hospital.

7. In October 2020, Grievant was diagnosed with new illness and additional new problems were diagnosed in May and June of 2021.

8. In the course of her illness, Grievant exhausted all her accumulated sick and annual leave. A staff member with the BCF assisted Grievant in applying for various leave benefits as her regular leave ran out.

9. By letter dated September 11, 2019, Grievant was granted twelve weeks of Family Medical Leave Act (FMLA) leave running from August 9, 2019, through November 1, 2019. (Respondent Exhibit 2)

10. The letter also advised the Grievant that she would be on a six-month Medical Leave of Absence (MLOA) from September 30, 2019, through March 30, 2019, and that the MLOA and FMLA run concurrently. (*Id.*)

11. The September 11 letter also notified the Grievant that, under the Division of Personnel (DOP) Administrative Rule § 14.8.3.d.3, failure to return from a MLOA could result in dismissal of employment. (*Id.*)

12. By letter dated October 29, 2020,<sup>4</sup> the Grievant was notified that she was approved for a Personal Leave of Absence ("PLOA") to run from November 5, 2019, until November 4, 2020. The October 29 letter noted that the Grievant had exhausted her FMLA leave. (Respondent Exhibit 3)

13. Community Service Manager ("CSM") Janice McCoy recommended the PLOA be approved due to the Grievant's medical conditions and because she was a valued employee.

---

<sup>4</sup> There was some confusion among the parties as to whether the letter was corrected date or is it should have been dated October 20, 2019. It is noted that the Grievant's 12 weeks of FMLA expired on November 1, 2019. (Respondent Exhibit 2) Thus, it seems likely that the letter was dated correctly, October 20, 2020. However, the date of the letter does not affect the outcome.

14. By letter dated November 5, 2020, the Grievant requested a second PLOA for the period of November 5, 2020, through January 30, 2021. (Respondent Exhibit 4)

15.. On November 20, 2020, Respondent granted Grievant's request for the second PLOA from November 5, 2020, through January 31, 2021. (Respondent Exhibit 5)

16. Grievant provided Respondent with a note from her doctor dated November 23, 2020, stating Grievant would not be able to return to work for approximately 6 months, which would be May 22, 2021. (Respondent Exhibit 6) Grievant's condition had not improved to a degree that would enable her to return at the end of the six months.

17. Grievant visited the office in May 2021 to say "hello" to her coworkers. She was not told that her unpaid leave was about to expire. Nor was she told that she could apply for an additional PLOA.

18. By letter dated June 14, 2021, Respondent notified Grievant that her PLOA expired on January 31, 2021. The letter also notified Grievant that beginning May 22, 2021, her absence was no longer approved under any leave program. (Respondent Exhibit 7)

19. The letter indicated that Grievant must return to work on June 22, 2021, and failure to do so could result in dismissal of employment. A predetermination conference was scheduled for June 22, 2021, in case Grievant could not return to work by that date. (*Id.*)

20. Upon receipt of the June 14, 2021 letter, Grievant consulted her doctor who provided her a note regarding her ability to return to work. Grievant provided the note dated June 17, in which her doctor stated he was "unable to determine at this time" when

the Grievant would be able to return to work. He set a “target date” for December 31, 2021. (Respondent Exhibit 8)

21. By letter dated August 3, 2021, Grievant was dismissed from employment. The reason cited for the action was Grievant’s failure to return from her PLOA. The dismissal letter noted that the Grievant’s doctor set a target date of December 31, 2021, to return to work. However, Grievant had exhausted all her leave and PLOA. Additionally, she did not qualify for FMLA or an additional MLOA because she had not worked the required number of hours to be eligible under those programs. (Respondent Exhibit 1)

22. The dismissal letter advised Grievant that when “you are released to return to work, we hope you reapply for jobs with DHHR.” (*Id.*)

23. The letter did not advise Grievant that she could request another discretionary Personal Leave of Action because it had already been determined by Respondent that such request would not be granted.<sup>5</sup>

24. It is more likely than not that enough leave had been donated for Grievant to allow her to be paid at least until November 2021 or maybe longer.

### **Discussion**

As this grievance involves a disciplinary matter,<sup>6</sup> Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.);

---

<sup>5</sup> CSM Janice McCoy testified that Grievant had been given a longer leave of absence period than any other employee she knew of and that she needed to fill the position.

<sup>6</sup> While this case does not seem like a typical disciplinary action Respondent did terminate Grievant’s contract for cause, which places the burden of proof on Respondent.

*Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) (“Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.”). . .

*W. Va. Dep’t of Trans., Div. of Highways v. Litten*, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent terminated Grievant’s employee because she did not return to employment at the end of her discretionary personal leave of absence (“PLOA”). Grievant was medically unable to return to work at that time, but Respondent points out that all mandatory leave had been provided to Grievant as well as a significant amount of discretionary leave. Respondent argues that it could no longer hold the position for Grievant but encouraged her to apply for any vacant positions when she was able to work.

Grievant argues that she was never advised that she was running out of leave and unfairly surprised when the June 14, 2021, letter arrived giving her until June 22, 2021, to return to work. She provided a note from her doctor estimating that she might be able to return to work by December 31, 2021. She points out that her PLOA expired on January 31, 2021, but she was allowed to remain on leave through May 2021. Hence, Grievant argues that she should have been allowed to remain on leave for the rest of the year or at least until the leave that had been donated for her use was exhausted.

Respondent's representatives testified that they simply let Grievant's leave ride through most of May even though her PLOA expired at the end of January. Grievant argues that Respondent simply failed to check on her leave until that time. However, speculation regarding this extension is not helpful since it is undisputed that Grievant's PLOA expired on January 31, 2021. The five-month delay in notifying Grievant her leave had expired was a benefit to her whether intended or not.

The Division of Personnel ("DOP") Administrative Rule states the following regarding a medical Leave of absence:

An injured or ill permanent classified employee upon written application to the appointing authority shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve-month period. . .

W. VA. CODE ST. R. § 143-1- 14.8.c.1.

There is no dispute that Respondent helped Grievant apply for and receive a six-month medical leave of absence ("MLOA") dating September 30, 2019, through March 30, 2019. Nor does Grievant contest that her FMLA leave ran concurrently with the MLOA.

Regarding personal leaves of absence, the DOP Administrative Rule states:

An appointing authority may, at his or her discretion based on the agency's personnel needs, grant a permanent, probationary, or provisional employee a leave of absence without pay for a specific period of time which normally should not exceed one (1) year.

W. VA. CODE ST. R. § 143-1- 14.8 a

The DOP Administrative Rule also provides:

Failure of the employee to report to work promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to and approved by the appointing authority, is cause for dismissal. An employee

dismissed for failure to return from leave of absence without pay is not eligible for severance pay.

W. VA. CODE ST. R. § 143-1-14.8.d.3.

Respondent complied with the DOP Administrative Rule in terminating her employment. Grievant received all her accumulated leave, a medical leave of absence, FMLA benefits and two discretionary personal leaves of absence. Respondent notified Grievant of the expiration of her leave and gave her a date certain for her return. When Grievant could not return to work at the end of her second PLOA, Respondent was authorized to terminate her employment pursuant to the foregoing DOP Administrative Rule (W. VA. CODE ST. R. § 143-1- 14.8.d.3).

Respondent could have granted Grievant another PLOA but was not required to do so. Grievant's supervisors were generous with the discretionary leave provided for Grievant. Unfortunately, her terrible medical condition still did not allow her to return to work. Respondent proved the dismissal was justified by a preponderance of the evidence.

Finally, Grievant argues that she should have been allowed the benefit of the leave donated for her use by fellow State employees regardless of her dismissal. The DOP has established a legislative rule titled the Leave Donation Program which implements the provisions set forth in W. Va. Code § 29-6-27 regarding a voluntary annual leave donation program for State employees. W. Va. Code St. R. § 143-2-1 et seq. The program allows State employees to donate leave to their colleagues who have exhausted their normal leave but cannot work due to medical emergency.<sup>7</sup>

There was a tremendous outpouring of support for Grievant through her coworkers donating leave for her benefit. This allowed Grievant to continue to be paid while she was

---

<sup>7</sup> See W. VA. CODE ST. R. § 143-2-3 for eligibility requirements for donated leave.

on her leaves of absence. That did not change the fact that Grievant's absence from work was controlled by the rules for the various leaves of absence. Specifically, the Leave Donation Program states:

The receipt of donated leave in no way relieves an employee of the responsibilities of applying for either a personal or a medical leave of absence without pay or receiving approval for a personal leave of absence without pay in accordance with the Administrative Rule of the Division of Personnel.

W. VA. CODE ST. R. § 143-2-4.4.

The DOP Administrative Rule provisions control how an employee applies for and receives unpaid leaves of absence. The Leave Donation Program provides a way for the employee to be paid during those leave periods. It does not create a separate right to leave. In fact the DOP Leave Donation Program specifies that:

d. A recipient's use of donated leave shall cease:

A. if the recipient, for any reason, ceases employment with the state;

W. Va. Code St. R. § 143-2-5.2(d). Thus, when Respondent terminated Grievant's employment due to her inability to return from her second PLOA pursuant to W. VA. CODE ST. R. § 143-1-14.8.d.3, her ability to use any remaining donated leave balance ended.

Accordingly, the grievance is **DENIED**.

### **Conclusions of Law**

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018). Where the

evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. The Division of Personnel ("DOP") Administrative Rule states the following regarding a medical Leave of absence:

An injured or ill permanent classified employee upon written application to the appointing authority shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve-month period. . .

W. VA. CODE ST. R. § 143-1- 14.8.c.1.

3. Regarding personal leaves of absence, the DOP Administrative Rule states:

An appointing authority may, at his or her discretion based on the agency's personnel needs, grant a permanent, probationary, or provisional employee a leave of absence without pay for a specific period of time which normally should not exceed one (1) year.

W. VA. CODE ST. R. § 143-1- 14.8 a.

4. The DOP Administrative Rule also provides:

Failure of the employee to report to work promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to and approved by the appointing authority, is cause for dismissal. An employee dismissed for failure to return from leave of absence without pay is not eligible for severance pay.

W. VA. CODE ST. R. § 143-1-14.8.d.3.

5. When Grievant could not return to work at the end of her second PLOA, Respondent was authorized to terminate her employment pursuant to the foregoing DOP Administrative Rule (W. VA. CODE ST. R. § 143-1- 14.8.d.3). Respondent proved by a preponderance of the evidence the dismissal was justified.

6. The DOP Leave Donation Program states:

The receipt of donated leave in no way relieves an employee of the responsibilities of applying for either a personal or a medical leave of absence without pay or receiving approval for a personal leave of absence without pay in accordance with the Administrative Rule of the Division of Personnel.

W. VA. CODE ST. R. § 143-2-4.4.

7. The DOP Leave Donation Program specifies that:

d. A recipient's use of donated leave shall cease:

A. if the recipient, for any reason, ceases employment with the state. . .

W. Va. Code St. R. § 143-2-5.2(d).

8. When Respondent terminated Grievant's employment due to her inability to return from her second PLOA pursuant to W. VA. CODE ST. R. § 143-1-14.8.d.3, her ability to use any remaining donated leave balance ended.

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 156 C.S.R. 1 § 6.20 (2018).

**DATE: February 3, 2022**

  
**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**