GARLAND CLARK,

Grievant,

v.

DOCKET NO. 99-DJS-428

WEST VIRGINIA DEPARTMENT OF MILITARY
AFFAIRS & PUBLIC SAFETY/DIVISION
OF JUVENILE SERVICES,

Respondent.

D E C I S I O N

Grievant, Garland Clark, grieves his dismissal from the West Virginia Department of Military Affairs & Public Safety/Division of Juvenile Services ("DJS"), effective October 19, 1999, for abandonment of his position. Grievant filed his grievance directly at level four on October 15, 1999, and a level four hearing was conducted in this matter on November 12, 1999, at which time this case became mature for decision. DJS was represented by C. Scott McKinney, Assistant Attorney General, and Grievant appeared pro se.

SUMMARY OF EVIDENCE

Respondent's Exhibits

Ex. 1 -

Division of Personnel Administrative Rule § 15.8. Leave of Absence Without Pay.

Ex. 2 -

July 1, 1999 letter from Garland Clark to Al Leavitt, Director.

Ex. 3 -

July 20, 1999 Physician's Certificate.

Ex. 4 -

August 11, 1999 Physician's Certificate.

Ex. 5 -

August 31, 1999 letter from Garland Clark to Al Leavitt, Director, signed by Garland Clark on September 16, 1999.Ex. 6 -
October 4, 1999 dismissal letter from Ray M. Swecker to Garland Clark.

Grievant's Exhibit

Ex. 1 -

October 6, 1999 letter from Julie A. Peasak to Ray M. Swecker.

Testimony

DJS presented the testimony of Margaret Fulks and Ray M. Swecker. Grievant testified in his own behalf.

FINDINGS OF FACT

The facts are not in dispute and are set forth in the following findings of fact.

1. Grievant, at all times pertinent, was employed as a Juvenile Detention Officer I ("JDO I") with DJS.

2. On June 26, 1999, Grievant spoke with Al Leavitt, Director, and Margaret Fulks, Assistant Director, of the South Central Regional Juvenile Detention Center, regarding an illness from which he was suffering. As Grievant had exhausted all of his annual and sick leave, it was decided he should apply for a medical leave of absence.

3. Ms. Fulks prepared a letter for Grievant to Mr. Leavitt requesting a medical leave of absence, to begin on June 26, 1999, through August 31, 1999. R. Ex. 1. The medical leave of

absence was granted.

4. Pursuant to policy, Grievant kept Ms. Fulks and Mr. Leavitt aware of the status of his illness while off on medical leave. His physician faxed a Physician's Certificate to Ms. Fulks on July 20, 1999, and another on August 11, 1999. R. Exs. 3, 4.

5. On August 31, 1999, the day before his medical leave was to run out, Grievant called Ms. Fulks and informed her he was not able to return to work yet. Sheadvised him he would need to submit another request for medical leave and physician's statement, and she once again typed up a letter from him to Mr. Leavitt.

6. Ms. Fulks placed the letter and physician's form on the front desk for Grievant to come in and sign.

7. Grievant did not come in to sign the letter immediately after August 31, 1999, because he had just had surgery. On approximately September 13, 1999, Ms. Fulks telephoned him and reminded him he needed to sign the letter.

8. Grievant came in on September 16, 1999, and signed the letter. He picked up the physician's form and took it to his physician to fill out.

9. Grievant left the form with his physician. The form was placed in Grievant's file and never completed by his physician.

10. Sometime between September 16 and October 4, 1999, Mr. Ray Swecker, Assistant Director of Operations, and DeeAnn Groves, Human Resource Director, attempted to telephone Grievant to inquire about the physician's statement. They were unable to reach Grievant and only attempted to call him that one time.

11. On October 4, 1999, Mr. Swecker issued Grievant a letter dismissing him from employment for abandoning his position. R. Ex. 6.

12. On October 6, 1999, the Administrator of Grievant's physician's office wrote a letter to Mr. Swecker, informing him that the physician's certificate Grievant had provided them on September 16, 1999, had been inadvertently placed in Grievant's file and never completed by his physician. G. Ex. 1.

PRELIMINARY ISSUE

Although this grievance has proceeded as a disciplinary matter, with the burden of proof lying with

DJS, Respondent has asked the undersigned to review the matter and make a determination whether it is considered disciplinary when an employee has allegedly abandoned his or her position following a medical leave of absence. The confusion in this regard comes from two recent Grievance Board cases involving abandonment of position following medical leaves of absence. In one case, the Administrative Law Judge placed the burden on the employer, thus indicating the dismissal was disciplinary. In the other, the same Administrative Law Judge placed the burden on the grievant, giving rise to the inference the case should not be considered disciplinary. See Baire v. W. Va. Div. of Corrections, Docket No. 97-CORR-129 (Mar. 11, 1998) and Freshour v. Bureau of Employment Programs, Docket No. 98-BEP-491 (Mar. 16, 1999).

A review of the Grievance Board case law on abandonment of employment following a medical leave of absence does little to clear up the confusion. In Spencer v. Bureau of Employment Programs, Docket No. 97-BEP-139 (Feb. 26, 1999), the grievant was informed her medical leave of absence would be ending, and her employer gave her the option of resigning, returning to work, or being dismissed. The grievant did not submit a resignation, nor did she return to work, and she was dismissed. The Administrative Law Judge placed the burden on the grievant in that case, simply noting the dismissal was not disciplinary.

In two earlier cases, Moore v. Department of Rehabilitation Services, Docket No. 95-RS-165 (July 31, 1995), and Lewis v. Department of Health and Human Services,Docket No. 94-HHR-1146 (Apr. 25, 1995), the grievants both failed to return to work after their medical leaves of absence had ended. In those cases, the Administrative Law Judge held the subsequent dismissals for abandonment of position were disciplinary in nature and placed the burden on the employer to prove the cases by a preponderance of the evidence. Thus, there is no clear distinction among the cases, and no discussion in them as to why the burden was placed on the employer or employee, as the case may be.

The undersigned finds, in the instant case, that Grievant's termination was disciplinary in nature. A review of the dismissal letter states in part, “[t]he charge for your dismissal is the abandonment of your position.” R. Ex. 6. The word “charge” carries with it an implication of wrongdoing. It is defined in The American Heritage Dictionary, 2nd College Ed., 1991, p. 259 in the following manner: “. . . 3. To blame, accuse, or impute something to. . . .6. An accusation or indictment: . . . “.

In the Grievance Board cases cited herein involving abandonment of position following a medical

leave of absence, the employer is implicitly or explicitly "charging" the employee with misconduct, by failing to follow the applicable procedures, i.e., failure to make timely reports of his or her condition, and/or for failing to return to work after the leave has ended. Clearly, in the employer's eyes, the employee has done something wrong, for which dismissal is justified. Therefore, I find that to dismiss an employee for alleging abandoning his or her position following a medical leave of absence is a dismissal for cause as set forth in Oakes and Guine, infra., and thus, is disciplinary in nature, and the cases cited to the contrary are hereby overruled on the issue of burden of proof only.

DISCUSSION

In disciplinary proceedings involving state employees, W. Va. Code § 29-6A-6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence. E.g., Davis v. Dept. of Motor Vehicles, Docket No. 89- DMV-569 (Jan. 20, 1990). State employees, such as Grievant, who are in the classified service (See footnote 1) can only be dismissed for "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. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); W. Va. Code § 29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Davis, supra; Section 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993).

DJS charged with Grievant with abandoning his position following a medical leave of absence, and dismissed him from employment by letter dated October 4, 1999. On October 6, 1999, Grievant's physician explained that his office failed to complete and forward the necessary physician's certificate to DJS to justify Grievant's request for an extended medical leave of absence. DJS contends it was justified in terminating Grievant for not complying with the applicable Division of Personnel Administrative Rules, and sawno reason to change its mind upon receipt of Grievant's physician's letter on October 6, 1999.

Section 15.8 of the Administrative Rule of the Division of Personnel provides, with respect to medical leaves of absence, the following:

(c) Medical Leave: Notice to Employee

1. An injured or ill permanent 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 provided:

a. The employee (1) has exhausted all sick leave and makes application no later than fifteen (15) calendar days following the expiration of all sick leave . . .

b. The employee's absence is due to an illness or injury which is verified by a physician/practitioner on the prescribed physician's statement form stating that the employee is unable to perform his or her duties and giving a date for the employee's return to work or the date the employee's medical condition will be re-evaluated;

c. A prescribed physician's statement form is submitted each time the employee's condition is re-evaluated to confirm the necessity for continued leave; and

d. The disability, as verified by a physician/practitioner on the prescribed physician's statement form, is not of such nature as to render the employee permanently unable to perform his or her duties.

2. The appointing authority shall, at least 15 days prior to, if possible, but no later than five (5) days following the expiration of the employee's sick leave, mail to the employee a written notice of the employee's right to a medical leave of absence without pay and informing him or her that the leave will not be granted if he or she fails to apply within the time limits specified in subparagraph 15.8.c.1.a. of this rule.

(d)

End of Leave

. . .

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

R. Ex. 1.

DJS argued that Grievant failed to comply with subparagraph 15.8.c.1.b., because his physician's statements did not include a date for Grievant's return to work. However, the paragraph includes an alternative, which is a statement of when the employee's condition will be re-evaluated. While the physician's statements provided by Grievant do not specify an exact date of re-evaluation, their mere existence and submission shows that Grievant was, indeed, being re-evaluated by his physician on a regular basis. G. Exs. 3, 4. Furthermore, the statements do not give a date of return to work, because, as they clearly state, Grievant was still undergoing treatment for his illness. Thus, the undersigned does not agree with DJS that Grievant violated this portion of the medical leave policy, and it is clear from the dismissal letter that Grievant was not dismissed for those failures, but for the failure to submit the final physician's certificate following his second application for medical leave.

DJS further argues it cannot keep Grievant on medical leave interminably because it must concern itself with staffing and efficient running of its operations. I agree this is a valid concern of any employer, however, DJS' own actions serve to undermine the seriousness of this concern. DJS clearly was prepared to approve Grievant's second request for medical leave, and in fact, prepared the written request for him to sign. Thus, this argument in this context is merely a red herring, and does not support DJS' actions in terminating Grievant. Finally, with respect to the timing of the termination, the Baire decision, supra, provides a stark contrast between the treatment of that employee to the treatment given Grievant in this case, although the employers are, admittedly, not the same. In Baire, the grievant's approved medical leave of absence had expired on or about July 8, 1994, and the grievant failed to provide his employer with any physician's statements or correspondence of any kind, until he was dismissed on February 10, 1997, nearly three (3) years later. Even given that length of time, the employer wrote Grievant a warning letter, advising him if he did not contact them or comply with directives, his failure to do so would be considered abandonment, and he would be terminated. The grievant never did reply to the letter, but instead filed a grievance.

In the instant case, Grievant explained the reason he did not immediately come into the office following his telephone conversation with Ms. Fulks on August 31, 1999, was because he had just had surgery and did not have any transportation. When Grievant came into the office on September 16, 1999, to sign his request for extended medical leave, he picked up the physician's certification

form. He immediately took the form to his doctor. He did not know his physician had failed to return the form to his employer, nor did he get any kind of warning letter that his failure to provide documentation would be considered abandonment, justifying termination. Rather, the next contact he had from his employer was a dismissal letter on October 4, 1999. Grievant immediately contacted his physician to find out what had happened to the form, and it was discovered the form had been filed and never completed. The physician's office contacted Grievant's employer, andtook the blame for the error, with the offer to rectify the situation immediately. Nevertheless, Grievant's employer proceeded with Grievant's termination.

While Grievant certainly did not follow the procedure to the letter, there is nothing in the record which demonstrates that Grievant did not, at all times, attempt to act in good faith, or intentionally disregarded the rules and regulations governing medical leaves of absence. DJS argues it was merely following the Administrative Rules in terminating Grievant's employment. However, the Administrative Rules provide that “the failure of the employee to report promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to the appointing authority, is cause for dismissal.” (Emphasis added). The Rules do not require that termination take place. Grievant's error in this case does not amount to “misconduct of a substantial nature directly affecting the rights and interest of the public.” Rather, Grievant's mistake rests more within the “trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention”, which do not justify dismissal. See Oakes, supra. In this case, to abruptly terminate Grievant was a harsh punishment for this offense, and borders on an abuse of discretion. Consequently, the undersigned finds that the termination must be reversed.

CONCLUSIONS OF LAW

1. A dismissal of employment for abandonment of position following a medical leave of absence is a disciplinary dismissal, and the burden of proof shall rest with the employer to prove the charge by a preponderance of the evidence. To the extent previousGrievance Board cases have held the burden of proof lies with the employee, those cases are overruled on that ground only.

2. Section 15.08(c) of the Administrative Rule for the Division of Personnel allows an injured employee to be placed on an unpaid medical leave of absence, so long as a physician's statement justifying continued leave is submitted every thirty days. Failure of an employee to report to work at

the end of such a leave of absence or to provide proper justification for continued leave is grounds for dismissal. Baire v. W. Va. Div. of Corrections, Docket No. 97-CORR-129 (Mar. 11, 1998).

3. State employees, such as Grievant, who are in the classified service, can only be dismissed for “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. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461,141 S.E.2d 364 (1965); W. Va. Code § 29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Davis v. W. Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990); Section 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993).

4. Grievant acted at all times in good faith in attempting to comply with the Administrative Rule on medical leaves of absence. His failure to timely submit the required physician's statement for his extended medical leave was inadvertent and not within his control. 5. Grievant's conduct in this action amounts to a trivial or inconsequential matter, or mere technical violation of statute or official duty without wrongful intention, for which dismissal is not justified.

Accordingly, this grievance is **GRANTED**, and DJS is hereby **ORDERED** to reinstate Grievant to employment as a JDO I. Because Grievant is still on unpaid medical leave of absence, he is not entitled to any back pay in this matter, but shall be provided with any and all other benefits to which he is entitled.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: November 30, 1999

Footnote: 1

"Classified service" is defined by W. Va. Code § 29-6-2(g) as "an employee whose job satisfies the definition for 'class' and 'classify' and who is covered under the civil service system[.]"