STACEY BARKER,

Grievant,

v. Docket No. 01-BEP-602

BUREAU OF EMPLOYMENT PROGRAMS/

WORKERS' COMPENSATION DIVISION,

RESPONDENT.

DECISION

Grievant, Stacey Barker, was employed as an Underwriter I in the Self Insurance Unit of the Workers' Compensation Division, a Division of the Bureau of Employment Programs ("BEP"). She was terminated for job abandonment on October 29, 2001. Her Statement of Grievance, filed December 10, 2001, reads:

> **Wrongful termination while on medical leave**
>
> **Relief Sought: To be reinstated w/ full benefits and to be granted a formal leave of absence until such time as my physician(s) certifies I am able to return to work, and to have all records of the termination removed from any & all files maintained by BEP, Workers' Comp, DOP & all of their employees. I request to be made whole as an employee in every way.**

As this grievance was a termination, it was filed directly to Level IV, and the Level IV hearing was held on May 23, 2002. This grievance became mature for decision on July 11, 2002, after receipt of the parties' proposed findings of fact and conclusions of law. **(See footnote 1)**

After a detailed review of the entire record, including the pre-disciplinary hearing record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. **Grievant had been an Underwriter I in the Self Insurance Unit since the Fall of 2000.**

2. While Grievant was in this unit, she had multiple health problems, and used many days of sick leave.

3. In November 2000, she was placed on leave restrictions, and remained on these restrictions until her termination, October 29, 2001. Grievant was required to submit a doctor's excuse for every medical leave, and to request her annual leave in advance. There were times she had to apply for leave without pay, due to insufficient leave.

4. From July 11 through July 20, 2001, Grievant was absent from work. She provided doctor's excuses for these absences, although some of them were late and most were completed on the wrong form. Grievant was told to submit the correct forms. This failure to submit the correct forms had been an ongoing problem, and as part of her leave restrictions, Grievant was required to submit the correct forms. The doctor's excuses gave no diagnoses for these absences.

5. This series of doctor's statements submitted to cover this time period indicated Grievant would come in for an appointment, the doctor would write an excuse for several days off, and before that excuse would expire, Grievant would return to the doctor and get another excuse for a few more days off from work. Grt. Ex. No. 2.

6. On July 23, 2001, Grievant returned to work. The last day Grievant worked was July 26, 2001. 7. On July 27, 2001, Grievant was absent from work for scheduled oral surgery. Because she had again failed to complete the leave request on the proper form and within the proper time frame, she was considered to be absent without permission. The proper documentation for this leave was not submitted until September 24, 2001.

8. On Sunday, July 29, 2001, Grievant sent her supervisor, Gwen Stone, an e- mail from Boone County where she was staying with her father in Foster Hollow. This e- mail stated, in pertinent part:

> **We were majorly (sic)flooded over here on Thursday . . . The rain yesterday only added to the crap up here, but almost all the bridges are completely washed out, including the mail bridge. They were working on it this morning, but it's still not fixed. There is no way for me to get out until all 3 bridges are put back in. . . . I'm sorry about all this but there is nothing I can do. . . .**

Resp. Ex. No. 4.

9. Grievant again e-mailed her supervisor again on Tuesday, July 31, 2001. This message stated, in pertinent part:

> **I am pleased to announce we can officially get out of the hollow. We didn't take any pictures, but I'm sure I can find some, in case there may be someone who doesn't believe me.**

Resp. Ex. No. 5.

10. It is unclear when Grievant ceased to live at her Charleston address, or if she still resides there part-time.

11. Because Grievant's supervisor had heard rumors that Grievant's area had not been impassable, and the bridges were not closed, she called the Division of Highways and asked specifically about Grievant's bridges. Ms. Stone received the following fax from Scottie Linville, with the Division of Highways' Maintenance Section in Boone County. Mr. Linville reported, " On July 30 & 31, 2001 Foster Hollow was not closed. Also there werenot any bridges washed out. Please contact me over this matter." Resp. Ex. Nos. 5, 7, & 8 at Level IV.

12. Mr. Linville also testified at the Level IV hearing, and he was very clear there were no bridges out, and the roads were not closed. He further clarified there was only a three hour period on Sunday, July 29, 2001, when one road had only one lane open, but the other lane was passable.

13. Grievant phoned her supervisor on August 1, 2001, and stated she would be into work after her morning doctor's appointment. Grievant called back at 1:15 p.m. and informed Lisa Teel, her second level supervisor, that the doctor was excusing her from work for a month, and she had been diagnosed as having fibromyalgia. Grievant was directed to provide the necessary medical forms.

14. Grievant turned in an Application for Leave Without Pay due to medical reasons, but included on this form the days she was absent because of the "flooding." Grievant was directed to fill out the form correctly. As of her termination, Grievant had not turned in a corrected form.

15. On August 20, 2001, Grievant faxed a brief statement from Ashton Care Center signed by a technician which stated Grievant "should be able to return to work IN ONE

MONTH (FMLA)." The form stated Grievant had been seen on August 1, 2001. The form did not specify whether the leave was for personal or family reasons. A doctor's form was also faxed with this statement which stated Grievant would be incapacitated until Sunday, August 31, 2001, but confusingly also stated she could not resume her employment until Wednesday, September 4, 2001. Upon her return to work Grievant would need no work limitations, and there would be no permanent disability. No diagnosis wasgiven. Grievant testified this leave was for fibromyalgia. Resp. Ex. No. 5. Grievant did not return to work on September 4, 2001.

16. Ms. Teel talked frequently with Grievant during this time, and she directed her to submit the needed information. Since Ms. Teel was having so much difficulty getting Grievant to submit the required information on the correct forms, she sought advice from the Division of Personnel ("DOP"). DOP told her to send her request to Grievant at both her addresses by both certified and regular mail. Ms. Teel did this and sent Grievant four letters on August 9, 2001, detailing the forms that were needed, and why they were needed. Ms. Teel directed Grievant to submit the forms no later than August 17, 2001, and that failure to submit the correct forms would result in disciplinary action. She also directed Grievant to contact her if she needed help to fill out the paperwork. Resp. Ex. No. 5.

17. Grievant testified she did not receive this letter or the forms, and that no one would ever help or send her forms when she requested them.

18. Contrary to Grievant's testimony, she signed for receipt of the certified letters sent to both addresses.

19. Grievant turned in some of the requested forms on August 17, 2001. **(See footnote 2)**

20. On August 20, 2001, Grievant also requested an application for donated leave. This form was sent to her.

21. On or about August 22, 2001, Grievant was hospitalized for seizure activity. She was informed by her doctor she could not drive until she was seizure free for one year. She called Ms. Teel and informed her of the seizure activity. She indicated the doctor saidshe would need to be off for one year because of this problem, and that she had no drivers' license because of her seizures. **(See footnote 3)**

22. On September 4, 2001, Grievant e-mailed Nancy Barna at BEP requesting help with filling out the proper forms. Grievant informed Ms. Barna she would be off at least one year

because of her "recent bout with seizures." Grievant wanted to know what she should do to receive her one year leave of absence.

23. On September 6, 2001, Ms. Barna referred Grievant to Robin Simmons at BEP who was more familiar with the issues involved in these types of situations. Ms. Barna also told Ms. Simmons that Mr. Rardin, the Director of BEP's Personnel Section, might need to be involved as no paperwork had been submitted.

24. Grievant submitted the Donated Leave Application on or about September 10, 2001. Grievant attached to this form was the required doctor's certificate for donated leave. This handwritten form indicated Grievant could not return to work until September 30, 2001. This form, completed on August 31, 2001, had been altered to reflect Grievant would not be able to return to work for an additional year, until September 30, 2002, but the date Grievant would be under the doctor's care had not been altered and read "9/30/01." (See footnote 4) **(Emphasis Added.) 25. Also on September 10, 2001, Grievant wrote to Ms. Teel. This letter stated in pertinent part, that her doctor had "taken me off work until I see the neurologist on October 24, 2001. At that time the neurologist will continue to monitor me and complete paperwork for me to remain off work until September 1, 2002, providing I do not have anymore (sic) seizures during the year. Please accept this as my formal request for medical leave for 1 year." Grievant went on to discuss her other medical problems, and that she would be applying for disability because she was eligible for it. She stated she was having trouble obtaining the proper forms. Grievant's neurologist never told her this leave of absence would be necessary for her health, and did not say she could not continue working. No medical forms accompanied this letter to verify Grievant's need for medical leave until the October 24, 2001, doctor's appointment. Resp. Ex. No. 2.**

26. On September 14, 2001, Grievant was sent the proper forms to apply for leave without pay. Resp. Ex. No. 9.

27. Grievant never submitted the required medical information to Respondent about her need for a medical leave. Apparently she believed the form attached to the Donated Leave Application would be sufficient.

28. On or about October 1, 2001, Grievant submitted what she stated was her second request for a leave of absence without pay. BEP had not received any prior requests for a

leave of absence without pay during September 2001.

29. On this form referred to in Finding of Fact 28, Grievant requested a leave of absence without pay until December 31, 2002, fifteen months. She did not specify whether she wanted a medical or personal leave. 30. No doctor has ever told Grievant at any time that she needed to be off work for one year or longer. (Grievant's testimony.) In fact, Grievant submitted into evidence a letter from her neurologist dated November 13, 2001, which stated,"Ms. Barker has been under my care for recently diagnosed seizures. I am currently adjusting her medication and she is having breakthrough seizures and side effects. Please be patient with her during this time of adjustment as she may have to be absent from work intermittently until better control is gained." Grt. Ex. No. 5. (Emphasis Added.)

31. Grievant asked if she could work part-time or from home, and BEP denied both these requests.

32. Ms. Teel talked frequently with Grievant during the time she was absent from work, and Grievant was aware she needed to complete required forms to receive any type of leave.

33. BEP never wrote Grievant a letter setting a date she must return to work or her employment would be terminated. Grievant was informed orally and in writing that she was not on approved leave because she had never submitted the proper forms and documentation. Grievant was also told orally that her position could not be held for her without the proper completion of forms, and that whether she would or could receive a personal leave of absence would be up to BEP.

34. On October 29, 2001, Grievant was terminated from employment with BEP for job abandonment, as she had not returned to position since July, 2001, and had not supported this need to be absent with the correct documentation. Among other charges, this letter noted Grievant had failed to request properly a leave from her assigned position, and this factor included failure to submit proper documentation. 35. Grievant was allowed to respond to this termination letter and she choose to do so. In this letter dated November 1, 2001, Grievant 1) averred no one would ever send her the necessary forms; 2) noted she had requested a formal leave of absence on September 10, 2001; 3) complained because her supervisor, Ms, Stone had not spoken to her (See footnote 5) **; 4) stated she had never said the bridges were washed out; 5) stated she had her first seizure on August 22, 2001, when she**

was on her way to the doctor to get released to return to work (See footnote 6) ; 6) stated she had not lied about any of her medical problems; and 6) stated she her long-term companion was dying of cancer. Grievant also went on to recount her medical problems, and the fact that no one at her work place cared enough to call or inquire about her health. She also pointed out that she believed some people came to work drunk, and others sat at their desks all day without doing anything. She stated she had repeatedly requested forms and help without success, and wanted a transfer to the Boone County area.

36. Mr. Rardin asked Ms. Teel to respond to Grievant's allegations, and she did so with a letter dated November 8, 2001. In this letter she denied Grievant's allegations and recounted the difficulties she had trying to get Grievant to turn in the required forms. Ms. Teel was clear in this letter and also in her testimony that she had told Grievant that simply requesting a leave of absence would not be sufficient; she would also need to submit the required forms and documentation. 37. BEP did not reverse its decision to terminate Grievant's employment.

38. Grievant's continued absence created hardship for her unit, and the remaining staff had difficulty completing all the required work.

39. Grievant submitted sufficient information to support a medical leave of absence for the month of August 2001, but this information was not submitted in a timely manner as it was not sent until approximately three weeks after she was seen by the doctor on or about August 1, 2001. (See footnote 7)

Issues and Arguments

Respondent asserted it tried to work with Grievant in terms of completion of her forms, including forms for a leave of absence, without success. Grievant never completed the necessary forms, and never provided the essential medical documentation. Finally, considering the lack of response and information from Grievant, Respondent terminated her employment. Respondent also notes Grievant did not submit her request for a leave of absence until at least a month after she had depleted her sick and annual leave. Grievant's leave was exhausted as of July 30, 2001.

Grievant asserted she never abandoned her position, and was trying to complete the

forms, but BEP refused to cooperate with her. She viewed the "flood incident" as BEP attempting to catch her in a lie, and trying to make her look bad. She argued BEP never offered her the option of applying for leave under the Family Medical Leave Act, and the employer is required to do so by law. Grievant also asserted she filled out all thenecessary forms to support her leave, and BEP is merely engaging in semantics and was being too fastidious when they would not accept the material she offered.

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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

The employer must also demonstrate that the 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, 380 S.E.2d 226 (W. Va. 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 rights and interests 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 Serv. Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dep't of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Serv. Comm'n, 141 S.E.2d 364 (W. Va. 1965)." Scragg v. Bd. of Director. W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

I. Credibility

The first issue to address is witness credibility, as the testimony of Grievant and BEP's witnesses was diametrically opposed. Additionally, some of the documentation did not support Grievant's assertions. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility

determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). An administrative law judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). The Grievance Board has applied these factors in many cases, and considers the following in assessing a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999); Perdue, supra. The majority of the witnesses appeared to be truthful. In evaluating the available evidence, the undersigned finds that the testimony of the Respondent's witnesses was substantially consistent. Moreover, their demeanor and responses under cross-examination revealed no particular animosity toward Grievant, so as to cause them to fabricate or embellish their statements.

Where Grievant's testimony differed, the undersigned Administrative Law Judge has found Grievant to lack credibility. Several of these incidences are noted in the Findings of Fact. The undersigned Administrative Law Judge will review several incidents where the testimony of Grievant called her credibility into question. Grievant stated she did not receive materials from BEP when two certificates of service clearly show Grievant signed for these materials. Grievant stated she could not come to work because three bridges were washed out. This was not true. Grievant stated the neurologist was going to excuse her from work for at least one year because of her seizures. The truth is no doctor ever stated she would not be able to work for a year, and Grievant never submitted the necessary documentation because she did not

have it. The only form that even came close was the altered form discussed in Finding of Fact 24. Accordingly, the undersigned Administrative Law Judge finds Grievant's testimony lacks credibility.

II. Merits of the case

BEP asserts Grievant failed to complete the necessary forms, and she abandoned her position. As outlined in the Findings of Fact, Grievant's last day of work was July 26, 2001, and her sick leave and annual leave was exhausted by July 30, 2001. Grievant asserts she did not abandon her position but was diligently seeking a leave of absence because of medical problems. The parties agree Grievant was less than diligent in meeting her leave restrictions. Grievant noted that at times she turned the forms in late or did not obtain the necessary prior approval. This pattern continued while Grievant was off.

The rules governing a leave of absence for state employees are contained in Division of Personnel Rule 14.8.

> **14.8. Leave of Absence Without Pay**
>
> **(a) Personal Leave - An appointing authority may 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 year. The employee shall apply for the leave of absence in writing to the appointing authority. If the appointing authority approves the request, the approval shall be in writing. A leave of absence without pay may exceed the normal one year limitation and the appointing authority may grant the leave of absence at his or her discretion based on the agency's personnel needs. Time spent by provisional employees for leaves of absence does not extend the provisional period limitation. Written approval of the appointing authority is required in all cases. Approval of personal leave is discretionary with the appointing authority.**
>
> **. . .**
>
> **(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 14.8(c)1.a. of this rule.

(d) End of Leave

1. At the expiration of a leave of absence without pay, the employee shall be returned to duty to either his or her former position, or one of comparable pay and duties, without loss of rights, unless the position is no longer available due to a reduction-in-for

2. If the leave of absence without pay was granted due to personal illness, the employee must furnish from the attending physician/practitioner a prescribed physician's statement form indicating the ability of the employee to return to work. The appointing authority may permit an employee to return to work at or before the expiration of the leave of absence at less than full duty, but the terms of return are subject to the same conditions specified in subdivision 14.4(h) of this rule.

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.

A. Personal leave

The first issue to address is whether BEP should have granted Grievant a personal leave. As stated in Rule 14.8, this type leave is discretionary with the agency, and the denial of personal leave can only be overturned if the decision was arbitrary and capricious. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp.v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "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 her judgment for that of [the agency]. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

The undersigned Administrative Law Judge cannot find BEP's failure to grant Grievant a personal leave was arbitrary and capricious. Grievant never provided sufficient documentation to support her request for leave. Additionally, Grievant's job as an Underwriter in the Self-Insured unit, completing audits, was important, and the remaining staff could not complete the necessary job duties.

B. Medical leave

The next issue is two fold: 1) whether BEP followed the provision outlined in the above-cited rule; and 2) whether BEP should have granted Grievant a medical leave of absence for one year.

It is clear BEP did not follow all the requirements identified in 14.8(c)2. BEP was required

to give Grievant written notice at least fifteen days prior to, if possible, but no laterthan five days following the expiration of her sick leave, and to mail to Grievant a written notice of her right to a medical leave of absence without pay. This notice was also required to inform Grievant that the leave would not be granted if she failed to apply within the time limits specified in 14.8(c)1.a.

BEP believed when Grievant first left work in July 2001, that she would be returning to work shortly, and focused on Grievant's apparently normal behavior in submitting leave of absence forms late or incorrectly. Numerous attempts were made to call Grievant and messages were left on her phone without success.

In the August 9, 2001 letter, Ms. Teel told Grievant, in writing, that she needed to submit her request for a leave of absence without pay and a physician's statement verifying the time she would need to be off work. This notice was several days past the five day requirement, and did not specify Grievant could request a medical leave of absence without pay. The undersigned Administrative Law Judge finds this written notice to be sufficient to make Grievant aware of her rights, especially when it was followed up with phone calls and additional mailed information. Ms. Teel told Grievant a medical leave of absence could not be granted without submitting the required documentation.

Rule 14.8 is clear that a medical leave of absence is not to exceed six months. Grievant was asking for a leave of absence of at least one year, and up to fifteen months. A medical leave of this length cannot be granted, even if documentation is submitted.

Rule 14.8 is also clear that the required physician's documentation must be submitted on the "prescribed physician's statement form and giving a specific date for the employee's return to work." Grievant never submitted the proper form, a physician never stated Grievant needed to be off work for a year, and the date Grievant was expected toreturn to work was "a moving target." While BEP did not jump through all the required technical hoops, the undersigned Administrative Law Judge finds it substantially complied with the requirements of Rule 14.8, and correction of the technical violation would not have resulted in a different outcome.

Further, it must be noted Grievant was the only person who believed she needed to be off for at least a year. Only she believed she was this incapacitated. She submitted no medical

documentation to support her beliefs, and she finally admitted at the Level IV hearing that no doctors had ever said she needed to be off for a year, must less the fifteen months she requested. Grievant's testimony that she is too sick to work is insufficient to her request for leave. Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp. 1028, 1035 (M.D. Tenn. 1995).

Additionally, Grievant did not return to work in either September or October 2001, after the expiration of the leave slips she had submitted pursuant to Rule 14.8(d)3, and this failure can be cause for termination.

III. Family Medical Leave Act

Grievant asserts BEP failed to notify Grievant of her rights to leave under the Family Medical Leave Act ("FMLA"), and this should nullify the termination. This is an affirmative defense and the burden of proof of this issue is with Grievant. BEP agrees it did not discuss FMLA with Grievant because she never raised the issue.

At this point in time there are several federal circuits that have indicated FMLA only applies to private employers and does not apply to states. See Garrett v. Univers. of Ala. - Birmingham/ Bd. of Trustees, 261 F. 3d 1242 (11th Cir. Dec. 12, 2001). In Garrett, which has a long procedural history, the Court ruled the Americans with Disabilities Act did notapply to states, as this was an abrogation of the rights granted under the 11th amendment. The same argument has been applied to FMLA. As there is currently no case law cited to the undersigned Administrative Law Judge on this issue in West Virginia or the fourth circuit, this issue will be briefly addressed.

In a case similar to this grievance, Myers v. West Virginia Department of Transportation, Docket No. 96-DMV-304 (May 29, 1997), the administrative law judge noted that when an employer has established that an employee has continuously abused leave without doctor's excuses, after being asked to comply, the decision to terminate will be upheld. Morrison v. W. Va. Div of Health, Docket No. 90-H-013 (Apr. 30, 1990).

However, Grievant asserts the rules and regulation governing FMLA have not been followed, and these violations should result in the reversal of the termination. This is an affirmative defense, and Grievant has the burden of proof on this issue. Young v. W. Va. Dep't of Health and Human Resources, Docket No. 90-HHR-541 (Mar. 29. 1991).

First, it should be noted that FMLA requires covered employers to provide up to twelve

weeks of unpaid leave. 29 C.F.R. 825.100. Grievant was asking for at least a year of leave, accordingly, the majority of this time cannot be covered by FMLA even if Grievant is found to eligible.

Grievant notes FMLA obligates an employer to designate whether the leave requested is FMLA-qualifying based on the information provided by the employee, and it is required to notify the employee of the designation of this leave within two business days after an employee has stated the need for leave. If the employer does not have sufficient information about the reason for the unpaid leave the employer should inquire further. This rule also states that when the employer lacks sufficient information to make thedesignation, the required notice must be given within two days of the employer's determination that the leave requested qualifies. 29 C.F.R. 825.208

Given the information provided by Grievant, or the lack thereof, it is understandable BEP was unclear what Grievant actually wanted, and what data she had to support her request. Respondent repeatedly asked for this information to no avail. With this set of facts, Grievant could not have been granted leave because she had no data to support such a request. While BEP may have been remiss when it did not even broach the subject of FMLA with the Grievant, this failure does not nullify Grievant's termination.

Further, Grievant did not prove she had a "serious health condition," a requirement to qualify for FMLA. As previously stated, her own testimony that she was too sick to work was insufficient to prove her absence was necessary. Brannon, supra; Myers, supra. Here, as in Brannon, Grievant's doctor never advised her to remain off work for one year. Myers, supra.

The above-discussion will be supplemented by the following Conclusions of Law.

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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. The employer must also demonstrate that the 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, 380 S.E.2d 226 (W. Va. 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 rights and interests 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 Serv. Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dep't of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Serv. Comm'n, 141 S.E.2d 364 (W. Va. 1965)." Scragg v. Bd. of Director. W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. Personal leave is discretionary with the agency, and the denial of personal leave can only be overturned if the decision was arbitrary and capricious. DOP Rule 14.8

4. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, andin disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "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 her judgment for that of a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

5. BEP's failure to grant Grievant a personal leave of absence was not arbitrary and capricious.

6. DOP Rule 14.8(c)2 required BEP to give Grievant written notice at least fifteen days prior to, if possible, but no later than five days following the expiration of her sick leave, and to mail to Grievant a written notice of her right to a medical leave of absence without pay.

7. BEP did not meet all the requirements of Rule 14.8 as they pertain to sick leave, as the notice advising Grievant of the expiration of her sick leave was several days late. This failure was technical in nature, and would not have affected the outcome of its decision to terminate Grievant.

8. A medical leave of absence cannot be granted for greater than six months; thus, BEP's failure to grant a one year leave of absence did not violate any policy, rule or regulation.

. 9. Grievant failed to submit the required documentation to support her request for a medical leave of absence; thus, BEP's failure to grant this leave of absence did not violate any policy, rule or regulation. 10. When a grievant presents an affirmative defense, she or he has the burden of proof on this issue. Young v. W. Va. Dep't of Health and Human Resources, Docket No. 90-HHR-541 (Mar. 29. 1991).

11. Grievant did not demonstrate BEP violated the Family Medical Leave Act, as it was unable to give the required notice because of the lack of data to assess Grievant's leave request.

12. Grievant did not demonstrate she had a serious health condition that would qualify her for FMLA, as she did not present information from her doctors to document her need to be absent from work for an extended period.

Accordingly, this grievance is DENIED.

Any party, or the West Virginia Division of Personnel, 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 31, 2002

Footnote: 1

Grievant was represented by Kevin Church, of ASCME. Respondent was represented by its attorney, Patricia Shipman.

Footnote: 2

Grievant explained that even though she did not get the letters and the enclosed forms, she had talked to Ms. Teel, and Ms. Teel had told her what information to submit.

Footnote: 3

At Level IV, Grievant testified she still had her drivers' license, it had not been revoked as the doctor had told her it would, but she was no longer driving pursuant to her doctor's directions.

Footnote: 4

The alteration of this form was not pointed out to the undersigned Administrative Law Judge by any party, but it is noticeable on its face. Additionally, a similar form from the same facility had been submitted by Grievant for a leave of absence for the month of August, and on this form both dates reflected a similar time frame.

Footnote: 5

Grievant sent an e-mail to BEP indicating she would only talk to Ms. Teel, and did not want anyone else from BEP to contact her in any way.

Footnote: 6

Grievant had already been released to return to work through the doctor's slip that had excused her from work until September 4, 2001.

Footnote: 7

Grievant may have also been eligible for a leave of absence for the month of September 2001, but this information was not submitted until on or about September 11, 2001. The form that provided this information was attached to the application for donated leave, and this was the form that had been altered. See Finding of Fact 24, supra.