TIMOTHY HATCHER,

Grievant,

v. Docket No. 03-DOH-093

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Timothy Hatcher, filed this grievance against his employer, the Division of Highways ("DOH"), and his Statement of Grievance alleges, "Section 12-02 Volume IX, Chapter 12" was violated, as well as his civil rights, when he was terminated. The relief sought was to be put back to work as soon as possible.

This grievance was filed directly to Level IV on March 26, 2003, and a Level IV hearing was held on September 5, 2003, after several continuances for good cause. (See footnote 1) **This case became mature for decision on September 22, 2003, when the undersigned Administrative Law Judge received the additional exhibits that were to be submitted by DOH. The parties elected not to submit proposed findings of fact and conclusions of law.**

Issues and Arguments

Grievant maintained he should not have been terminated because his absences were due to illness, and he had medical excuses to cover all of them. Additionally, Grievant asserted his absences were also due to stress cause by racial slurs and jokes in the workplace. Respondent maintains Grievant was properly terminated for his repeated failure to report to work, leave abuse, and continued use of unauthorized leave because of his failure to notify the employer of his absences prior to the start of the work day. Respondent states unauthorized leave can occur even when an employee later turns in a medical excuse, if he

does not call-in to report off. Respondent notes Grievant did not grieve any of his written reprimands or suspensions, and did not file any grievances over the alleged racial slurs and jokes.

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

Findings of Fact

1. Grievant was hired as a Transportation Worker I on July 5, 1994.

2. Shortly thereafter Grievant began to have trouble with leave abuse.

3. On November 2, 1994, Grievant was given a verbal warning for failure to notify the employer of his absence prior to the start of the work day. Resp. No. 1.

4. On December 6, 1994, Grievant was given a written warning for failure to notify the employer of his absence prior to the start of the work day. Resp. No. 1.

5. Grievant was placed in docked pay status on November 18 and 19, and December 2, 5, and 9, 1996, as he did not have leave to cover his absences. Additionally, Grievant did not notify anyone of his absences or request nonleave time for the work hours missed. On December 11, 1996, Grievant received a Form RL-544 notifying him that further similar violations would result in further disciplinary action, including dismissal. Resp. No. 5.

6. In January 1997, Grievant was given a written reprimand for his failure to report to work and to notify employer of his absences of January 7 through 13, 1997.

7. On March 10, 1997, Grievant was given a written reprimand for his failure to report to work and failure to notify his employer of his absences for January 7 through 13, 21, and 24; February 4, 7, 14, 21, 25, and 28; and March 3 and 4, 1997. This written reprimand informed Grievant that further leave abuse would result in progressive discipline. Grievant was given an opportunity to meet with his supervisor or District Engineer Wilson Braley, and he did not elect to meet with anyone to discuss his absences. Resp. Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, & 16. (See footnote 2)

8. On April 7, 1997, Grievant was given a written reprimand for his failure to report to work and failure to notify his employer of his absences of April 2 through 4, 1997. Again, this written reprimand informed Grievant that further leave abuse would result in progressive

discipline. Resp. No. 17.

9. In April 1997, Grievant was notified of a seven-day suspension for his failure to report to work and failure to notify the employer of his absences for April 16 and 18, 1997. This suspension notice informed Grievant that further leave abuse would result in progressive discipline. Resp. Nos. 18 & 19.

10. Grievant received an on-the-job injury on April 28, 1997. He returned to work on June 30, 1998. Grt. No. 1. 11. On January 27, 1999, Grievant was evaluated by Dr. Paul Bachwitt for a permanent partial disability as a result of this injury. Dr. Bachwitt reported Grievant had twice been scheduled for rehabilitation evaluations, but had missed both appointments. He found Grievant had reached his maximum degree of medical improvement, was "employable from an orthopedic standpoint," and recommended a 5 percent whole person impairment. Grt. No. 1.

12. In January 2001, Grievant received another RL-544 for failure to report to work and failure to notify the employer of his absences of November 1 through 12; November 27 through December 1; December 11 through January 5; and January 10 through 15, 2001. Grievant did not have enough leave time to cover these absences. Grievant was given an opportunity to meet with District Engineer Braley, but he chose not to avail himself of this option. This notice again informed Grievant that further leave abuse could result in further disciplinary action, including dismissal. Resp. Nos. 20, 21, 22, & 23.

13. In February 2001, Grievant received a three-day suspension for his failure to report to work and failure to notify his employer of absences from January 23 through February 5; and February 8 through 12, 2001. It was noted Grievant returned to work without any medical excuses, and that he had no leave time to cover these absences. Resp. Nos. 24, 25, & 27.

14. The suspension identified in Finding of Fact 13 was served from March 27 through 29, 2001, with Grievant to return to work on March 30, 2001. Grievant did not return to work on that date or notify his employer that he would be absent. Grievantreceived a ten-day suspension for his conduct of March 30, 2001. Again, Grievant did not wish to meet with District Engineer Braley to discuss his actions. Resp. Nos. 26, 27, & 28.

15. Grievant served the ten-day suspension from May 8 through 21, 2001. The suspension letter dated May 1, 2001, reviewed Grievant's problems with leave abuse, referred

Grievant to the Employees Assistance Program, offered Grievant the opportunity to meet with Assistant Commissioner Jack White, and noted Grievant's grievance rights. Resp. No. 29.

16. In August 2001, Grievant received notification that he would receive a twenty- day suspension for his failure to report to work, and his failure to notify his employer of his absences of July 2 through 13, 2001. (See footnote 3) **Again, Grievant was informed further problems of a similar nature could result in dismissal. Resp. Nos. 30 & 31.**

17. Before Grievant could serve this suspension, Grievant was placed on a requested medical leave of absence. When Grievant returned to work on July 16, 2002, the Division of Highways then attempted to place Grievant on suspension, but Grievant requested and was granted another medical leave of absence from July 22 until July 26, 2002.

18. During this same time frame, Grievant did not report to work or call-in on August 1, 2002, did call-in August 2, 2002, and requested sick leave, but did not bring in a doctor's excuse when he returned to work on August 5, 2002, and did not have any leave time to cover these absences. 19. Grievant served the suspension identified in Finding of Fact 16 from October 23 through November 19, 2002. In the suspension letter dated October 15, 2002, Grievant's history of unauthorized leave and problems were discussed, and Grievant was informed that "[t]he next time you are on unauthorized leave or fail to call your supervisor to report your absence, a dismissal will be recommended." Resp. No. 32.

20. Grievant failed to report to work February 11 through 19, 2003. Grievant only called in two of his absent days to notify his employer of his absence. By letter dated March 18, 2003, Grievant was notified he would be terminated because of his continued pattern of leave abuse. Grievant was informed of his right to meet with Assistant Commissioner Jerry Bird. Grievant did meet with Assistant Commissioner Bird and Jeff Black, Division of Highways' Director of Human Resources, on March 27, 2003. Resp. Nos. 33 & 34.

21. After this meeting, Grievant was notified by letter dated March 31, 2003, his comments at the meeting had been considered, and Grievant's dismissal would remain in effect. Resp. No. 34.

22. At the meeting with Assistant Commissioner Bird and Director Black, Grievant stated the racial slurs and jokes he had heard at work had stressed him out so much that he could not go to work. Test. Black and Grievant.

23. Grievant is an African-American. At times during Grievant's employment, co-workers would call other people the "N" word, and tell jokes using the "N" word. Grievant was never called an "N" by co-workers. 24. One time, several years ago, Grievant called in from a job site where a contract employee had called him an "N." Grievant's supervisor came to the job site and removed Grievant from this negative situation.

25. Another time several years ago, a co-worker called some people he found to be very bad "N's" in front of Grievant. Grievant reported this behavior, and the supervisor talked to the co-worker. (See footnote 4) This behavior was not repeated.

26. Grievant discussed this use of racial slurs and jokes with a union steward and was told to file a grievance, but he did not.

27. Infrequently, an employee would call in sick, and this absence would not get reported to the Office Assistants who took care of the time.

28. At the Level IV hearing, Grievant presented a doctor's report dated February 18, 2003, excusing him from work until March 5, 2003. Grievant did not send this report to his supervisor. No excuse for his absences of February 11 through 17, 2003, was placed into evidence. See Finding of Fact 20.

29. Also at the Level IV hearing, Grievant placed into evidence what appeared to be a portion of a Workers' Compensation form completed on March 24, 2003, after his termination. This form states Grievant was examined on March 3, 2003, and he had been excused from work on temporary total disability benefits (TTD's) since February 11, 2003, and these TTD's were to continue until May 12, 2003. Grt. No. 3.

30. Grievant was not on TTD's at the time of his termination.

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.

In order to dismiss a tenured state employee, the employer must meet the judicial standard set out in Syllabus Point 2, of Buskirk v. Civil Service Commission, 175 W. Va. 279, 332 S.E.2d 579 (1985), which 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." See Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); Scragg v. Bd. of Director. W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

This grievance is controlled by the Division of Personnel's Rules which discuss job abandonment. The Division of Highways dismissed Grievant under Rule 12.02 for "failure to report to work, leave abuse and unauthorized leave." Resp. No. 34. This Rule states:

> **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 daysafter 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.** (See footnote 5)

The Division of Personnel Rule 3.51 defines "Job Abandonment" as "[t]he absence from work under such conditions as to be synonymous with resignation." Additionally, Division of Personnel Rule 3.83 defines "Resignation" as "[v]oluntary separation from employment, including job abandonment, by an employee." According to these sections of Division of Personnel's Rules, abandonment of a position by an employee is just cause for his dismissal.

The Division of Personnel's Rule 14.6. defines "Unauthorized Leave" as:

> **When an employee is absent from work without authorization for sick or annual leave, the appointing authority shall dock the employee's pay in the next pay period for an equal amount of time paid during which no work was performed. The appointing authority shall notify the employee in writing that his or her pay is being docked and that the unauthorized leave is misconduct for which discipline is being imposed. The appointing authority shall use unauthorized leave only in cases when the employee fails to obtain the appropriate approval, according to agency policy, for the absence. The appointing authority shall transmit notice of the action in writing to the Director of Personnel.**

Given the evidence in this case, there is really no issue as to whether Grievant failed to

report to work, had excessive use of unauthorized leave, or engaged in leave abuse. Grievant admitted at hearing that one of the reasons he did not grieve several of the suspensions was because he knew he had done wrong. Because Grievant did not grieve any of the prior disciplinary actions, they cannot be reviewed at this time, and they will stand to demonstrate the agency's attempt to use progressive discipline to correctGrievant's behavior. Clearly, the written reprimands, numerous suspensions, and the repeated docking of Grievant's pay did not have the desired effect as Grievant's attendance grew worse.

Grievant's argument that his attendance problems are related to his 1998 injury is not supported by the evidence. Grievant had numerous problems with his attendance prior to his injury. Additionally, Grievant's injury does not explain his repeated failure to notify employer of his absences prior to the start of the work day. Even if Grievant was unable to come to work, there is no reason he could not call. Further, even though Grievant argued he had doctors' excuses for all his absence, this assertion is not borne out by the evidence, as many of the RL-544's note Grievant did not present doctors' slips when he returned to work.

As for the racial slurs and jokes, this behavior is clearly inappropriate on the part of his co-workers. However, it does not appear Grievant's complaints were altogether ignored, as Grievant was removed from the area with the contract worker, and the co- worker who made inappropriate remarks was talked to by the supervisor, and this behavior has not been repeated. Grievant did not file a grievance or an EEO complaint, and while this is not essential, it does not appear Grievant ever told anyone that these occasional remarks were so stressful that they prevented him from coming to work. Grievant did not allege this point until he was notified of his termination.

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. In order to dismiss a tenured state employee, the employer must meet the judicial standard set out in Syllabus Point 2, of Buskirk v. Civil Service Commission, 175 W. Va. 279, 332 S.E.2d 579 (1985), which 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." See Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); Scragg v. Bd. of Director. W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. The Division of Personnel Rule 3.51 defines "Job Abandonment" as "[t]he absence from work under such conditions as to be synonymous with resignation." 4. Division of Personnel Rule 3.83 defines "Resignation" as "[v]oluntary separation from employment, including job abandonment, by an employee."

5. Division of Personnel Rule 12.2(c) states:

> **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.**

6. DOH has met its burden of proof and demonstrated Grievant abandoned his job, as he failed to report to work, abused his leave, and repeatedly took unauthorized leave. These actions were of a "substantial nature directly affecting rights and interests of the public." Syl. Pt. 2, Buskirk, supra.

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: September 30, 2003

Footnote: 1

Grievant represented himself with the assistance of co-worker Emery Marcum. Respondent was represented by its Attorney Barbara Baxter.

Footnote: 2

Respondent's Exhibit Number 9 indicates Grievant was also on unauthorized leave on January 28, 1997. Respondent's Exhibit Number 12, also indicates Grievant received a written reprimand for unauthorized leave on February 11, 1997.

Footnote: 3

Grievant did call in to report his absences for some of these days.

Footnote: 4

The supervisor did not remember this incident.

Footnote: 5

Grievant received severance pay.