ROBERT COGAR,

Grievant,

v. **Docket No. 03-DJS-351**

DIVISION OF JUVENILE SERVICES/
INDUSTRIAL HOME FOR YOUTH,

Respondent.

DECISION

Robert Cogar ("Grievant") filed this grievance directly at level four on November 7, 2003, following the termination of his employment by Respondent Division of Juvenile Services ("DJS"). He seeks as relief to have the termination letter removed from his personnel file, and seeks to have DJS records reflect that he voluntarily retired from his position. After numerous continuances and unsuccessful settlement negotiations between the parties, a hearing was held in Westover, West Virginia, on June 6, 2005. Grievant represented himself, and Respondent was represented by counsel, Steven R. Compton. The parties elected not to submit post-hearing proposals, so this matter became mature for consideration at the conclusion of the hearing.

The following material facts are undisputed by the parties.

Findings of Fact

1. Grievant was employed by DJS at the Industrial Home for Youth as a Correctional Officer V/Shift Supervisor. Prior to his termination, he had been employed by the Division of Corrections, then DJS, for a combined total of approximately 36 years.

2. Grievant suffered a back injury while on duty at the Industrial Home ("IHY") on February 26, 2001.

3. As a result of his on-the-job injury, Grievant received Workers' Compensation benefits for an extensive period of time. His claim was closed on July 21, 2003.

4. By letter dated August 22, 2003, IHY Superintendent Alvin Ross notified Grievant that, within

ten days, he needed to notify Mr. Ross regarding his intentions regarding his employment. He advised Grievant that, if he was still unable to work due to his medical condition, he would need to provide a doctor's excuse and request a medical leave of absence. Mr. Ross also advised Grievant that, if he chose to take a medical leave of absence, and his position was no longer available upon his return to work, he would be placed in a comparable position.

5. By correspondence dated September 10, 2003, Grievant wrote to DJS Director Manfred Holland regarding the letter he had received from Mr. Ross. Grievant requested that Mr. Holland “rescind” the August 22 letter and allow him a “few additional months” to assess his situation. Grievant stated he was still unable to work, was under a physician's care, and was contemplating back surgery. He also advised Mr. Holland that he did not want to take a medical leave of absence, since his position may not be available upon his return.

6. Director Holland responded to Grievant's correspondence by letter dated October 10, 2003. He advised Grievant that he emphathized with his situation, but thatGrievant would have to make a decision regarding his continued employment with DJS. He gave Grievant ten days to advise Mr. Ross whether he would be returning to work or electing to take a medical leave of absence. If Grievant did not do so, he was advised that he would be considered to have abandoned his position, effective October 20, 2003.

7. On October 20, 2003, Grievant met with Superintendent Ross to discuss Director Holland's correspondence. Grievant advised Mr. Ross that he would not submit a doctor's excuse, because he wished to “appeal” Director Holland's decision to Secretary Joseph Martin. Mr. Ross reminded Grievant that he would be terminated if he did not submit a proper doctor's excuse and request a leave of absence.

8. On October 20, 2003, Grievant sent a letter to Joseph Martin, Secretary of the Department of Military Affairs and Public Safety, providing the same information as he had related in his letter to Director Holland and asking that the decision be “rescinded.”

9. After receiving no further information from Grievant, on October 30, 2003, Director Holland advised Grievant that his employment was being terminated for job abandonment. His termination was effective October 30, 2003.

10. On November 10, 2003, Grievant hand delivered a doctor's excuse to Superintendent Ross. It was dated September 9, 2003, and stated that Grievant had not sufficiently recovered from

his injury to return to work. Grievant had written on the bottom of the statement that it was “NOT to be used to place me on medical leave of absence, as that is against my wishes.”

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 Res., 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, 581 (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). (See footnote 1)

The Division of Personnel (“DOP”) Rule Section 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 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.

It has previously been held that employers are not required to maintain disabled workers on their payrolls when it is obvious that the employee is physically unable to perform his job duties and the period of disability cannot be determined. Coury v. Dep't of Transp., Docket No. 01-DOH-588 (Apr. 29, 2003); Wyoming Cablevision, Inc. v. Powell, 184 W. Va. 700, 403 S.E.2d 717 (W. Va. 1991); Baire v. W. Va. Div. of Corrections, 97- CORR-129 (March 11, 1998). Respondent complied with DOP's Rule regarding injured employees, who may be offered a medical leave of absence for a non-

permanent injury, not to exceed six months, pursuant to Section 14.8, as supported by a physician's statement.

Grievant's inability to return to work, accompanied by his refusal to request a medical leave of absence, left his employer no choice. Grievant's refusal to comply with DOP's requirements has resulted in abandonment of his position with DJS, justifying his termination. While it does seem a harsh result for a dedicated, long-term employee to be terminated under these circumstances, Grievant was given ample opportunities to comply with his employer's requests, which were necessary under applicable law. An employee who is unable to work, who is no longer on Workers' Compensation, and who is out of sick leave, must either return to work or take a medical leave of absence. Grievant did not do either, in spite of having this explained to him repeatedly, so his termination was DJS's only option.

The following conclusions of law support this decision.

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).

2. “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 Service Commission, 175 W. Va. 279, 332 S.E.2d 579, 581 (1985); 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. Employers are not required to maintain disabled workers on their payrolls when it is obvious that the employee is physically unable to perform his job duties and the period of disability cannot be determined. Coury v. Dep't of Transp., Docket No. 01-DOH- 588 (Apr. 29, 2003); Wyoming Cablevision, Inc. v. Powell, 184 W. Va. 700, 403 S.E.2d 717 (W. Va. 1991); Baire v. W. Va. Div. of Corrections, 97-CORR-129 (March 11, 1998).

4. Grievant's termination was justified, due to his inability to perform his job duties, and his

refusal to return to his position or take a medical leave of absence.

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.

Date: June 15, 2005

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The Grievance Board has held that the employer has the burden of proof in job abandonment grievances. Breeden v. Dep't of Health & Human Res., Docket No. 04-HHR- 287 (Oct. 29, 2004).