THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JEFFREY RAYBURN CONLEY,

Grievant,

v. **Docket No. 2010-1123-DOT**

WEST VIRGINIA DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant Jeffrey Conley has been employed by the West Virginia Department of Highways ("DOH") as a Transportation Worker 2. He was an Equipment Operator assigned to District 2, District Force which performs heavy maintenance tasks on the roadways in that area. By letter dated February 2, 2010, Grievant was notified that his employment was terminated effective February 18, 2010, due to "unauthorized leave and job abandonment." Jeffrey Conley filed a grievance form dated February 24, 2010, contesting his dismissal and requesting that he be reinstated and that he be paid for the days he was off sick.[1]

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on August 9, 2010. Grievant Jeffrey Conley appeared *pro se* and the DOH was represented by Jason Workman, Esquire, of the DOH Legal Division. After the hearing, the parties submitted proposed findings of fact and conclusions of law, the last of which was received on September 13, 2010. The grievance became mature for decision on that date.

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[1] Pursuant to W. VA. CODE § 6C-2-4 (a) (4) Grievant waived levels one and two and appealed his dismissal directly to level three.

Synopsis

Respondent alleges that Grievant abandoned his job by taking off work for several months without providing any medical authorization. Grievant does not deny that he missed work but avers that he was ill and unable to work. Grievant was unable to provide any medical documentation that he was unable to work during the period he was away from work. Respondent was able to prove that Grievant was contacted and told he needed to return to work or provide medical documentation confirming that he was unable to do so. Even after receiving the notice, Grievant failed to do either. Consequently the Grievance must be DENIED.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Jeffrey Conley was a Transportation Worker 2/Equipment Operator employed by the DOH. He was assigned to the District Force which is a work crew that does the heavy maintenance projects for roadways in DOH District Two.

2. On January 8, 2009, Grievant told his supervisor that he was ill and went home from work.

3. Over the next couple of weeks, Grievant went to Logan General Hospital, Cabell Huntington Hospital and other doctors seeking treatment.

4. Grievant called off work sick on January 21, 2009, and did not call off again thereafter.

5. Grievant received a “Disability Certification” slip from Cabell Huntington

Hospital stating that Grievant was unable to perform his duties through January 21, 2009. Grievant Exhibit 1a.

6. Grievant produced slips from the Eden Family Practice in Logan indicating that he should be off work from February 2, 2009, through February 16, 2009, under a doctor's care. Grievant Exhibits 1b & 1c.

7. At the level three hearing, Grievant produced a slip from Doctor John Justice dated April 21, 2010, stating that Grievant had been under his care since April 28, 2009. Neither Doctor Justice, nor any of the other medical professionals, would provide Grievant with a statement confirming that he was unable to report to work after February 16, 2009.

8. District Manager Keith E. Chapman sent Grievant a letter dated March 18, 2009, concerning his employment status. Manager Chapman noted that Grievant had not reported to work since January 8, 2009, had not provided proper documentation for a leave of absence and had not provided any medical excuses. He further wrote that Grievant was on unauthorized leave status and if he failed to return to work immediately he could possibly face termination of his employment for job abandonment. Respondent Exhibit 3. Grievant did not respond to this letter.

9. Over the next few months, Grievant's immediate supervisor, Ernest Rockel, unsuccessfully attempted to contact Grievant by phone and by visiting his residence, to check his medical and employment status.

10. Grievant was given a DOH Form RL-544 dated November 17, 2009, recommending that he be discharged from employment for job abandonment. The reason for the recommendation was that Grievant had been off work for ten months without furnishing any documentation from a medical professional or for a leave of absence.

Respondent Exhibit 1.

11. On December 17, 2009, Grievant was given a DOH Form RL-546 which is a verification of disciplinary action. This form documents that an employee has been given an opportunity to give a written explanation of the conduct that led to the discipline. On this form Grievant explains that he saw his family doctor, Physicians at the Logan Regional Hospital and the Cabell Huntington Hospital and a chiropractor. None of the doctors could find a specific physical cause for his illness and none of the doctors would give him any documentation that he was unable to work. He has been under the care of Doctor Justice for more than a year.[2] Doctor Justice did not provide documentation that Grievant's condition rendered him unable to work. Respondent Exhibit 2.

12. Jeff Black, Director of the DOH Human Resources Division, gave Grievant a letter dated February 2, 2010, officially terminating Grievant's employment effective February 18, 2010. The specific reason stated for the dismissal was:

> You have been absent from work without approved leave since January 22, 2009. Your supervisor has made several unsuccessful attempts to contact you to determine why you had not been coming to work for the last ten months.

Respondent Exhibit 5.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No.

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[2] Doctor Justice is associated with Logan-Mingo Mental Health, Inc.

H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant was a permanent state employee in the classified service. Permanent state employees who are in the classified service can only be dismissed for "good 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. 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).

The West Virginia Division of Personnel Legislative Rule related to dismissal of state classified employee states the following:

> (c) 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.

143 C.S.R. 1 § 12.2 (c).

It is well established that job abandonment is a valid ground for termination, even when the employee expresses a desire to eventually return to his position. *See Wolfe v.*

Dep't of Health & Human Ser., Docket No. 2008-1863-CONS (Mar. 4, 2010); *Bachman v. Potomac State Coll. of W. Va. Univ*., docket no. 07-HE-198 (Jan. 17, 2008); *Chapman v. Dep't of Health and Human Res.*, Docket No. 06-HHR-277(2006).

Grievant last contacted his employer near the end of January 2009, by calling in sick. After that, he did not communicate to his employer the status of his medical condition nor when he would be available for work. The District Supervisor, Keith Chapman, wrote Grievant a letter on March 18, 2009, explaining that Grievant was on unauthorized leave status and failure to report to work could result in his dismissal from employment. Grievant did not respond to this inquiry. Additionally, Grievant's Supervisor, Ernest Rockel, was unable to contact Grievant by phone or at his home. Grievant was not only absent from work for three consecutive days without notice to his employer, he was gone for months without any contact with his supervisors.

Grievant argues that he was ill and under the care of doctors the entire time he was away from work and therefore should not be dismissed. There is indication that Grievant sought treatment from a number of doctors and finally was under the care of Doctor Justice. However, none of the medical professionals who examined or treated Grievant would confirm that his condition prevented him from working. Examining the evidence in the light most favorable to the Grievant, the last date a doctor indicated he should be excused from work was February 16, 2009. This was a month before the District Supervisor wrote to Grievant about his employment status. Grievant simply did not produce any evidence that would justify his absence from work for months without contacting his employer. Consequently the Grievance must be DENIED.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Grievant was a permanent state employee in the classified service. Permanent state employees who are in the classified service can only be dismissed for "good 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. 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).

3. The West Virginia Division of Personnel Legislative Rule related to dismissal of state classified employee states the following:

> (c) 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.

143 C.S.R. 1 § 12.2 (c).

4. Respondent proved by a preponderance of the evidence that Grievant was guilty of job abandonment as that term is utilized in 143 C.S.R. 1 § 12.2 (c). Consequently Respondent met the burden of proof necessary to justify dismissal of Grievant from permanent state employment.

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 (2008).

DATE: DECEMBER 27, 2010.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE