THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SHELIA NESTOR,
Grievant,

v. **Docket No. 2012-0652-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/HOPEMONT HOSPITAL,
Respondent.

DECISION

Grievant, Shelia Nestor, filed this grievance on December 20, 2011, challenging the termination of her employment. Her relief sought is to be made whole including back pay plus interest and benefits restored. Grievant filed this challenge directly to level three. A level three hearing was conducted before the undersigned Administrative Law Judge on May 7, 2012, in the Board's Westover office location. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, James "Jake" Wegman, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on June 11, 2012.

Synopsis

Grievant was terminated for insubordination and a pattern of leave abuse. Grievant had a history of leave abuse, and had received reprimands and suspensions. Despite attempts at counseling sessions and an attendance plan of improvement, Grievant continued to engage in leave abuse. Grievant alleged that Respondent violated the Family

and Medical Leave Act by continuing the leave restrictions placed in her Attendance Improvement Plan. Barring unusual circumstances, an employer is entitled to require an employee to follow the usual and customary leave notice requirements in seeking Family and Medical Leave Act coverage. Respondent met its burden of proof and demonstrated that Grievant was terminated for good cause.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant was employed as a Licensed Practical Nurse since 1999 at Hopemont Hospital, a nursing home operated by the West Virginia Department of Health and Human Resources.

2. Grievant underwent knee replacement surgery in 2009, during this time she exhausted her available leave.

3. In 2009, 2010, and 2011, Grievant was absent from work on her scheduled workdays approximately 45 times per year. Grievant's attendance records indicate a pattern of connecting call-ins to be off on scheduled workdays with scheduled days off.

4. In 2009, Grievant called off from work on the following dates in connection to scheduled days off: January 31, February 22 and 23, March 9 and 10, April 22 and 23, May 24 and 25, June 4 and 18, July 1, 14, 27 and 28, August 11, September 3, 4 and 5. Grievant also called off partial days on March 16 and 25, April 16, and September 15.

5. Grievant was issued a verbal counseling regarding her attendance issues on September 16, 2009. The counseling required that Grievant provide 48 hours notice prior to using annual leave and to report unplanned sick leave at two hours before assigned shifts.

6. Attendance problems continued as Grievant called off work on the following dates in connection to scheduled days off: September 24, 26, and 29, October 5, 8, 10, 11, 12, 14, 15, 16, 19 and 20, December 9, 19 and 20. Because Grievant lacked sick leave, these absences were charged as personal leave without pay.

7. In 2010, Grievant called off from work on the following dates in connection to scheduled days off: January 11, 12, 13, 14, 16 and 17, February 19, 22, 27 and 28, March 3 and 18.

8. Grievant was issued a verbal warning on March 19, 2010, due to continued attendance problems. The verbal warning provided that further attendance issues would result in the issuance of an Attendance Improvement Plan. Grievant claimed she was covered by the Family and Medical Leave Act at this time. The Hospital had no record of Grievant submitting any paperwork regarding a claim. To the contrary, in 2009 and 2010, Grievant submitted annual assessments in which her physician determined she was physically capable of doing her job duties.

9. Respondent gave Grievant information regarding the Family and Medical Leave Act, including a form for her doctor to complete and return.

10. Grievant called off work on the following dates in connection to scheduled days off: March 27 and 28, May 8, 9 and 28, June 1, 2, 22 and 23.

11. Grievant was placed on an Attendance Improvement Plan on June 24, 2010. This Attendance Improvement Plan was issued because Grievant's "pattern of leave use has become so frequent that your attendance and service to our agency is not sufficiently dependable to perform the essential elements of your job." Respondent's Exhibit No. 4.

12. The Attendance Improvement Plan placed Grievant on restrictive leave status, which required Grievant to call in at least two hours before using sick leave, and submit a Physician's Statement for each occurrence of unplanned sick leave immediately upon return to work. The Attendance Improvement Plan required monthly performance evaluations to monitor Grievant's attendance for six months.

13. Grievant called off from work on the following dates in connection to scheduled days off: July 7, 8, 9 and 26, August 4, 5 and 6. Grievant did not submit the required Physican's Statement regarding the July 7, 8 and 9 absences.

14. Grievant's physician, Dr. Roger Lewis, submitted Family and Medical Leave Act ("FMLA") paperwork, Certification of Health Care Provider for Employee's Serious Health Condition, to Respondent on July 18, 2010. Dr. Lewis opined that Grievant should be allowed to miss work 1 to 2 days per 3 months of employment.[1]

15. By letter dated July 30, 2010, Respondent acknowledged receipt of Grievant's paperwork and approved her for up to twelve weeks of unpaid and unscheduled leave, expiring on July 21, 2011. The letter required Grievant to notify her supervisor that she was using a FMLA day.

16. Grievant called off work on July 26, 2010, in connection with scheduled days off on July 24 and 25, 2010. The record reflects that this time was not claimed by Grievant as a FMLA day off work.

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[1]The Family and Medical Leave Act of 1993, 29 U.S.C. 2601, *et seq*, provides an unpaid leave program for new parents, seriously ill employees and employees with seriously ill family members. The Department of Labor promulgated regulations as to the implementation of FMLA. 29 C.F.R. 825.

17. Grievant called off work on August 4, 5 and 6, 2010 in connection with scheduled days off on August 3, 7 and 8, 2010. The record reflects that this time was not claimed by Grievant as FMLA days off work.

18. Due to failing to turn in a physician's excuse for days called off work on July 7, 8 and 9, Grievant was issued a Written Warning and Reprimand on August 9, 2010.

19. Grievant called off work on September 1, 2010, in connection with a scheduled day off on August 31, 2010. The record reflects that this time was claimed by Grievant as a FMLA day off work.

20. Grievant called off work on October 4 and 5, 2010, in connection with a scheduled day off on October 2 and 3, 2010. The record reflects that this time was not covered under her FMLA certification.

21. Grievant called off work on October 23 and 24, 2010, in connection with a scheduled day off on October 22, 2010. The record reflects that this time was claimed by Grievant as FMLA days off work.

22. Grievant called off work on December 8, 9, 10 and 12, 2010, in connection with a scheduled day off on December 11, 2010. The record reflects that this time was claimed by Grievant as FMLA days off work.

23. Grievant called off work on December 22, 2010, in connection with a scheduled day off on December 23, 2010. The record reflects that this time was claimed by Grievant as a FMLA day off work.

24. Grievant called off work on January 6 and 7, 2011, in connection with scheduled days off on January 8 and 9, 2011. The record reflects that this time was claimed by Grievant as FMLA days off work.

25. On January 19, 2011, Respondent required another certification of Grievant's FMLA coverage because she was missing more than the 1-2 days per 3 months previously indicated in her FMLA certification provided in July 2010.

26. By Certification of Health Care Provider dated February 3, 2011, Dr. Lewis opined that Grievant should be allowed to miss 1-2 days per week with a 24-48 hours duration per episode of employment from 2010 until 2035. This Certification also placed restrictions concerning "limited time on foot, activities requiring a lot of bending of knees, prolonged standing, squatting, lifting over 10 lb. working over 8 hrs." Respondent's Exhibit No. 15.

27. Respondent sent Dr. Lewis a job analysis form related to Grievant's position description, and asked if Grievant was able to perform the requirements of the position. Dr. Lewis responded that Grievant could perform her job duties as long as appropriate accommodations were made.

28. On February 18, 2011, Grievant was placed on a second Attendance Improvement Plan. It included similar leave restrictions, including requiring 48 hours notice of annual leave, two hour notice of sick leave, and submission of a doctor's statement upon returning to work from sick leave.

29. Grievant called off work on March 7 and 8, 2011, in connection with scheduled days off on March 5 and 6, 2011. The record reflects that this time was claimed by Grievant as FMLA days off work.

30. Grievant failed to provide two hours notice before calling off sick on March 21, 2011, and April 6, 2011. The record reflects that this time was claimed by Grievant as FMLA days off work.

31. In a somewhat bizarre twist, by Certification of Health Care Provider dated March 31, 2011, Dr. Lewis modified his opinion and disclosed to Respondent that Grievant should be allowed to miss 1 time per 6-8 weeks, with a 1-2 day per episode.

32. Grievant called off work on April 9, 2011, she did not give a two hour notice. Grievant did not provide a doctor's statement upon her return to work on April 10, 2011. This day was a Sunday. Respondent's phone/fax machine was down on April 11, 2011. Grievant obtained a doctor's statement on that date. Grievant was off work on Tuesday, April 12, 2011. Grievant delivered the doctor's statement to Respondent on Wednesday, April 13, 2011.

33. Grievant was issued a three-day suspension on April 15, 2011. The letter provided that the suspension was "for not giving a two (2) hour notice when calling in and for not providing a required Physician Statement for a Non-FMLA day immediately upon return; as required by your AIP. This continuing pattern of inability to work as scheduled constitutes leave abuse as outlined in Hopemont Hospital's Leave Abuse Policy." Respondent's Exhibit No. 7.

34. Grievant called off work on May 12, 2011, in connection with scheduled days off on May 10, 2011, and May 11, 2011. The record reflects that this time was claimed by Grievant as FMLA days off work.

35. Grievant called off work on May 17 and 18, 2011, in connection with a scheduled day off on May 16, 2011. The record reflects that this time was claimed by Grievant as FMLA days off work.

36. By letter dated May 18, 2011, Respondent sent the following to Dr. Lewis:

> In review of the FMLA Certification that you filled out for Shelia Nestor, LPN dated 3/31/11, you had stipulated that she may miss work 1 time in 6 to 8 weeks. Since your review, she has missed 4 days within a six week period as follows: April 6, May 3, May 12, May 17 and 18. This is not consistent with the frequency that you indicated in your FMLA Certificate. For clarification purposes, please reply with a verification via an updated Certification form.

Respondent's Exhibit No. 7.

37. By Certification of Health Provider dated May 24, 2011, Dr. Lewis opined that Grievant should be allowed to miss 2-3 times per month, with 1-2 days per episode.

38. Grievant called off work on June 8 and 9, 2011, in connection with a scheduled day off on June 7, 2011. The record reflects that this time was claimed by Grievant as FMLA days off work.

39. Grievant called off work on June 22, 2011, in connection with a scheduled day off on June 21, 2011. The record reflects that this time was claimed by Grievant as a FMLA day off work.

40. Grievant called off work on July 11, 2011, in connection with scheduled days off on July 9 and 10, 2011. The record reflects that this time was claimed by Grievant as FMLA days off work.

41. Grievant called off work on July 25, 26, and July 28, 29, 30 and 31, 2011, in connection with scheduled days off on July 23, 24, 27, and August 1, 2011. The record reflects that this time was not covered under her FMLA certification. It was charged against her as 35.39 hours of unauthorized leave.

42. Grievant was issued a five-day suspension on August 5, 2011. The letter noted that Grievant was continuing to call off on days in connection to days off, violating various aspects of her AIP, and taking unauthorized leave.

43. Grievant called off work on September 1, 2011, in connection with a scheduled day off on September 2, 2011. The record reflects that this time was claimed by Grievant as a FMLA day off work.

44. Grievant called off work on September 7, 8, 10 and 11, 2011, in connection with a scheduled day off on September 9, 2011. The record reflects that this time was claimed by Grievant as FMLA days off work.

45. By Certification of Health Care Provider dated September 26, 2011, Dr. Lewis opined that Grievant should be allowed to miss work 2-3 times per month, with a 1-2 days per episode. Respondent approved this FMLA request by letter dated September 29, 2011.

46. Grievant called off work on October 3 and 4, 2011, in connection with scheduled days off on October 1 and 2, 2011. The record reflects that this time was claimed by Grievant as FMLA days off work.

47. Grievant was issued a 10 day-suspension on October 13, 2011. The letter stated that the "action is being taken due to exhibiting a pattern of leave use, directly impacting the efficient level of care for residents at Hopemont Hospital as well as burdens co-workers with additional duties and/or overtime work. This continuing pattern of inability to work as scheduled with connecting call ins to scheduled days off, holidays and weekends constitutes leave abuse . . ." Respondent's Exhibit No. 9.

48. Grievant called off work on November 15, 2011, in connection with scheduled days off on November 12 and 13, 2011, as well as a scheduled holiday off work on November 14, 2011. Grievant did not provide a two hour notice of this absence. The record reflects that this time was claimed by Grievant as a FMLA day off work.

49. Grievant called off work on November 27, 2011, in connection with scheduled days off on November 26 and 29, 2011, as well as days off for holiday on November 25 and 28, 2011. The record is unclear whether this was claimed by Grievant as FMLA time off work.

50. Grievant was requested to work mandatory overtime on December 1, 2011, as provided in Respondent's policy. Grievant refused to follow this directive.

51. Grievant called off work on December 8 and 9, 2011, in connection with scheduled days off on December 7, 10 and 11, 2011, as well as a scheduled holiday on December 6, 2011. The record reflects that this time was claimed by Grievant as FMLA days off work.

52. Grievant was terminated by letter dated December 19, 2011.[2] The letter contained, in pertinent part, the following:

> Since your employment, November 1, 1999, your prior supervisor and your current supervisor, Emilee Friend, RN, DON, have shared their concerns with you regarding your attendance, your continuing frequent unavailability to work, your inability to report off with proper notification and the excessive unauthorized leaves. There is no more basic right of an employer than to expect employees to report to work when scheduled. Your failure to report for work is a serious offense in any work environment, but becomes more serious at a state facility responsible for providing direct care for residents around the clock, not to mention the fact that when you call in, one of your co-workers must assume the responsibility of your job functions, causing extra duties, burden, stress and morale issues that eventually have a negative effect on the quality care our residents receive.
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> Respondent's Exhibit No. 1.

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[2]It should be noted that prior to each disciplinary action by Respondent a predetermination conference was provided to Grievant to discuss the issues.

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); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 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). In other words, "[t]he 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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).

Grievant asserts that her high usage of sick leave and use of coverage under the Family and Medical Leave Act cannot be viewed as abusive. In addition, Respondent violated Grievant's FMLA rights by imposing leave restriction requirements on her during

her period of FMLA eligibility. All disciplinary action taken by Respondent concerning leave use during Grievant's eligibility for FMLA was improper. Respondent contends that Grievant's pattern of calling off work in connection with scheduled days off resulted in the Hospital having to find another nurse to provide coverage for the absent Grievant. This required the supervising nurse to take time away from patient care to find someone to work for the Grievant. Peers of the Grievant bore the brunt of covering Grievant's duties, which caused additional employee relation problems for the Respondent. Patient care suffered and Grievant's absentee issues led to low morale among nurses.

To address Grievant's attendance issues, Respondent placed her on two improvement plans and leave restrictions. In addition, Respondent attempted to correct Grievant's attendance on scheduled work days through the progressive discipline process. Due to a pattern of connecting days in which she called off with scheduled days off, a failure to provide reasonable notice that she would be calling off work for the day, and the failure to work overtime on one occasion, her actions constituted leave abuse and insubordination.

First, the insubordination charge will be addressed. The charge of insubordination is defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See*

Santer v. Kanawha County Bd. of Educ., Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

Grievant did not contest the charge of insubordination. Respondent was able to prove by a preponderance of the evidence that on December 1, 2011, it was Grievant's turn to work mandatory overtime, nevertheless, Grievant refused. Accordingly, Respondent proved that Grievant was insubordinate on this date.

Grievant argues that she was on approved FMLA leave during many of her absences, therefore maintaining the leave restriction requirements during these periods improperly interfered with her right to utilize that leave. Because Respondent is a public employer which employees at least fifty employees at its work site it is an employer covered under the FMLA and Grievant was an employee entitled to benefits under the Act. *See,* 29 U.S.C. § 2611(4)(A)(3); 29 C.F.R. § 825.108(d); *Fain v. Wayne County Auditor's Office*, 388 F.3d 257, 259 (7th Cir. 2004).

The FMLA permits an eligible employee to take up to 12 weeks of leave per year if the employee has a serious health condition that renders the employee unable to perform one or more of the essential functions of his or her job. 29 U.S.C. § 2612(a); 29 C.F.R. 825.112(a). The Act further provides that employers may not "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the Act]." *Id.* § 2615(a)(1). Grievant argues that Respondent interfered with her exercise of her FMLA rights by continuing to require her to follow the leave restriction requirements of her Attendance Improvement Plan.

To prevail on a claim for FMLA interference, the employee must prove that: (1) he was eligible for FMLA protections; (2) his employer was covered by the FMLA; (3) he was entitled to leave under the FMLA; (4) he provided sufficient notice of his intent to take FMLA leave; and (5) his employer denied him FMLA benefits to which he was entitled. *Brown v. Auto. Components Holdings*, *LLC,* 622 F.3d 685, 689 (7th Cir. 2010); *Ridings*, 537 F.3d at 761.

Prior to being granted Family and Medical Leave Act coverage, Grievant was placed on an Attendance Improvement Plan to address poor attendance issues. Grievant did not comply with those notice provisions even though she had been made aware of the expectations orally and in writing. Even if the undersigned were to discount the FMLA days, it does not change the fact that they were claimed in connection with scheduled days off. The record established that on many occasions FMLA coverage was not involved in Grievant's attendance problems. Grievant called off work on July 25, 26, and July 28, 29, 30 and 31, 2011, in connection with scheduled days off on July 23, 24, 27, and August 1, 2011. The record reflects that this time was not covered under her FMLA certification. It was charged against her as 35.39 hours of unauthorized leave.

Grievant's argument that her FMLA rights were somehow violated due to leave restriction requirements is misplaced. In fact, employers can enforce call-off rules that require the reporting of absences prior to the start of shifts, or even two hours prior to the start of shifts, or that require the calling of a specific designated call-off number, absent unusual circumstances that prevent the employee from complying. 29 C.F.R. 825.303(c); 825.304(3). If an employee does not comply with the employer's usual notice and procedural requirements for reporting and requesting unforeseeable leave, and no unusual

circumstances justify the failure to comply, “FMLA-protected leave may be delayed or denied.” 29 C.F.R. 825.303(c).

Respondent was able to prove by a preponderance of the evidence that Grievant failed to comply with the notice procedures that it had put in place to address her attendance issues. Respondent also demonstrated that Grievant engaged in leave abuse by consistently linking the days in which she called off scheduled work days with previously scheduled days off. Grievant was also insubordinate when she refused to work her scheduled turn for overtime.

The following conclusions of law support the decision reached.

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); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. Since Grievant was a tenured employee in the state’s classified service, the Respondent must also demonstrate that the misconduct which forms the basis for the dismissal was of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989).

3. "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 Service Comm'n*, [175 W. Va. 279,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir./W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

4. In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

5. Respondent was able to prove by a preponderance of the evidence that on December 1, 2011, it was Grievant's turn to work mandatory overtime, nevertheless, Grievant refused. Accordingly, Respondent proved that Grievant was insubordinate on this date.

6. The federal regulations adopted to implement the FMLA provide that employers may require their employees to comply with their "usual and customary notice and procedural requirements" when requesting FMLA leave. *Id.* § 825.302(d). An employee's failure to comply with his employer's internal leave policies and procedures is

a sufficient ground for termination and forecloses an FMLA claim. *Righi v. SMC Corporation of America*, 632 F.3d 404 (7th Cir. 2011); citing: *Brown*, 622 F.3d at 689-90; *Ridings*, 537 F.3d at 769 n.3, 771; *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706, 710 (7th Cir. 2002); *Gilliam*, 233 F.3d at 971.

7. Respondent was able to prove by a preponderance of the evidence that Grievant failed to comply with the notice procedures that it had put in place to address her attendance issues. Respondent also demonstrated that Grievant engaged in leave abuse by consistently linking the days in which she called off scheduled work days with previously scheduled days off.

Accordingly, this 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: August 29, 2012

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Ronald L. Reece
Administrative Law Judge