WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

TAMMY JEAN DALTON
Grievant,

v. **Docket No. 2013-1547- DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/JACKIE WITHROW HOSPITAL,
Respondent.

DECISION

Grievant Tammy Jean Dalton, was employed by Respondent, the Department Health and Human Resources at Jackie Withrow Hospital ("Hospital") beginning in December of 2007. Grievant was terminated from her position as a Food Service Worker effective March 7, 2013. On March 11, 2013, Ms. Dalton filed this grievance challenging her dismissal by Respondent. The statement of grievance is:

> "While under Dr. Shamblin's care I was sent out to a FCE performed by Body Works to see if I had progressed or not since my injury in order to prepare a treatment plan to see if I needed a surgeon or another plan of treatment. During the meantime [sic], before my physician could review Body Works [sic] findings there was a dispute between Workman's Comp and myself so an attorney was brought in. I was never released by Dr. Shamblin. Jackie Withrow/Angie Booker/Amy Bragg received a copy from Body Works from Workman's Comp, etc. They took it upon themselves to interpret the letter from Body Works as to say it was releasing me to come back to work, but it was not. Body Works findings was that I could go back to work on a limited basis for three hours a day, sedentary work only, not involving injured body parts. Dr. Shamblin never signed off for me to be released to go back to

> work. I was sent a letter by Amy Bragg mandating I come back to work or my job would be terminated. Not only did they not wait for a release from my doctor, they also violated my Americans With Disability Act that had been requested by doctor Omar Hasan to put me on days until my panic and anxiety disorders were taken care of. I have statements from Dr. Hasan from 10-7-09 to 5-10-11 that show I should've been placed on dayshift only and concerning my 9-20-[illegible] my injuries on 5-1-11 and 6-11-11 and I feel if they had followed through with my Americans with Disability Act the injury may never have happened to begin with."

As relief, Grievant seeks, "Job reinstated, all annual leave that was wrongfully taken from me, non-harassment from Amy Bragg, Angie Baker, Serena Hamb, etc. … Severance pay, and monetary payment for undue stress, harassment, not following Dr. [sic] orders."

This grievance was filed directly to Level Three pursuant to W. VA. CODE § 6C-2-4(a)(4) and the Level Three hearing was held on July 8, 2013. Grievant appeared *pro se*. Mr. Harry C. Bruner, Jr., Assistant Attorney General, represented Respondent West Virginia Department of Health and Human Resources/Jackie Withrow Hospital. The parties submitted Proposed Findings of Fact and Conclusions of Law, which were received at the West Virginia Public Employees Grievance Board on August 16, 2013. This grievance became mature for decision on that date.

Synopsis

Grievant sustained an injury while at work and was granted a six month medical leave of absence, followed by a personal leave of absence of approximately three months. Grievant returned to work for several weeks and was absent for nearly ten months afterward, during which time Respondent

sought to obtain medical documentation from Grievant authorizing her absence from employment. Respondent terminated Grievant for job abandonment. Grievant argued that she was not required to take medical or personal leaves of absence while absent from work due to a work-related injury. However, Grievant was required to take these leaves of absence pursuant to the DOP Administrative Rules at 143 C.S.R. 1 §§ 14.8.(c) “Medical Leave, Notice to Employee”; 143 C.S.R. 1 §14.4.f.7.; “Work Related Illness or Injury,” and 143 C.S.R. 1 § 18.8.a, “Personal Leave.”

Respondent demonstrated that Grievant's extended absence from work was unauthorized. Grievant failed to provide medical evidence confirming the necessity for her leave or a medical release to her employer indicating a date when she would be physically able to return to perform the essential duties of her position, as required by the DOP Administrative Rule at 143 C.S.R. 1 § 14.4.g.4, "Physician's Statement,” with or without a reasonable accommodation for her Permanent Partial Disability she incurred from an on-the-job injury, and failed to return to work. Respondent gave Grievant every opportunity to provide the necessary medical evidence to justify her leave, but Grievant consistently failed to cooperate. In addition, Grievant argued that Respondent improperly required her to return to work, without a physician's release, and did not accommodate her disability. Grievant failed to timely file a grievance protesting these matters and, therefore, the Grievance Board is prohibited from considering them.

The following Findings of Fact are made based upon the entire record developed in this matter.

Findings of Fact

1. Grievant, Tammy Jean Dalton, was employed by Jackie Withrow Hospital (Hospital")" beginning in December 2007. While working as a Food Service Worker ("FSW") for the Hospital she was injured at work in April or May of 2011.

2. Following her work-related injury, pursuant to DOP Administrative Rule at 143 C.S.R. 1 § 14.8.(c), the Hospital gave Grievant a six month Medical Leave of Absence (sometimes hereinafter referred to as "MLOA") from June 15, 2011 to December 15, 2011, while she received temporary total disability benefits. The MLOA was followed by a personal leave of absence (sometimes hereinafter referred to as "PLOA") from her position, which began on or about December 15, 2011.

3. Grievant was notified by then Director of Human Resources for the Hospital, Ms. Amy Bragg, by an undated letter, that her leave of absence from her position as a FSW at the Hospital beginning on June 15, 2011, was approved as Medical Leave of Absence. The expected return to work date was October 1, 2011.

4. On January 30, 2012, the Assistant Administrator at the Hospital, Ms. Amy Bragg, sent a letter to Grievant notifying her that her PLOA from her position at the Hospital began on December 15, 2011.[1] If Grievant had any

[1] Ms. Bragg's title/position with the Hospital changed to Assistant Administrator at the Hospital and Ms. Serena Hamb subsequently replaced her as the Director of Human Resources.

questions regarding this action, she was invited to contact Ms. Bragg, who provided her personal extension.[2]

5. On March 15, 2012, Ms. Bragg sent a letter to Grievant to determine her intentions concerning her employment with DHHR. The letter further stated that Grievant had been on MLOA since June 15, 2011, which expired after six months, on December 15, 2011, and on a PLOA beginning December 15, 2011, for her Workers' Compensation injury. The letter explained that the Hospital had received a Functional Capacity Evaluation ("FCE") from Body Works, dated February 17, 2012, which indicated that Grievant could return to work at modified duty.[3] The Hospital requested Grievant to return to work on Wednesday, March 21, 2012, with restricted working hours, from 3:00 PM until 6:00 PM, to accommodate her working restrictions.

6. The Hospital limited Grievant's duties according to the instructions related on the FCE.[4] Ms. Dalton worked for approximately three and one-half weeks, but on April 13, 2012, she was sent home due to elevated blood pressure and instructed to follow-up with her primary care physician.

7. From the period of April 13, 2012, through June 10, 2012, Grievant did not provide the Hospital with any documentation to demonstrate that her absence was medically necessary.

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[2] Respondent Exhibit No. 1 at page 35.

[3] One of the signatures on the FCE was that of Paula Gallimore, PTA, Ex. Phys. Ms. Booker believed Gallimore was a physician.

[4] Respondent Exhibit No. 3 - List of five tasks Ms. Dalton would undertake at the Hospital upon her return in March 2012. Signed and dated by Ms. Dalton on March 22, 2012.

8. Therefore, on June 11, 2012, Ms. Hamb, sent a letter to Grievant stating, "Please find enclosed a Physician's/Practitioners Statement (hereinafter sometimes referred to as "Physician's Statement"). It needs to be completed and returned to the facility within 15 days of receipt of this letter. Without receipt of this statement, your absence will be considered unauthorized leave." The letter further provided that the Physician's Statement must meet the obligations set forth under DOP Administrative Rule, § 14.4. The letter provided pertinent portions of that rule as follows:

> "For extended periods of sick leave, a prescribed physician's statement form confirming the necessity for continued leave must be submitted within thirty (30) calendar days of the commencement of the sick leave and must indicate the date the physician will release the employee to return to work or the date the physician will reevaluate the employee's medical condition. For employees being re-evaluated, an additional physician's statement must be submitted upon re-evaluation. Failure to produce the required statement is grounds to terminate further sick leave benefits and the appointing authority shall immediately place the employee on unauthorized leave and notify the employee in writing of such action as provided in sub§14.6 of this rule. This written notice shall allow the employee fifteen (15) days to submit the required physician's statement. Failure of the employee to submit the required statement within the fifteen day notice period, except for satisfactory reasons submitted in advance to the appointing authority, is cause for dismissal." Administrative Rule of the West Virginia Division of Personnel, 143 C.S.R. 1 §14.4.g.4

9. The letter noted that both the Grievant's supervisor and the Human Resources Department had attempted to contact Grievant via telephone regarding her intentions to return to work at modified duty but had been unsuccessful in reaching her.

10. On June 14, 2012, Ms. Hamb sent another letter to Grievant providing the specific days for which Grievant might be charged with unauthorized leave, beginning in March 21, 2012, through April 13, 2012.[5] Additionally, Grievant was specifically,

> " … [r]eminded that it is your responsibility to keep your supervisor informed of any emergency which prevents you from being at work as scheduled or to obtain prior approval for scheduled time off. Failure to do so renders you absent without authorization for approved leave and will result in a dock of pay. This is in accordance to [sic] the Administrative Rule of the West Virginia Division of Personnel, §14.6-Unauthorized Leave."[6]

The letter instructed Grievant that if she felt this absence qualified for a Medical Leave of Absence, then she should remit the necessary, enclosed documents no later than 15 calendar days from the date of the absence per DOP Administrative Rule § 14.8.c. "Medical Leave; Notice to Employee."[7]

10. Because of Grievant's continued failure to comply with the Hospital's request to provide medical documentation of her asserted need to be absent from work, Attorney Jennifer Meeks ("Attorney Meeks") corresponded with Grievant's counsel in her Workers' Compensation case and asked him to help to explain to Grievant what she must do to protect her position at the Hospital. Attorney Meeks is DHHR's Monitoring Counsel in Workers' Compensation litigation and General Counsel for DHHR's Office of Human

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[5] Apparently, though Grievant reported to work on these days, she did not complete her shift.

[6] The pertinent portion of DOP Administrative Rule §14.6-"Unauthorized Leave" was also cited.

[7] There was no way for Grievant to comply with the requirement to submit a Physician's Statement timely, as her absence had been more than 15 days from the date of the notification/letter. However, the Hospital allowed additional time to comply.

Resources Management. She works with Jackie Withrow Hospital in both capacities.

11. On July 10, 2012, Attorney Meeks sent a letter to Grievant's counsel, Stephen P. New, Esq., explaining that:

> "Pursuant to Administrative Rule 143 C.S.R. 1, when a state employee is unable to work for medical reasons, she has two options: request paid time off using accrued sick leave or annual leave when no sick leave is available, or request unpaid medical leave of absence of up to six months per 12-month period … "
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> "Either option requires the employee to submit a physician statement certifying the medical necessity of the leave if the absence is for more than three consecutive scheduled work days or if it is unpaid. Failure to provide such certification results in the leave being unauthorized, with the employee's pay docked accordingly, and could result in termination of the employment relationship. When an employee is off work due to a work-related injury, s/he is typically on MLOA (while receiving temporary total disability TTD) benefits. Ms. Dalton is no longer receiving TTD benefits, and must either request paid leave or an unpaid leave of absence in order to remain in a valid employment status… "
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> "[B]y independent medical examination (IME) dated December 12, 2011, and functional capacity evaluation (FCE) dated February 17, 2012, Ms. Dalton was released to return to work at modified duty. As a result of the IME, Ms. Dalton was last paid TTD benefits through January 9, 2012. While I recognize that the TTD closure has been protested, the Hospital must treat that closure as valid, as far as her employment status and compliance with the *Administrative Rule* is concerned."

The letter further explained that Grievant had failed to submit a physician's statement certifying the medical necessity of her continued need to be off work since April 13, 2012. The letter continued that:

> "We cannot continue an employee in an off-work status without documentation that the absences are justified. There is work to be done to protect and assist patients, and the absence creates a hardship for other staff members who must cover for an absent

> employee. Unlike the private sector, the Hospital has limited ability to obtain substitute personnel while an employee remains employed but absent."

Attorney Meeks also referred to the June 11, 2012, letter to Grievant from Ms. Hamb, which enclosed Medical Leave of Absence forms for Grievant to complete and explained that those forms hadnot yet been received. Finally, Attorney Meeks clarified that:

> "If Grievant's current condition mandates that she remain off work, and it may qualify for FMLA or other protected leave status, we have specific forms for certifying that situation which are enclosed for your convenience. Please note the job descriptions for both her regular job and the modified duty are enclosed for presentation to the person certifying her condition. Ms. Dalton may return these completed forms to the Hospital by July 27, 2012 to avoid adverse employment action. As explained in the June 11, 2012 letter, failure to provide a physician statement taking her off work will result in her absence being considered unauthorized leave, for which she may be disciplined, up to and including termination."[8]

12. Grievant received and reviewed the July 10, 2012, letter from Attorney Meeks to Attorney New.[9]

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[8] For some reason, which is unclear from the record, Attorney Meeks sent another letter, dated July 11, 2012, to Attorney New, which was substantially the same as the letter dated July 10, 2012. The most notable difference between the letters was that in the letter of July 11, 2012, Ms. Meeks requested Grievant to contact Andy Garretson by July 18, 2012, to "facilitate the exchange of information and ensure the proper form(s) are provided, and to avoid adverse employment action." Grievant did not acknowledge receiving this letter at hearing. It is noted that Grievant received the letter dated July 10, 2012, which allowed Grievant more time to respond to Respondent's requests than the July 11, 2012 letter; an additional nine days.

[9] It is unclear from the record when Grievant received this letter addressed to Attorney New, but she did not indicate that she was not given enough time to act upon it.

13. On July 18, 2012, Mr. Andrew Garretson, the Disability, Attendance and Safety and Loss Control Manager for DHHR sent a letter to Grievant stating that he was sending her forms to complete to determine whether she might qualify for FMLA or MLOA. Mr. Garretson specified that Grievant needed to "complete the DOP/L4 that will request the leave. Your physician will need to complete the [Physician's/Practitioner's Statement DOP]L/3 and ADA form to let us know exactly what we will need to do to accommodate you." Mr. Garretson requested Grievant to return the forms by August 2, 2012, and warned that failure to comply might result in denial of Grievant's FMLA application and her status being changed to unauthorized leave for any days taken to the present for her condition. Grievant admittedly received this correspondence from Mr. Garretson.

14. On August 27, 2012, Attorney New sent a Physician's Statement, dated August 10, 2012, (hereinafter the "August 10, 2012, Physician's Statement") to Mr. Garretson for his review, to determine whether Grievant qualified for FMLA or MLOA. The "Period of Incapacity" on this statement was from August 10, 2012 to November 10, 2012.

15. During the time that the Hospital was seeking proper documentation of Grievant's leave, Ms. Booker explained to Grievant that regardless of the status of the Grievant's Workers' Compensation case at the time, Grievant was obligated to her employer to provide the requested forms/documents in order to protect her position with the Hospital.

16. On September 17, 2012, Ms. Booker sent a letter to Grievant requesting to know Grievant's intentions regarding continued employment as a FSW with the Hospital. The letter stated that, as of September 17, 2012 Grievant:

> "failed to return any documentation to Mr. Garretson's office or to … [the] Hospital, regarding requesting leave, requesting to work with or without restrictions, or providing your workplace with any information regarding your continued absence. Therefore, you are required to report to work as normally scheduled on September 24, 2012 at 12 Noon [sic]. You must have your treating medical professional complete the enclosed Practitioners Statement (DOP-L3) indicating your ability to return to work and present the statement immediately on your return. If you fail to return to work by September 24, 2012, absent any information that documents a serious illness, and your inability to maintain appropriate and timely communication with your supervisor, [sic] I will conclude that you have abandoned your position. In such case, this letter will serve as a fifteen (15) day notification of your dismissal from the Department of Health and Human Resources, effective October 3, 2012 … The time you have off will be considered unauthorized leave resulting in your pay being docked for the time absent from work and is subject to disciplinary measures. This act is in accordance to [sic] the Administrative Role of the West Virginia Division of Personnel, §14.6-Unauthorized Leave."

The letter further informed Grievant of the opportunity to meet with Ms. Booker or to provide her with a written explanation if Grievant believed the Hospital's action was inappropriate, and directed Grievant to respond within 15 days of the date of the letter.[10]

17. Ms. Booker's September 17, 2012, letter to Grievant was in error in stating that Grievant had not responded to Mr. Garretson's letter of July 18, 2012,

[10] Apparently, at the writing of this letter, Ms. Booker was unaware that Mr. Garretson had received the August 10, 2013, Physician's Statement from Grievant.

because Attorney New had corresponded with Mr. Garretson on August 27, 2012, as noted above at Finding of Fact 14.

18. On September 19, 2012, Grievant received the September 17, 2012, letter from Ms. Booker, via certified mail.

19. On September 19, 2012, Grievant sent her application for FMLA or MLOA, together with the August 10, 2012, Physician's Statement to the Hospital.

20. On October 4, 2012, Mr. Garretson sent a letter to Grievant informing her that she did not qualify to receive either FMLA or MLOA because she had not worked the requisite number of days from the time period of October 4, 2011, through October 4, 2012. There was no indication that this letter was sent by certified mail. However, the address on that letter was the same as had been used in the past and the address at which Grievant continually resided throughout the time period relevant to this grievance.

21. The Physician's Statement of August 10, 2012, indicated that Grievant would have a "Period of Incapacity" from August 10, 2012, to November 10, 2012, but there was no specific date given on it for Grievant's return to work or for re-evaluation. In addition, it did not inform the employer as to whether Grievant's condition would permanently prevent her from performing her duties. Rather, the form indicated "pending further evaluation."

22. Because the August 10, 2012, Physician's Statement did not meet the requirements of DOP Administrative Rule 143 C.S.R. 1 § 14.4.g., Hospital Administration requested Grievant to provide the additional information required

by the Physician's Statement to authorize her absence from the period of August 10, 2012 to November 10,

23. The Hospital effectually extended Grievant's leave and provided Grievant with more personal or medical leave than required.[11]

24. From November 10, 2012, through March 7, 2013, Grievant had no communication whatsoever with the Hospital.

25. Dr. Paul Bachwitt, by report dated February 11, 2013, found Grievant to be at Maximum Medical Improvement ("MMI").

26. By letter dated February 19, 2013, Ms. Booker notified Grievant of her dismissal as a FSW with the Hospital. The letter stated, in pertinent part, that:

> "This personnel action will be effective March 7, 2013 which provides a 15 calendar day notice in accordance with subsection 12.2 of the Division of Personnel's *Administrative Rule.* The reason for the dismissal is your failure to return to work since being placed on unauthorized leave on April 13, 2012.[12] Since I consider you to have abandoned your position, you are not eligible for severance pay. You will be paid for any accrued and unused annual leave available … According to our records, your last working day was April 13, 2012. On August 12, 2012 you requested an extension to your leave of absence without pay for medical reasons and were denied any additional days of Medical or Family Medical Leave. By letter from Andy Garretson dated October 4, 2012 you were advised that such unpaid leave had expired and would not be extended beyond that date. Whereas you have not contacted the facility in regards to continuing work, I must conclude you've abandoned your position and as such this letter will serve as 15 day

[11] Respondent did not specify what type of leave it was granting to Grievant, but it would appear to have been PLOA for medical reasons.

[12] The September 17, 2012, letter from Ms. Booker to Grievant indicates that she had been absent from work since June 15, 2012, whereas this letter indicates April 13, 2012. It is unclear from the record why these dates differ. However, the record demonstrates that Grievant's unauthorized leave began on April 13, 2012.

notice of your dismissal from your position as Food Service Worker effective, March 7, 2013."[13]

27. Grievant did not provide any documentation/Physician's Statement to the Hospital concerning her absence from April 14, 2012, through August 9, 2012, or from November 11, 2012, through her termination on March 7, 2013.

28. On numerous occasions during Grievant's employment with the Hospital, in 2011, Grievant completed and submitted DOP-L3 Physicians/Practitioners Statements to justify her absences from employment.[14]

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 & Human Res.,* Docket No. H-88-005 (Dec. 6, 1988). In addition, the Grievance Board has held that the employer has the burden of proof in job abandonment grievances. *Breeden v. W. Va. Dep't of Health & Human Res.,* Docket No. 04-HHR-287 (Oct. 29, 2004). "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 & Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). "A preponderance of the

[13] Fifteen calendar days from February 19, 2013, is actually March 11, 2013.

[14] Respondent's Exhibit No. 1 at pp. 32, 36, 38, 40, 41 and 42.

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).

Because Grievant is a permanent, classified employee, DHHR must establish that Grievant's termination for failure to return to work or provide a medical excuse for such failure, was accomplished for good cause. *Moore v. W. Va. Div. of Rehabilitation Serv.,* Docket No. 95-RS-165 (July 31, 1995*) See Guine v. Civil Serv. Comm'n,* 149 W.Va. 461, 141 S.E.2d 364 (1965). An employee's failure to return to duty following expiration of a medical leave of absence may provide a proper basis for the employee's dismissal from employment. *Lewis v. W.Va. Dep't of Health and Human Res.,* Docket No. 94-HHR-1146 (Apr. 25, 1995).

The DOP Administrative Rule at 143 C.S.R. 1 §12.2(c) states, in pertinent part:

> 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 (15) calendar days after the appointing authority notifies the employee of the dismissal.

"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 ([Oct. 31,] 2006)." *Conley v. W. Va. Div. of Highways*, Docket No. 2010-1123-DOT (Dec. 27, 2010).

Respondent asserts that it properly terminated Grievant from employment with the Hospital because she abandoned her job beginning on April 14, 2012, through the date of her dismissal on March 7, 2013. Specifically, Respondent contends that it repeatedly attempted to gain Grievant's compliance with the provision of DOP Administrative Rule at 143 C.S.R. 1 §14.8.c that requires employees to submit a Physician's Statement to authorize their leave taken for illness or injury. Respondent provided ample evidence of its multiple attempts to obtain medical evidence that Grievant's absence was justified or a medical release from Grievant indicating a date when she would be physically able to return to perform the essential duties of her position, with or without accommodation. These efforts began with the June 11, 2012, and June 14, 2012, letters from Human Resources Director, Ms. Hamb to Grievant. In that correspondence, Ms. Hamb informed Grievant that she needed to provide a Physician's Statement or her absence would be considered unauthorized leave and enclosed the forms for Grievant to submit if she believed her absence qualified as a MLOA. In those letters, the Hospital further explained Grievant's responsibility to keep her supervisor informed of any emergency which prevented her from being at work as scheduled or to obtain approval for scheduled time off, or be subject to unauthorized leave and docking of her pay. The Hospital also attempted to clarify with Grievant that any ongoing appeals of her Workers' Compensation case did not excuse her from properly communicating with her

employer concerning her absences. In addition, Ms. Booker personally spoke with Grievant to explain to Grievant what documentation she needed to provide to the Hospital.

When Grievant still did not cooperate, in a further attempt to clarify for Grievant what she needed to do to protect her position at the Hospital, Attorney Meeks of DHHR corresponded with Grievant's counsel, Attorney New. In her July 10, 2012 letter, Attorney Meeks concisely detailed how Grievant was to properly document her absence. She further explained that the Hospital could not continue an employee in an off-work status without documentation to justify the absences because, “there is work to be done to protect and assist patients and the absence creates a hardship for other staff members who must cover for an absent employee.”

In addition, Ms. Booker sent a letter dated September 17, 2012, to Grievant requesting to know Grievant's intentions regarding continued employment with the Hospital and informed Grievant, *inter alia*, that she was to report to work on September 24, 2012, and “have your treating medical professional complete the enclosed Practitioner’s Statement (DOP-L3) indicating your ability to return to work and present the statement immediately on your return." If Grievant did not comply, she would be terminated by October 7, 2012. Grievant responded on September 19, 2012, by sending a Physician’s Statement dated August 10, 2012, to the Hospital. However the August 10, 2012, Physician’s Statement did not comply with the requirements of DOP Administrative Rule at 143 C.S.R 1 §14.4.g.4, "Physician's Statement," to include

a date for the employee's "return to work," or a medical re-evaluation of the employee. It also did not indicate whether Grievant's condition would permanently prevent her from performing her duties.[15] Consequently, the Physician's Statement was insufficient to authorize Grievant's absence from August 10, 2012, through November 10, 2012. Therefore, Grievant was on unauthorized leave for the entire period from April 13, 2012, through March 17, 2013. In addition, Respondent showed that during 2011, Grievant submitted numerous, properly completed Physician's Statements to the Hospital documenting a "period of incapacity" to excuse her absences. Given Grievant's obvious familiarity with this form and the requirement to submit it to her employer to avoid being placed on unauthorized leave status, it is inexplicable why Grievant failed to comply with Respondent's legitimate directives to provide the Physician's Statement(s) for the absences at issue. Though Respondent could have acted in September 2012, to terminate Grievant's employment, the Hospital continued to "work with" Grievant to obtain compliance with DOP Administrative Rule at C.S.R. 1 §14.8C.

The facts of this grievance are analogous to those in *Cook v. West Virginia Dep't of Health & Human Res.,* Docket No. 99-HHR-298 (Nov. 30, 1999), *Hayden v. Dep't of Health & Human Res.*, Docket No. 98-HHR-133 (November 30, 1990) and *Toler v. Dep't of Health & Human Res.,* Docket No. 2012-0189 -

[15] Even assuming that the August 10, 2012 Physician's Statement was adequate to provide authorization for Grievant's absence from August 10, 2012, through November 10, 2012, Grievant provided no documentation whatsoever to authorize her absence for the remainder of the time she was absent from work.

DHHR (Aug. 1, 2012) wherein the grievants/employees neglected to provide evidence of when they could return to their previous job duties following extended leaves of absence. "Grievant's failure to make any meaningful effort to comply with her employer's requirements to document her status over such an extended period of time, following multiple notifications, represents more than a trivial or inconsequential failure to comply with the technical requirement." *Toler, supra. Cf. Adkins v. Dep't of Health & Human Res.,* Docket No. 2011-1392-DHHR (December 22, 2011). Like the Respondent in *Toler, supra,* in this grievance, the Hospital went to great lengths to inform Grievant of the steps she needed to take to safeguard her position at the Hospital, but Grievant neglected to respond as requested.

Grievant responds that she should not have been required to use MLOA from the period of June 15, 2011, through December 15, 2011, or PLOA from December 16, 2011, until her return to work on March 21, 2012, because she was absent from work due to a work-related injury.[16] Throughout the hearing, Grievant did not seem to understand that the Hospital had approved a six-month MLOA, followed by a PLOA from her position as a FSW, which covered the period from approximately June 15, 2011, through March 20, 2012, during the time she was absent and recovering from her work-related injury. Grievant contends that, "If you are unable to work due to Workmen's Compensation Injury

[16] Grievant's response in her Findings of Fact and Conclusions of Law was confusing, at best, and the undersigned has attempted to address the matters raised there is fully as possible.

it is Workmen's Comp NOT personal leave or medical leave." (Emphasis in the original.) Grievant is in error in this assertion. Pursuant to DOP Administrative Rule 143 C.S.R. 1 §14.8.c.1. “Medical Leave,” an injured or ill permanent employee shall be granted a medical leave of absence without pay not to exceed six months within a 12 month period. Additionally, DOP Administrative Rule 143 C.S.R. 1 §14.4.f.7. provides that;

> An employee who elects not to use sick leave under this paragraph *shall* be placed on a medical leave of absence without pay as provided under subsection DOP Administrative Rule 143 C.S.R. 1 §14.8 of this rule. Provided that such paid or unpaid leave due to work-related injury or illness shall be, if qualified, counted as and run concurrently with federal Family and Medical Leave Act (FMLA) leave.” (Emphasis added.)

Grievant testified that she did not apply for this leave. However, Grievant was required to do so, to maintain the ability to return to her position. Moreover, Respondent clearly advised Grievant in correspondence that while she was absent from employment at the Hospital due to her work-related injury, a MLOA and PLOA were granted/used.[17]

Grievant further asserted at hearing that she did not receive the October 4, 2012, letter from Mr. Garretson notifying her that she did not qualify for a MLOA or FMLA. The letter was, apparently, not sent via certified mail. However, DHHR sent the letter to the address where Grievant continually resided during her absence and where other mail from Respondent had successfully been delivered to her. Given the general reliability of the U.S. Postal Service, the

[17] There was no evidence presented concerning whether Grievant had used all of her sick leave, i.e., why she must have elected to use unpaid MLOA.

undersigned finds that it more likely than not that Grievant received the letter from Mr. Garretson. Even assuming that Grievant did not receive the October 4, 2012, letter denying this leave, the Hospital extended additional leave to Grievant, outside the requirements of the DOP's Administrative Rule, and attempted to obtain the necessary documentation to justify her continued absence from work. Respondent was prepared to terminate Grievant in September of 2012, as set forth in the September 17, 2012, letter from Ms. Booker to Grievant. However, as discussed more fully above, after the Hospital received Grievant's incomplete August 10, 2012, Physician's Statement, it effectively extended her leave of absence and encouraged her to provide the proper medical documentation to protect her position at the Hospital. Ms. Booker explained that the Hospital Administration elected to be more lenient with leave than required, because Grievant had some pressing "personal issues" and had been injured. In summary, Grievant was not harmed by the failure, if any, to receive notification of the denial of MLOA/FMLA, because Respondent extended Grievant's leave of absence.

Grievant further avers that Respondent wrongly relied on a FCE, dated February 17, 2012, from Body Works, which was not signed by Dr. Shamblin, in requesting Grievant's return to work in March of 2012.[18] Grievant contends that, before her return to work, Respondent should have obtained a Physician's release and Grievant should have undergone work hardening/conditioning by a certified therapist at a certified rehabilitation facility. Grievant did return to work

[18] Dr. Shamblin's first name was not provided at the Level Three hearing.

on March 21, 2012, at the request of Respondent, with very limited, sedentary duties, per the direction of the FCE. Her return to work was in March of 2012, and she filed this grievance on March 11, 2013, far beyond the fifteen-day period for filing prescribed at W. VA. CODE § 6C-2-4(a).[19] Grievant did not timely file a grievance relating to whether Respondent properly required her to return to work pursuant to the FCE and, thus, the undersigned is precluded from addressing same.

Finally, Grievant asserts in her grievance statement that Respondent, "violated my Americans with Disability Act that had been requested by Dr. Omar Hasan to put me on days until my panic and anxiety disorders were taken care of. I have statements from Dr. Hasan from 10-7-09 to 5-10-11 that show I should've been placed on dayshift only and concerning my 9-20-[illegible] my injuries on 5-1-11 and 6-11-11 and I feel if they had followed through with my Americans with Disability Act the injury may never have happened to begin with." It is well-settled that the Grievance Board does not have jurisdiction to determine whether the ADA has been violated, based upon the West Virginia Supreme Court of Appeals' holding in *Vest v. Bd. of Educ*., 193 W.Va. 222, 455 S.E.2d 781 (1995); *Adkins v. Dep't of Labor,* Docket No. 04-DOL-071 (Jan. 25, 2005).

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[19] Grievant's argument on this issue was underdeveloped and unpersuasive to the undersigned. Grievant did not demonstrate that the "discovery rule" exception is applicable under these circumstances as she was notified by letter dated March 15, 2012, from the Hospital, that Respondent requested her return to work based upon the information in the FCE. *See, Spahr v. Preston County Board of the Education*, 182 W.Va. 726; 391 S.E.2d 739 (1990) and W. VA. CODE §§ 6C-2-1 et seq.

Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination," as that term is defined in W. VA. CODE § 6C-2-2(d), includes jurisdiction to remedy discrimination that would also violate the ADA. In other words, the Grievance Board does have subject matter jurisdiction over handicap-based discrimination claims. *Smith v. W. Va. Bureau of Employment Programs*, Docket No. 94-BEP-099 (Dec. 18, 1996). *See Vest, supra.* However, this issue was not addressed in any detail in either the hearing or Grievant's post-hearing argument. Grievant asserts that these "requests" from Dr. Hasan were made during the period from October 7, 2009, through June 11, 2011, but there is just one Physician's Statement signed by Dr. Hasan in the record, dated June 6, 2011, recommending day shift only.[20] Given that Grievant filed this grievance on March 11, 2013, approximately one year and nine months after that Physician's Statement, Grievant did not timely file a grievance to protest this matter and, thus, the undersigned is precluded from addressing same.[21]

A technical violation of DOP policy, 143 CSR 1 §12.2, does not necessarily amount to good cause for dismissal of a permanent public employee. *See Sloan v. Dep't of Health & and Human Res.,* 215 West Virginia 657, 661, 600 S.E.2d 554, 558 (2004) (*Per curiam).* "'Good cause' for dismissal will be

[20] Respondent's Exhibit No. 1 at p. 40.

[21] Grievant's argument on this issue was also underdeveloped and unpersuasive to the undersigned. Grievant did not demonstrate that the "discovery rule" exception is applicable under these circumstances, as she was aware of Dr. Hasan's recommendations when they were made in June 11, 2011, but did not file a grievance for Respondent's failure to accommodate her /act on same, assuming there was any obligation for Respondent to do so. *See, Spahr v. Preston County Board of the Education*, 182 W.Va. 726; 391 S.E.2d 739 (1990) and W. VA. CODE §§ 6C-2-1 *et seq*.

found when the employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Service Commission*, 180 W. Virginia 143, 145, 375 S.E.2d 775, 777 (1988). Grievant showed "gross disregard" for her professional responsibilities when she failed to provide any medical evidence or medical release to her employer indicating a date when she would be physically able to return to perform the essential duties of her position, with or without a reasonable accommodation for her PPD which resulted from an on-the-job injury and failed to return to work. Respondent has met its burden of proof that Grievant's termination was proper. It has not only complied with the pertinent provisions of DOP's Administrative Rule regarding medical and personal leaves of absence, but approved more generous leave than required. Respondent gave Grievant every opportunity to provide the necessary medical evidence, but Grievant consistently failed to cooperate. *See, Adkins v. West Virginia DHHR/Bureau for Children and Families,* Docket No. 2011-1392-DHHR (Dec. 22, 2011).

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. *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988).

2. The employer must also demonstrate that 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,* 181 W. Va. 49, 380 S.E.2d 226 (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 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).

3. "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)." *Conley v. W. Va. Div. of Highways,* Docket No. 2010-1123-DOT (Dec. 27, 2010).

4. The Division of Personnel's Legislative Rules provide at 143 C.S.R 1 § 12.2(c) "that an appointing authority may dismiss an employee who is absent from work for three consecutive days without notice but it certainly does not require such dismissal. Further, the rule does not eliminate consideration of other factors such as the employee's work record and the circumstances surrounding

the incident that must be considered in a good cause determination. *See Conley v. Div. of Corrections,* Docket No. 00-CORR-109 (June 30, 2000); *Ferrell v. W.Va. Dep't of Transp./Div. of Highways,* Docket No. 00-DOH-237 (Dec. 22, 2000) *rev'd on other grounds, W.Va. Dep't of Transp./Div. of Highways v. Ferrell*, Kanawha County Circuit Court Civil Action No. 01-AA-6, (May 30, 2002)." *Adkins v. W. Va. Dep't of Health and Human Res.*, Docket No. 2011-1392-DHHR (December 22, 2011).

5. A technical violation of DOP policy, 143 CSR 1 §12.2, does not necessarily amount to good cause for dismissal of a permanent public employee. *See Sloan v. Dep't of Health & and Human Res.,* 215 West Virginia 657, 661, 600 S.E.2d 554, 558 (2004) (*Per curiam).* "'Good cause' for dismissal will be found when the employee's conduct shows a gross for disregard professional responsibilities or the public safety." *Drown v. W. Va. Civil Service Commission,* 180 W. Virginia 143, 145, 375 S.E.2d 775, 777 (1988).

6. Grievant showed "gross disregard" for her professional responsibilities when she failed to provide any medical evidence or medical release to her employer indicating a date when she would be physically able to return to perform the essential duties of her position, with or without a reasonable accommodation for her PPD which resulted from an on-the-job injury, and failed to return to work. Respondent has met its burden of proof that Grievant's termination was proper. It complied with the pertinent provisions of DOP's Administrative Rule regarding medical and personal leaves of absence. Respondent gave Grievant every opportunity to provide the necessary medical

evidence to justify her extended leave, but Grievant consistently failed to cooperate.

7. "Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of the continuing practice giving rise to grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing." W. VA. CODE § 6C-2-4(a)(1).

8. Grievant did not timely file a grievance relating to whether Respondent properly required her to return to work in March 2012, pursuant to the February 17, 2012, FCE or whether Respondent was required to provide her with an accommodation in the workplace based upon the June 2011, recommendation of one of her treating physicians.

Accordingly, the grievance is **DENIED.**

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance the 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/ the Grievance the Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared

and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: October 10, 2013 _____

SUSAN L. BASILE
ADMINISTRATIVE LAW JUDGE