THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TERRANY THOMAS,

Grievant,

v. **Docket No: 2012-1374-DHHR**

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/
BUREAU FOR MEDICAL SERVICES,

Respondent.

DECISION

Grievant Terrany Thomas' ("Grievant") employment with West Virginia Department of Health and Human Resources Bureau for Medical Services ("Respondent") was terminated on May 21, 2012, effective June 6, 2012. Grievant timely filed an expedited third level grievance, by and through her union representative, dated May 31, 2012, with the WV Public Employees Grievance Board. As her grievance, Grievant states that she was terminated without good cause and, as relief, she seeks to be made whole including back pay with interest and all benefits restored.

A third level hearing on the grievance was held on September 28, 2012. Grievant was represented therein by Mr. Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union and Respondent was represented by Michael E. Bevers, Esquire, Assistant Attorney General.

Thereafter, Grievant, by her representative, moved for an extension of time for filing Findings of Fact and Conclusions of Law, originally due on October 26, 2012. On October 19, 2012, the parties appeared telephonically for a hearing on the motion. Upon

a showing of good cause, the motion was granted and the parties were ordered to submit Findings of Fact and Conclusions of Law to be postmarked no later than November 13, 2012. The parties further stipulated that the days in the extended filing shall not be counted toward any relief awarded of back pay if such is found to be justified.

The grievance became mature on November 13, 2012 after receipt of the partis' proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent proved by a preponderance of the evidence that it had good cause to terminate Grievant's employment for job abandonment.

Findings of Fact

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

1. Grievant began working for DHHR in 2005.

2. Grievant received Respondent's employee handbook in October 2006.

3. Grievant worked for Bureau of Medical Services ("BMS"), within West Virginia Department of Health and Human Resources ("DHHR"), since 2009. At BMS, Grievant first worked under the supervision of Cindy Beane, BMS HHR Deputy Commissioner. Grievant most recently worked under the supervision of Tanya Cyrus, Director of Policy and Administrative Services, an office within BMS. Grievant's job title was Health and Human Resource Specialist, Senior. Grievant began working under Ms. Cyrus' supervision in the aforementioned role in the beginning of 2011.

4. BMS administers the state Medicaid program. It is a $3 billion a year

program with 400,000 recipients and enrolls 25,000 medical providers. BMS administers federal monies.

5. Six employees report to Deputy Commissioner Beane, four employees report to Ms. Cyrus.

6. Grievant played a crucial role in ensuring that Medicaid payments would be made to 25,000 medical providers and that payment or medical services would be provided to a 400,000 person client base, which includes low income, disabled, handicapped and elderly West Virginians.

7. In September 2011, Ms. Cyrus began to notice excessive absenteeism on the part of Grievant.

8. Grievant was assigned to several big project teams and Grievant's absenteeism jeopardized the ability of those project teams to function and accomplish their missions; though there was no evidence presented that any deadlines were missed specifically because of Grievant.

9. Ms. Cyrus held informal discussions with Grievant regarding her excessive absenteeism on multiple occasions and, in December 2011, Ms. Cyrus advised Grievant she needed to call either Ms. Cyrus, as the direct supervisor, or Deputy Commissioner Beane, if she was going to be absent.

10. Grievant had Ms. Cyrus' home, work, and cell numbers as early as October 3, 2011.

11. Grievant has recognized medical conditions.

12. Grievant filed for medical leave benefits based on those recognized medical

conditions. She did not advise anyone, nor did her doctor, that she had an additional medical condition, which she disclosed and discussed at the hearing in this matter.

13. Based upon the information provided by Grievant in her application for medical leave benefits, Mr. Andy Garretson, a disability manager in DHHR's Human Resources Management office, Department of Employee Management, conducted a study and determined that the benefit that would most accommodate Grievant was an Intermittent Medical Leave of Absence ("MLOA") benefit.

14. Mr. Garretson testified that his recommendation was largely based on what Grievant's doctor put on the physician form as regarding her illness and its effects on her ability to regularly come to work, in Grievant's case 1-2 times a month for 3-5 days.

15. As outlined in a letter dated February 23, 2012, Grievant was granted Intermittent Medical Leave of Absence benefits with a beginning date of February 11, 2012. The February 23, 2012 letter advised:

> Intermittent Medical Leave of Absence benefits provide a medical leave benefit of up to six months (1040 hours) leave in a twelve month period. . . *[E]very time you call in for your shift due to your documented medical condition, you must let your supervisor or the employee accepting your call in know that you are taking a Medical Leave of Absence day*. You must turn in a doctor's excuse every 30 days covering each day that you called in that month as a medical leave of absence day as pertaining to your documented chronic medical condition we have on file. Any day not covered by this excuse will be counted as an unauthorized leave of absence. Any and all other call in's [sic] not pertaining to your chronic medical condition will be counted against your accumulated sick time. In the event no time is available, the absence will be counted as unauthorized leave of absence.

Respondent's Ex. 7 (emphasis added).

16. The February 23, 2012 letter states that it was issued in response to Grievant's request to take an Intermittent Medical Leave of Absence.

17. Grievant accepted Intermittent Medical Leave of Absence benefits, and agreed to abide by that policy's requirements, by returning the forms required, a DOP-L4, filled out by Grievant, and a DOP-L5, filled out by her treating physician.

18. Grievant was not approved for Family Medical Leave Act (FMLA) benefits.

19. The MLOA benefit affords a greater number of days, six months in one year to be claimed as subject to the documented illness, than FMLA's benefit, 12 workweeks of unpaid leave a year.

20. The DOP-L5 signed by her doctor estimated that her "episodes would occur 1-2 times per month with a duration of 3 to 5 days." Respondent Ex. 2 at 1 (of amended letter).

21. As a requirement of the MLOA benefit, Grievant was required to call her supervisor each day she would claim MLOA. Respondent Ex. 7.

22. Grievant did not always call Ms. Cyrus, as set forth in the MLOA policy, to advise that she would be absent and that such absence was subject to the MLOA benefit.

23. In a letter dated April 13, 2012, Deputy Commissioner Beane advised Grievant that her pattern of leave use had become so frequent that her attendance and service to the agency was not sufficiently dependable to perform the essential elements of her job. As an illustration of such, the letter set forth her leave usage between January 1, 2011 and February 29, 2012:

> 1. Between January 1, 2011 and February 29, 2012, you were absent from work a total of 147.13 hours (one hundred and forty seven hours and eight minutes) and 32.25 hours (thirty two hours and fifteen minutes) family sick leave. This includes absences reported as Sick leave (SL) and Family Sick (FS) and represents a total of 22 work days.

2. Between January 1, 2011 and February 29, 2012, you have been absent from the workplace for a total of 24.00 hours (seventy three hours and fifteen minutes) off payroll (OP). This includes absences reported as Off Payroll (OP) and represents a total of 3 (three) work days.

3. Between January 1, 2011 and February 29, 2012, you were absent from work a total of 13.25 hours (thirteen hours and fifteen minutes) emergency annual leave. This includes absences reported as Emergency Annual Leave (EA) and represents a total of 1 ½ work days.

4. Between January 1, 2011 and February 29, 2012, you used a total of 110.38 hours (one hundred and ten hours and twenty three minutes) of Sick leave [sic] (SL), Family Sick Leave (FS), Off Payroll (OP) and Emergency Annual Leave (EA) on a Monday or Friday, before or after a Holiday. This includes absences reported as Sick leave [sic] (SL), Family Sick Leave (FS), Off Payroll (OP) and Emergency Annual Leave (EA) and represents a total of over 13 days. This constitutes as a pattern of misuse of leave, as defined as the following:

    a. Hooking – The unplanned call-in absences of short duration which may be linked or "hooked" with scheduled days off, holidays, weekends, or periods of annual leave;
    b. Repeated call-in absences on a specific day of each week or calendar date;
    c. Use of leave immediately upon accrual, thus maintaining zero or near zero leave balances;

5. In summary, this represents a combined total of 216.63, or 27 days you have been absent from the workplace.

I am sure you will agree that no element of employment is more basic than the right of the employer to expect employees to report for work as scheduled and to comply with established procedures for requesting and reporting absences. Your record of frequent absences has placed an undue hardship on this section as well as on your co-workers who must assume your assigned duties during your absences. Regardless of the reason(s) for an employee's absence, when absence occurs so frequently that an employee's presence cannot be counted on, the employee's value to the employer is questionable.

Therefore, based on authority provided in section 14.5 of the Division of Personnel, Administrative Rule, you are being placed on an attendance improvement plan. The provisions of that statute are as follows:

14.5 Suspected Misuse of Leave – When an employee appears to have a

> pattern of leave use that is inconsistent with the reasons provided in subdivision 14.4(f) of this rule, including such frequent use of sick leave as to render the employee's services undependable, the appointing authority may request appropriate substantiation of the employee's claim for leave, for example, verification of an illness of less than three days. The appointing authority shall give the employee prior written notice of the requirement for appropriate substantiation.

. . .

Requirements' [sic] of this plan includes [sic];

- You are required to submit a completed Physician/Practitioner's Statement form (DOP-L3) to verify all future leave taken for medical/health reasons.

- You will be required to submit a Physician/Practitioner's Statement form (DOP-L3) for any family member for whom you are requesting sick leave immediately upon return to work. Failure to do so will be considered unauthorized leave.

- If a physician's statement is not provided within two days of your return to work, when you are absent for an illness, you will be place on unauthorized leave for the entire absence.

. . .

- If an emergency occurs, please contact your supervisor, Tanya Cyrus personally by phone, and she will consider the situation on its merits. . . Your supervisor, Tanya Cyrus's cell number is [cell number] and work number is [office number]. Any emergency annual leave requests will be granted to you on a case by case basis, depending on the circumstances involved and the documentation provided.

. . .

You are reminded that your work schedule is 9:00 AM – 5:00 PM Monday through Friday.

. . .

So there is no misunderstanding, I am again directing that you report any unscheduled absences or tardiness to your supervisor, Tanya Cyrus personally, by telephone, no later than within forty-five minutes of your

> **scheduled workday.** In your supervisor's absence, you are to personally report by telephone, such absences or tardiness to me, Cindy Beane, Deputy Commissioner at [office number].
>
> The restrictions outlined in this plan will be effective until you demonstrate a sustained, acceptable level of attendance and the ability to meet established standards. Your attendance record will be periodically reviewed to determine if a lifting of the restrictions, in whole or part, is merited.
>
> Failure to adhere to Department regulations, established standards and/or the directions outlined in this improvement plan will be viewed as unwillingness, rather than inability, to meet the required standards of work and will result in disciplinary action up to and including termination of your employment.

. . . .

Respondent's Ex. 1 at 1-3 (emphasis added).

24. The letter ended by advising Grievant of her right to respond to the letter in writing or in person within three working days of the date of the letter, with detailed appeal rights outlined. *Id*.

25. Ms. Cyrus and Deputy Commissioner Beane met with Grievant on April 16, 2012, regarding Grievant's poor attendance and formally outlined the contents of the April 13 letter.

26. Grievant had an opportunity to respond to the allegations in the April 13 letter but did not do so nor did she respond to such in writing at any time. Grievant never denied or challenged that her leave patterns evidenced leave abuse, specifically hooking as defined in the letter. *Id.*

27. Grievant did not question the requirements for attendance improvement plan compliance as set forth in the April 13 letter and as fully discussed in the April 16 meeting.

28. Grievant understood the reason for the attendance improvement plan.

29. Grievant understood what she needed to do to comply with the attendance improvement plan requirements.

30. Grievant's attendance did not improve nor did her compliance with the reporting requirements of the MLOA policy and the attendance improvement plan.

31. Grievant did not report absences in the manner required in the attendance improvement plan, *i.e.* by direct call to Tanya Cyrus and if Ms. Cyrus could not be reached, by direct call to Deputy Commissioner Beane.

32. Deputy Commissioner Beane's direct line rolls to her secretary if she is unavailable, and continues to roll to a live person until one is reached so that her line is always answered.

33. On May 2, 2012, Grievant left a voicemail message for Ms. Cyrus advising that she would be taking the remainder of the week [May 2, 3, 4] as FMLA and further advised that she would "like to come in on Friday 5/4 to complete her paperwork" for a Continuous Medical Leave of Absence benefit request. She also sent an email to Ms. Cyrus on that same day reiterating her intentions to take the remainder of the week off as FMLA.

34. Per her voicemail, Grievant did not work on May 2, 3, or 4, 2012.

35. On May 4, 2012, Grievant did not go to the BMS office to file for Continuous Medical Leave of Absence benefits.

36. Grievant did not report to work on Monday, May 7, 2012. She did not call to report that she would be absent on that day, as required by the MLOA policy and/or

attendance improvement plan. Grievant texted Ms. Martha Edens, BMS HR Director, on that day, however, and advised that she could not make it on that day to fill out the Continuous Medical Leave of Absence benefits paperwork but that she would come in the next day.

37. May 8, 2012 was a state holiday.

38. Grievant did not report to work on Wednesday, May 9, 2012. She did not call to report that she would be absent on that day as required by the MLOA policy and/or attendance improvement policy.

39. Grievant did not report to work on Thursday, May 10, 2012. She did not call to report that she would be absent on that day as required by the MLOA policy and/or attendance improvement policy.

40. Grievant did not report to work on Friday, May 11, 2012. She did not call to report that she would be absent on that day as required by the MLOA policy and/or attendance improvement policy.

41. Grievant did not report to work on Monday, May 14. 2012. She did not call to report that she would be absent on that day as required by the MLOA policy and/or attendance improvement policy.

42. On May 14, 2012, Deputy Commissioner Beane sent Grievant a certified letter[1]:

> The purpose of this letter is to determine your intentions relative to your employment with the Bureau for Medical Services . . . You called in and left a voicemail message on May 2, 2012 to your supervisor, Tanya Cyrus indicating that

[1] On that same day an amended letter, dated May, 2012, was sent Grievant, correcting Grievant's deadline to provide the documentation therein from "Friday, May 21, 2012" to "Monday, May 21, 2012."

> you would be in on Friday, May 04, 2012 to complete your April timesheet and to request a Continuous Medical Leave of Absence. You cannot be approved for a Continuous Medical Leave of Absence until we have received the proper request form and physician's statement from you. The time you have been off will be counted as unauthorized leave until we have received the completed, proper forms. In order to request a Continuous Medical Leave of Absence, you will need to complete the enclosed DOP L/4 and have your treating medical professional complete the enclosed Physician's/Practitioner's Statement (DOP-L3) indicating your need for a continuous Medical leave of absence no later than 9:00 am on **Monday, May 21, 2012**.
>
> If you fail to request a continuance medical leave of absence or return to work by **Monday, May 21, 2012**, I 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 **June 06, 2012.** If such action becomes necessary, that action is based on section 14.8(d) of the Administrative Rule and in compliance with DOP Administrative Rule 12.2.
>
> You have the opportunity to either meet with me in person or present me with a written explanation indicating why you believe the facts and grounds contained in this letter are in error and why you may think this action is inappropriate. You must submit your explanation within fifteen (15) days of the date of this letter.

. . . .

Respondent Ex. 2 at 1 (amended letter) (emphasis in original.)

43. Grievant did not report to work on Tuesday, May 15, 2012. She did not call to report that she would be absent on that day as required by the MLOA policy and/or attendance improvement policy.

44. Grievant did not report to work on Wednesday, May 16, 2012. She did not call to report that she would be absent on that day as required by the MLOA policy and/or attendance improvement policy.

45. The May 14, 2012 amended letter was signed for by "T. Hall" and delivery accepted on May 16, 2012.

46. Grievant did not report to work on Thursday, May 17, 2012. She did not call to report that she would be absent on that day as required by the MLOA policy and/or attendance improvement policy.

47. Grievant did not report to work on Friday, May 18, 2012. She did not call to report that she would be absent on that day as required by the MLOA policy and/or attendance improvement policy.

48. Grievant did not communicate in any manner with Ms. Cyrus or Deputy Commissioner Beane from May 7, 2012 through May 18, 2012.

49. Grievant testified that most of the time she used her government email to advise Ms. Cyrus when she would be absent and that she does not now have access to that account; even if this is case, emailing Ms. Cyrus does not comply with either the requirements of the MLOA policy as set forth in the February 23, 2012 letter or the attendance improvement plan requirements as set forth in the April 13, 2012 letter and the April 16, 2012 meeting. Grievant further testified that she does not know how she advised Ms. Cyrus she would be absent on the days of May 7, 9, 10, 11, 14, 15, 16, 17, 18, or 21. Ms. Cyrus denies having received any communication from Grievant from May 7, 2012 to May 18, 2012.

50. On May 18, 2012, Grievant slid, under Martha Edens' locked office door, "a Doctor's excuse for 4/6/12 to 4/13/12 to return on 4/14/12; DOP L3 for 4//26/12 to return on 4/27/12; DOP L3 for 4/27/12 to 4/30/12 to return on 5/1/12; and a DOP L-4 completed by you for a Continuous Medical Leave of Absence for the period of 5/1/12 to 6/30/12." Respondent Ex. 3 at 1. Grievant did not contact either Ms. Cyrus or Ms. Edens

regarding the forms or her delivery thereof. Ms. Edens found the forms on her office floor on Monday, May 21, 2012. Grievant's badge had been used to enter the building on Friday, May 18, 2012 at 11:04 a.m.

51. On May 18, 2012, Grievant only provided a DOP-L4 that she filled out. Grievant did not comply with the requirements set forth in the May 14, 2012 amended letter requiring her to provide, as application for Continuous Medical Leave of Absence benefits, a DOP-L4 and a DOP-L3 completed by her treating medical professional physician statement.

52. Grievant advised Ms. Cyrus on Monday May 21, 2012, that she was unable to provide the DOP-L3 because she owed her doctor money and, as such, he refused to fill out the DOP-L3 form. Ms. Cyrus told her that she, Ms. Cyrus, needed to speak with someone else to determine if Grievant could be allowed more time to comply with the May 14, 2012 letter, as amended. Ms. Cyrus did not again contact Grievant regarding Grievant's request for additional time to comply with the May 14 letter, as amended, mandates.

53. West Virginia Division of Personnel Administrative Rule § 12.2 (c) states:

> An appointing authority may dismiss an employee for job abandonment who is absent from work for more than three consecutive workdays without notice to the appointing authority of the reason for the absence as required by established agency policy. The dismissal is effective fifteen calendar days after the appointing authority notifies the employee of the dismissal. Under circumstances in which the term job abandonment becomes synonymous with the term resignation, an employee dismissed for job abandonment is not eligible for severance pay.

54. Grievant missed ten (10) days of work without notifying her supervisor of the reason for the absence as required by established and clear agency policy.

55. Grievant knew she would be terminated for failure to abide by the requirements set forth in the May 14, 2012 amended letter.

56. Grievant failed to abide by the requirements of the May 14, 2012 amended letter.

57. The May 14, 2012 amended letter advised Grievant that she had the right to contest the requirements of the letter and did not do so.

58. Grievant was terminated by certified letter dated May 21, 2012. The letter was left at Grievant's residence, at the front door without a signature, in error[2], on May 22, 2012. Therein, Grievant was advised that she was terminated effective June 6, 2012, due to job abandonment for failure to adhere to the requirements of the May 14, 2012 amended letter and to provide appropriate documentation to apply for Continuous Medical Leave of Absence benefits. Grievant acknowledges she received the May 21, 2012 letter.

59. The May 21, 2012 letter set forth Grievant's rights to contest the termination, advising that she could respond to the letter in writing or in person within 15 calendar days, at which point her termination would become effective. Therein, Grievant was also advised of her appeal rights and afforded the opportunity to request a meeting prior to termination.

60. Grievant did not avail herself of her right to a meeting to voice her opposition to termination.

61. Throughout the fall of 2011 and spring of 2012, Grievant's communication

[2] The Fed Ex tracking slip indicated that the letter was to be signed for but then states that the letter was left at the front door as no signature was required. Respondent should have resent the letter, insuring proper delivery.

regarding her absenteeism was poor, not always communicated in the manner it was supposed to be, and, thus, ineffective, under the clear guidelines set forth by her superiors and policy.

Discussion

The burden is on the employer to prove that the action taken in this matter was justified. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. W. Va. Code § 29-6A-6; *Davis v. W. Va. Dept. of Motor Vehicles,* Docket No. 89-DMV-569 (Jan. 22, 1990); *Broughton v. W. Va. Div. of Highways,* Docket No. 92-DOH-325 (Dec. 31, 1992). "[G]ood cause" means "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. West Virginia Department of Finance and Administration*, 164 W. Va 384 (1980); *Guine v. Civil Service Commission*, 149 W. Va 461 (1965).

Initially, there is an outstanding procedural matter to be resolved. Grievant challenges Respondent's objection to a letter Grievant attempted to introduce at the level three hearing, marked as Grievant Exhibit 1. Respondent's objection was premised on Grievant's failure to produce the letter in response to discovery requests issued Grievant by Respondent on September 5, 2012. Though marked as Grievant Exhibit 1, the letter was not admitted into evidence at hearing, rather the undersigned held the ruling on admissibility in abeyance. The Grievance Board procedural rules encourage informal discovery but also allow for formal discovery to be issued by either party if authorized by the administrative law judge. 156 C.S.R. 1 § 6.12.1 (2008). Respondent did not seek leave to pursue formal discovery in this matter and, thus, Grievant did not have a duty to respond to the issued discovery.[3] Based on the foregoing, the undersigned **GRANTS** Grievant's motion to move Grievant's Exhibit 1 into evidence in this matter and will afford it such weight as the undersigned believes is warranted in the determination of the grievance.

As to the merits, Grievant asserts that she was terminated without good cause.

Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgment

[3] It should be noted, however, that Grievant's representative's assertion at hearing that the letter was not responsive to the formal discovery request, if the formal discovery were to be recognized as properly served, is unfounded. Grievant's Exhibit 1 would have been responsive to the discovery request's "Request for Production of Documents."

for that of the employer. *Jordan v. Mason County Bd. of Educ*., Docket No. 99-26-080 (July 6, 1999); *Tickett v. Cabell County Bd. of Educ*., Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ*., Docket No. 97-06-150 (Oct. 31, 1997).

Ms. Cyrus met informally with Grievant in the fall of 2012 regarding her absenteeism. On February 11, 2012, Grievant was afforded the benefit of Intermittent Medical Leave of Absence. Respondent Ex. 7. Grievant admitted that she regularly failed to comply with the notification requirements therein when she testified that she utilized her government email account to email Ms. Cyrus that she would be absent rather than by calling Ms. Cyrus as directed in the February 23 letter granting MLOA benefits to so do.

Grievant was admonished for her failure to comply with MLOA notice requirements and for excessive absenteeism by letter on April 13, 2012, which also set forth an attendance improvement policy. Grievant failed to adhere to the clear mandates of the attendance improvement policy as set forth in the April 13 letter, and fully discussed in the April 16 meeting with Deputy Commissioner Beane and Ms. Cyrus regarding the attendance improvements mandates set forth the April 13 letter. Grievant acknowledges that she understood the mandates contained in the April 13 attendance improvement policy letter. Grievant asserts that said mandates, particularly the requirement that she call Ms. Cyrus, and if Ms. Cyrus could not be reached, she call Deputy Commissioner Beane, is a prohibited employment restriction. This mandate is no more stringent than that set forth in the MLOA policy Grievant was already expected to adhere to, as set forth in the February 23 letter, and thus, the undersigned does not find that such created an

obstacle to Grievant's use of her MLOA benefit. To the contrary, Grievant took full advantage of the MLOA benefit granted her by Respondent as evidenced by her own testimony and timesheets admitted at the hearing. *See* Respondent Ex. 9. Grievant also asserts that Respondent failed to prove that she should have been subjected to the attendance improvement policy because Respondent failed to prove that she abused leave.

The above arguments are of no consequence because regardless of whether Grievant should or should not have been subjected to an attendance improvement plan; she was still subject to the policies outlined in the February 23, 2012 letter governing requirements for compliance with the MLOA policy, a benefit of which she availed herself, and she did not adhere to such requirements when she failed to contact Ms. Cyrus from May 8 to May 18 regarding her absenteeism.

Grievant asserts that she contacted Ms. Cyrus in some manner on each of the dates between May 8 to May 18, 2012 to advise that she would be absent due to illness but that she does not know the manner in which she contacted Ms. Cyrus. The undersigned does not find Grievant's testimony that she contacted Ms. Cyrus on each day between May 8 and May 18, 2012 to be credible. Some factors to consider in assessing the credibility of a witness include the witness's demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the

witness' information. *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999).

Grievant was openly hostile during much of her testimony. The undersigned assesses that Grievant is a smart woman, by virtue of the role she played at BMS and the faith put in her by her superiors to perform that role in an important unit that had only four employees, as well as by the undersigned's interaction with and observance of her during the level three hearing. Thus, I find that Grievant was capable of understanding the instructions set forth in the February 23, 2012 letter, the April 13, 2012 letter, and the May 14, 2012 amended letter, yet she continually, by her own admission, failed to comply with the clear mandates contained in those letters. Grievant testified she believed she had been granted the ability to avail herself of federal FMLA benefits contrary to that February 23, 2012 letter setting forth that she was being granted Intermittent Medical Leave of Absence benefits and the requirements for compliance regarding the benefit policy. The February 23, 2012 letter does not state that she was granted FMLA benefits. For the aforementioned reasons, the undersigned does not find Grievant's testimony as regarding her belief that she was approved for FMLA benefits credible. The evidence points to an unwillingness to comply with the clear mandates of reporting absenteeism to Ms. Cyrus via telephone, in compliance with the MLOA policy and the attendance improvement policy, rather than an inability to do so.

West Virginia Division of Personnel Administrative Rule § 12.2 (c) states:

> An appointing authority may dismiss an employee for job abandonment who is absent from work for more than three consecutive workdays without notice to the appointing authority of the reason for the absence as required by established agency policy. . . .

Grievant was absent from work from May 9 through May 18, totaling 8 working days. Grievant did not contact her employer *at all* during this time. It is inconceivable that any similarly situated employee, *even without* the clear mandates set forth for Grievant in the February 23 and April 13 letters, would not show up for work for eight days without checking in with their employer.

Respondent proved by a preponderance of the evidence that it had "good cause" to terminate Grievant's employment for job abandonment, not only by meeting the minimum criteria to merit such a termination in number of consecutive days missed, but also because Grievant's conduct substantially and directly affected the rights and interest of the public, and more specifically of the poor, disabled and infirmed of West Virginia. *See* Syl. Pt. 1, *Oakes v. West Virginia Department of Finance and Administration*, 164 W.Va 384 (1980); *Guine v. Civil Service Commission*, 149 W. Va 461 (1965).

Grievant was one of four people who served in a critical BMS unit, a unit responsible for the handling and reporting of a $300 billion dollar budget, a unit dedicated to serving 400,000 West Virginians and 25,000 practitioners. Grievant's absence, though not directly linked to deadlines missed in reporting, could very well have contributed to such and, had it continued, almost certainly would have contributed to such. Given that monies utilized and reported were partly federal, the missing of deadlines could in fact harm the State of West Virginia in a real way by leading to punitive fines. The undersigned **FINDS** that Respondent has carried its burden and proven its case by a preponderance of the evidence.

Grievant contends that her constitutional due process rights were violated because she did not have a predetermination meeting prior to termination, therefore, her dismissal should be invalidated. She contends that she did not know about her termination until the end of May, 2012, and, thus, was not afforded the opportunity to be heard.

The West Virginia Public Employees Grievance Board recognizes, as set forth in *Scragg v. West Virginia Board of Directors at West Virginia State College*:

> It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right in his employment may not be deprived of that right without due process of law. n2 "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway , 238 F.Supp. 228 (W. Va. 1968); see*, *Buskirk v. Civil Service Commission of W. Va. , 332 S.E.2d 579 (W. Va. 1985); Edwards v. Berkeley Co. Bd. of Educ.* , Docket No. 89-02-234 (Nov. 28, 1989). "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Board of Education v. Loudermill , 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494,* (1985), citing, *Mullane v. Central Hanover Bank & Trust Co. , 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).* One essential ingredient of due process is that an individual facing a deprivation of his or her right to employment must be given "some kind of hearing" on the issue before termination. Cleveland Board of Education v. Loudermill , *Id. , 470 U.S. at 542.* n3 "The chance to be heard, to present one's side of the story, is a fundamental requirement of any fair procedural system." *Id., 470 U.S. at 546.* A full-blown hearing is generally not required before an employee may be terminated but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Id., 470 U.S. at 542.*
>
> Further, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them opportunity to present their objections." n4, *Vanscoy v. Neal , 322 S.E.2d 37, 40 (W. Va. 1984).* Aside from all else, "due process" means fundamental fairness. *Pinkerton v. Farr , 220 S.E.2d 682 (W. Va. 1975).*

Scragg v. West Virginia Board of Directors at West Virginia State College, Docket Number 93-BOD-436 (1994.)

This defense is without merit because Grievant was advised on two occasions, in the May 14, 2012 amended letter and in the May 21, 2012 termination letter, that she would be in fact be terminated for job abandonment for failure to provide the necessary forms to apply for Continuous Medical Leave of Absence benefits on or before May 21, 2012.

Pursuant to W. Va. C.S.R. § 143-1-12.2.c. (2012):

> 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.

(Emphasis added.)

Grievant knew she owed her doctor money and that she could not provide the DOP-L3 form on or before May 21, 2012 as required by the May 14, 2012 amended letter. She was advised in both the May 14 and May 21 letters that she would be afforded the opportunity to respond either orally or in writing to the matters contained therein. When Grievant called Ms. Cyrus on May 21, 2012, she did not, however, request a meeting so that she could voice objection regarding the mandates outlined in the May 14 letter (amended) or as regarding her potential termination; rather, she requested additional time to provide the DOP-L3 form from her doctor. Grievant's long history of noncompliance with reporting absences under the MLOA policy and the attendance

improvement policy lent itself to her unwillingness to comply with the May 14 mandate.

Rule 12.2.c requires only a fifteen day notice when the reason for termination is job abandonment. Reading Rule 12.2.c in *para materia* with Rule 12.2.a, it is clear that job abandonment is treated differently than most other reasons for termination and that Grievant need not be afforded a predetermination meeting prior to dismissal. *See* 143 C.S.R. 1 § 12.2.c. (2012); *cf*. 143 C.S.R. 1 § 12.2.a. (2012). In this instance, Grievant was given fifteen days notice of her termination as required by Rule 12.2.c and was further afforded the right to be heard regarding her termination. Grievant did not avail herself of such opportunity to be heard. *See* Respondent Exhibit 3. Thus, the undersigned **FINDS** that Grievant's due process rights were not violated.

The undersigned further **FINDS** that Grievant's Exhibit 1, regardless of the evidentiary weight afforded such, does not constitute a defense for Grievant's failure to request a meeting as set forth in the May 21 letter. This is so because Grievant was advised that she would be dismissed for job abandonment on May 21, effective June 6, in the May 14 letter (amended), if she failed to comply with the May 14 letter mandates. *See* Respondent Exs. 2, 3. Therefore, it does not matter when she became aware of the May 21 letter or if such awareness was delayed because she was in a multidisciplinary facility for treatment of her medical conditions for she knew that she would be terminated for job abandonment and that she could request a meeting prior to her termination effective date.

Conclusions of Law

1. The burden is on the employer to prove that the action taken in this matter was justified. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence. Procedural Rules of the W.Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. W.Va Code § 29-6A-6; *Davis v. W. Va. Dept. of Motor Vehicles,* Docket No. 89-DMV-569 (Jan. 22, 1990); *Broughton v. W. Va. Div. of Highways,* Docket No. 92-DOH-325 (Dec. 31, 1992). "[G]ood cause" means "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. West Virginia Department of Finance and Administration*, 164 W.Va 384 (1980); *Guine v. Civil Service Commission*, 149 W.Va 461 (1965).

3. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No.

96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgment for that of the employer. *Jordan v. Mason County Bd. of Educ*., Docket No. 99-26-080 (July 6, 1999); *Tickett v. Cabell County Bd. of Educ*., Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ*., Docket No. 97-06-150 (Oct. 31, 1997).

4. The Grievance Board procedural rules encourage informal discovery but also allow for formal discovery to be issued by either party. 156 C.S.R. 1 § 6.12.1 (2008).

5. *Scragg v. West Virginia Board of Directors/West Virginia State College*, Docket Number 93-BOD-436 (1994) establishes:

> It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right in his employment may not be deprived of that right without due process of law. n2, "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway , 238 F.Supp. 228 (W. Va. 1968); see*, *Buskirk v. Civil Service Commission of W. Va., 332 S.E.2d 579 (W. Va. 1985); Edwards v. Berkeley Co. Bd. of Educ.* , Docket No. 89-02-234 (Nov. 28, 1989). "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Board of Education v. Loudermill , 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494,* (1985), citing, *Mullane v. Central Hanover Bank & Trust Co. , 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).* One essential ingredient of due process is that an individual facing a deprivation of his or her right to employment must be given "some kind of hearing" on the issue before termination. Cleveland Board of Education v. Loudermill, *Id., 470 U.S. at 542.* n3, "The chance to be heard, to present one's side of the story, is a fundamental requirement of any fair procedural system." *Id., 470 U.S. at 546.* A full-blown hearing is generally not required before an employee may be terminated but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Id., 470 U.S. at 542.*

> Further, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them opportunity to present their objections." n4, *Vanscoy v. Neal, 322 S.E.2d 37, 40 (W. Va. 1984).* Aside from all else, "due process" means fundamental fairness. *Pinkerton v. Farr, 220 S.E.2d 682 (W. Va. 1975).*

6. Some factors to consider in assessing the credibility of a witness include the witness's demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999).

7. Pursuant to 143 C.S.R. 1 § 12.2.c. (2012):

> 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.
>
> (Emphasis added.)

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* West Virginia 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 West Virginia 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: January 28, 2013

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Heather D. Foster Kittredge
Administrative Law Judge