ROGER CHANNELL,

Grievant,

v. **Docket No. 01-CORR-530**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL
CENTER,

Respondent.

DECISION

Roger Channell ("Grievant") initiated this proceeding on August 20, 2001, alleging he was improperly denied permission to work "light duty" by his employer, Respondent Division of Corrections ("DOC"). He seeks as relief to have the leave used during a six- week period in the summer of 2001 returned to him. The grievance was denied at level one on August 24, 2001, and at level two on September 10, 2001. A level three hearing was held on September 27, 2001, and the grievance was denied at that level on October 3, 2001. Grievant appealed to level four on October 15, 2001. After several scheduled hearings were continued for good cause shown, and this matter was held in abeyance at Grievant's request, the parties elected to have a decision rendered based upon the record developed below. Grievant was represented by Brian Simmons, and Respondent was represented at level three by Warden William Haines and at level four by counsel, Leslie K. Tyree. This matter became mature for consideration on May 15, 2002, the deadline for the parties' fact/law proposals. (See footnote 1) The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed at Huttonsville Correctional Center ("HCC") as a unit manager.
2. In June of 2001, Grievant developed swelling in his arm, for which he sought medical

attention. To date, the cause of the swelling has not been diagnosed.

3. Within a few days of July 1, 2001, Grievant informed his supervisor, Jerry Haney, that his doctor had advised Grievant to use his arm as little as possible. Mr. Haney asked Grievant to provide him with a doctor's statement regarding his condition.

4. On July 1, 2001, Grievant provided Mr. Haney with a doctor's slip, which stated that Grievant should perform “light duty” for six weeks.

5. Mr. Haney orally advised Grievant that it has been HCC's policy not to allow employees who have direct contact with inmates to perform light duty, because of the possibility that the employee may not be able to defend himself in the event of a physical altercation with an inmate.

6. Grievant took sick leave from July 2, 2001, through August 13, 2001, due to the condition of his arm and Mr. Haney's refusal to allow him to work light duty.

7. Connie Purden, case manager at HCC, injured her big toe in July or August of 2000, and wore a protective “bootie” to work. She was not under any restrictions from a physician at that time.

8. James Smith, a correctional counselor at HCC, broke his ankle (date unknown) and was not allowed to return to work on light duty. 9. Bill Easley, Associate Warden of Operations, suffered a broken arm approximately six years ago. He returned to work with a cast on his arm, and he had been released by his physician. His job duties require contact with inmates, whom he interviews from his office.

10. Michael Judy, trustee clerk, injured his knee in July of 2000. He returned to work in a knee brace and on crutches. When he returned to work, Mr. Judy's physician provided a report that stated he could continue to perform his job duties. Mr. Judy's job required contact with one inmate, who was a janitor, but he did not have contact with the general inmate population.

11. Albert Fordyce, unit manager at HCC, injured his toe and was on crutches for approximately two days in August, 2000. His doctor had not placed any restrictions on his ability to work at that time.

12. Delmas Graham, correctional counselor at HCC, injured his knee in early 2001. He returned to work in a knee brace, and his doctor provided a statement that he was able to work.

13. Grievant returned to work from sick leave on August 13, 2001, and filed this grievance on August 20, 2001.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va.Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6.

As a preliminary matter, Respondent had argued at the lower levels in this grievance that it was untimely filed. W. Va. Code §29-6A-4(a) provides that a level one grievance be filed within "ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance . . . ." However, W. Va. Code §29-6A-3(a) provides in pertinent part:

> A grievance must be filed within the times specified in section four [§29-6A-4] of this article . . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

Accordingly, the statutory ten-day time limit was tolled while Grievant was on sick leave from July 2, 2001, through August 13, 2001. Grievant filed his grievance within ten days of his return to work--on August 20, 2001--so the grievance is timely.

Grievant argues that Respondent's refusal to allow him to work under a light duty restriction was wrong in two respects. First, he contends that other employees at HCC have been allowed to return to work wearing casts or braces or using crutches, so he has been subjected to discrimination. He also believes that DOC failed to follow the applicable portion of the Division of Personnel ("DOP") Administrative Rule, entitling him to restoration of his used sick leave.

W. Va. Code § 29-6A-3(m) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order toestablish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the grievant must show:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18,1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant has attempted to compare himself to several other HCC employees whom he believes were similarly situated. However, the evidence of record fails to establish a prima facie case of discrimination. First, none of the employees who testified at the level three hearing presented a doctor's statement prescribing light duty work, except James Smith, whose request for light duty--like Grievant's--was refused. In addition, the record is devoid of any description of the duties of these other employees vis a vis their interaction with inmates, except for the one other unit manager. As to the unit manager, whose duties are presumably the same as Grievant's, he was only at work on crutches for two days, with no prescribed restriction from his physician. Although one could argue, as Grievant has,that even without the physician's restriction, it would seem obvious that Mr. Fordyce would not have been able to defend himself from an inmate attack while on crutches, he did only present himself at work in this condition for two days, a portion of which was spent in a staff training seminar. Conversely, Grievant presented a physician's statement restricting his activities for six weeks, which makes his situation different from that of Mr. Fordyce.

Grievant also argues that DOC's refusal to allow him to work light duty violates the following portion of DOP's Administrative Rule:

> (h) Return at Less Than Full Duty _ The appointing authority may permit an employee to return to work from sick leave at less than full duty, but the terms of return shall be in writing and are subject to review by the Director. The review may include the requirement of additional information from a physician regarding the employee's ability to perform the essential duties of his or her job.

> 1. Any denial of an employee's request to return to work at les than full duty must be approved by the Director.
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> 2. The Director may deny the request to return to work at less than full duty under conditions including, but not limited to, the following:
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> (a) The employee cannot perform the essential duties of his or her job;
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> (b) The nature of the employee's job is such that it may aggravate the employee's medical condition; or
>
> (c) The approval of the request would seriously impair the conduct of the agency's business.

DOP Administrative Rule, § 14.4(h) (2000).

Grievant contends that DOC violated this provision by not submitting his request to return to work at light duty to the Director, which is defined in Section 3.28 of the Rule as the “Director of Personnel . . . who serves as the executive head of the Division of Personnel.” Through Warden Haines, DOC admitted at the level three hearing in thisgrievance that it did not submit Grievant's request to the Director of DOP, as required by the Rule. However, this alone does not establish Grievant's entitlement to relief. As Warden Haines explained, Grievant's request was refused due to his contact with the general inmate population and potential for physical altercations, which could have aggravated Grievant's condition. Potential aggravation of the employee's condition is one of the bases for refusal of a return to work at less than full duty, and Grievant has provided no evidence regarding the specific nature of his duties or his ability to perform them with his injury. He has not introduced evidence which would show that Warden Haines' concern was without basis. Absent specific evidence regarding Grievant's condition and his job duties, the undersigned has no basis upon which to conclude that refusal of his request for light duty was unreasonable.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In non-disciplinary matters, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. In order to establish a prima facie case of discrimination, as defined in W. Va. Code § 29-6A-3(m), a grievant must show:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18,1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

3. Grievant failed to establish a prima facie case of discrimination regarding Respondent's refusal to allow him to work light duty.

4. An employee's request to return to work at less than full duty may be denied on the basis that the nature of the employee's job is such that it may aggravate the employee's injury. Division of Personnel Administrative Rule, § 14.4(h) (2000).

5. Grievant has failed to prove by a preponderance of the evidence that he was entitled to work at less than full duty for six weeks, or that Respondent's refusal violated Administrative Rule § 14.4(h).

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such

appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealingparty must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: May 30, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Neither party submitted a written argument at level four.