MATT McMILLION,

Grievant,

v. **DOCKET NO. 05-CORR-340**

DIVISION OF CORRECTIONS/

ANTHONY CORRECTIONAL CENTER,

Respondent.

DECISION

Grievant Matt McMillion, on July 11, 2005, filed a grievance against his employer, Anthony Correctional Center (ACC), claiming “Against medical orders I am scheduled to work security in Dining Halls. My treating Physician will not release me for security type posts. ACC Administration was told of my condition prior to my returning to work.” As relief, he seeks a modification of duties to meet his physician's orders, and proper training. He further seeks to be released from the obligation of working security posts.

A level four hearing was held in the Grievance Board's Beckley office on October 26, 2005. Grievant was self-represented, and Respondent was represented by counsel, John Boothroyd. The matter became mature for decision on November 28, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant was injured on the job and was off work on Workers' Compensation for several months. After his benefits ended, he took an unpaid medical leave of absence for several more months. Grievant returned to work, but sought to have security duties removed from his job to accommodate residual effects of his injury. Respondent contends Grievant is not disabled and is able to perform all the duties his job requires. At level four, Grievant attempted to raise discrimination as an issue, claiming another employee had been given an accommodation similar to what he seeks, but the grievance was never amended to include this allegation, and that argument will not be addressed.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed as a Correctional Counselor 1 at Anthony Correctional Center (ACC).

2. In December 2002, Grievant injured his right shoulder while at work, and from December 15, 2002 to February 27, 2004, was off work while receiving Workers' Compensation benefits. When Grievant was deemed ineligible to receive further Workers' Compensation benefits, he requested unpaid medical leave, which request Respondent granted.

3. An Independent Medical Examination of Grievant, performed by Dr. Ian Archibald, M.D., was the subject of his report dated August 27, 2004. The report indicated Grievant's original injury was “likely a posterior dislocation or subluxation of the rightshoulder,” and also noted Grievant suffered a prior, similar injury of the same shoulder in 1989. The report describes Grievant as “a very healthy, fit-appearing 33 y/o white male who is 6'5" in height and 207# in weight,” with “general excellent muscular conditioning . . . He is still an avid outdoor enthusiast with his primary activity being kayaking.” The report states, in part:

> [Grievant's] primary complaint is weakness in his arm with any type of overhead movement. He has excellent strength in his arms when they are at his side; does not feel he has any restriction in ability to lift from the ground up to waist level but once he attempts to do any type of lifting overhead he has significant weakness. This is the primary problem that has prevented him from returning to work at the Anthony Correctional Center, and there has been a complete agreement that he is incapable of returning to that work because of this problem by his treating physician Dr. Weidman, his surgeon Dr. Diduch, and the IME physician Dr. Bachwitt.
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> [H]e would rate a 1% impairment for loss of forward elevation; a 2% impairment for loss of abduction; a 0% impairment for his loss of adduction; a 4% impairment for his loss of internal rotation; a 0% impairment for loss of external rotation; 0% impairment for loss of extension. This totals a 7% impairment of the right upper extremity.

Dr. Archibald also speculated that additional testing (not performed) would add an extra 10% disability for general loss of strength, which, combined with his previously- discussed impairments, would yield an overall, whole-body impairment of 10% and an upper extremity impairment of 16%. Dr. Archibald prognosticated this was a permanent impairment with no hope for further improvement.

4. By letter dated June 6, 2005, ACC Warden Scott Patterson responded to an

Accommodation Request made by Grievant in a meeting held on May 23, 2005. Grievant claimed his impairment as a disability and requested as an accommodation that he never be placed in a situation where he was solely responsible for the security of offenders, orwhere he would be required to physically restrain offenders. Grievant provided a form from his physician, Dr. Weidman.

5. The Medical Inquiry Form filled out by Dr. Weidman stated, in part, that Grievant “will have difficulty if required to restrain inmates,” and that Grievant is “very capable of carrying out work activities as a counselor.” However, the Dr. Weidman also stated that Respondent should have “security personnel available to restrain inmates if that becomes necessary,” and that Grievant is “unable to be solely responsible for security.”

6. The Correctional Counselor 1 Classification Specification includes as examples of work: “Counsels inmates in crisis situations; deals with potentially violent or suicidal inmates to stabilize their behavior.” and “May assist correctional officers on living unit.”

7. At ACC, assisting correctional officers often involves covering for them on security posts or supervising the dining hall while inmates are eating. In such situations, Grievant is assigned dining hall duty along with another ACC staff member.

8. Warden Patterson's letter informed Grievant that, upon his return to work, he would not be required to physically restrain inmates unless he was, in Grievant's discretion, at a “sound tactical advantage.” However, Warden Patterson clearly stated Grievant could not be guaranteed working conditions where he was never alone with inmates. He also stated Grievant would “at the very least have a radio for communication and that if a perceived threat arises from an offender or group of offenders, you are able to radio for assistance.” He denied that it would be a reasonable accommodation to provide Grievant with a personal bodyguard. More specifically, he instructed Grievant,

> Moreover, as provided for by our Operational Procedure, you are not and would not be required to physically restrain offenders. If a crisis arose, your responsibility would be to give clear verbal direction to the offender(s) involved, to call for assistance, to maintain custody/care/control of any other offender(s) in your charge, and to take no further action until/unless you feel you are at a sound tactical advantage (e.g. other employees arrive to assist). If a situation arises in which your physical condition does not allow you to be at a sound tactical advantage, physical action is not required.

9. The June 6 letter noted Grievant had been absent from work since December 15, 2002, and directed Grievant to return to work on June 22, 2005 or be dismissed for job abandonment.

10. Grievant returned to work on June 23, 2005 and filed this grievance on July 11, 2005. In

the level two written response to the grievance, dated August 10, 2005, Warden Patterson stated, "with respect to this grievance, and to the extent the same may be supported by the evidence which is developed in this case, the Division of Corrections raises, so as not to waive, the defense of statute of limitations/timeliness and all other affirmative defenses which are assertable or may be asserted as the evidence is developed." (See footnote 1)

Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Grievant has not asserted any authority that would entitle him to the relief he seeks. Hesimply asserts he has a disability, and that he is not fully capable of performing his job unless his assigned duties are limited in the way his physician specified. There is no dispute that Grievant suffered an injury and continues to be limited by the effects of that injury. However, Grievant has not proven that his limitation prevents him from performing his job as Warden Patterson has defined it for him.

The simple facts of the matter are that Grievant chose to work in a correctional facility, and he is going to have contact with inmates, and possibly be placed in peril by those inmates, just like every other staff member at ACC. This situation is a condition of employment and cannot be avoided. Further, there is no evidence that Dr. Weidman knows anything more about Grievant's job than what he told her, and her extremely specific suggested accommodations sound like nothing more than parroting what Grievant asked her to say. Oddly, Grievant's impairment does not prevent him from other activities, such as kayaking, a sport in which the undesigned takes notice often requires overhead exertion, and in which certain life-saving maneuvers always require strong and quick overhead exertion. (See footnote 2) There is no evidence that Grievant, even with his limitations, is at a significant disadvantage compared to his coworkers.

The following conclusions of law support this discussion:

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is morelikely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. Grievant has not proven, by a preponderance of the evidence, that he is incapable of performing, with the accommodations provided for in Warden Patterson's June 6, 2005, letter, the duties of Correctional Counselor 1.

For the foregoing reasons, this grievance is hereby **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 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 appealing party 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.

December 30, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Respondent appears to have abandoned any timeliness defense at level four.

Footnote: 2

Grievant's assertion that he is not limited in this activity calls into serious question the credibility of the extent of his limitation as he has reported them to his physicians.