DIANA KINCAID,

Grievant,

v.

Docket No. 04-PEDTA-376

WEST VIRGINIA PARKWAYS,

ECONOMIC DEVELOPMENT AND

TOURISM AUTHORITY,

Respondent.

DECISION

The grievant, Diana Kincaid ("Kincaid"), challenges the action of her employer, respondent West Virginia Parkways, Economic Development and Tourism Authority ("Parkways"), in enforcing a policy requiring a doctor's excuse every thirty days for employees who are on less than full duty. Kincaid claims that enforcement of this policy, as to her, was retaliation for having filed two prior grievances.

In her statement of grievance, Kincaid sets forth her request for relief as follows:

> Parkways contact PEIA and obtain an affidavit which grants permission for my Physician to bill my husbands [sic] insurance every thirty days and pay the grievant four hours upon each visit not regularly scheduled by my Physician.

OR

> Parkways accept all medical expenses incurred and pay four hours to the grievant upon each visit not regularly scheduled by my Physician.

> In addition, the grievant request [sic] that the Parkways give a complete and detailed explanation in letter form to the grievant why, on January 6, 2004, it became of utmost importance to enforce this Policy upon the grievant, bearing in mind that most weeks the Parkway [sic] Authority fails to schedulethe part-time collectors more than the minimum of twenty four [sic] hours. Also, explain why the Parkway [sic] Authority has deemed it necessary to question the integrity of any Physician who is licensed to practice medicine in the State of West Virginia.

> Make whole and complete in everyway [sic] taking into consideration any and all medical privacy rights of the grievant.

The grievance was denied at all lower levels. An evidentiary hearing was conducted at Level III on June 15 and August 25, 2004. The record of the underlying proceedings, including the transcript of the Level III hearing, is incorporated as part of the Level IV record. (See footnote 1)

The Level IV evidentiary hearing was held on January 26, 2005, in the hearing room of the West Virginia Education and State Employees Grievance Board in Beckley. Kincaid represented herself at the Level IV hearing, with the assistance of Priscilla Skidmore, Toll Collector at Barrier B. Parkways was represented by attorney A. David Abrams, Jr. This grievance matured for decision on March 21, 2005, upon receipt of proposed findings of fact and conclusions of law submitted on behalf of Parkways. Kincaid opted not to submit a proposed decision.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Kincaid is employed by Parkways as a Toll Collector on the West Virginia Turnpike.

2 2. Kincaid works part-time due to medical restrictions. As such she is considered to be working “less than full duty.”

3 3. “Less than full duty” status is not intended to be a permanent condition. Rather, it is a transitional step for an employee who has suffered an injury or other medical problem that allows them to ease back into work as such employee's condition improves.

4 4. As a part-time employee, Kincaid is guaranteed twenty-four hours of work per week

5 5. Kincaid is currently assigned to Barrier A, which is the toll booth facility near Ghent. Such facilities operate, and must be staffed, 24-hours a day.

6 6. Tim Furches ("Supervisor Furches") is the Plaza Supervisor at Barrier A. At each toll barrier there is one supervisor and several foremen who form the supervisory chain for the toll collectors.

7 7. The next supervisory level above Supervisor Furches is the Toll Director for Parkways. This position has been filled by Frank Steven Maynard ("Toll Director Maynard") since in or about October 2002.

8 8. Shortly after he stepped into that position, Toll Director Maynard realized that there were "an excessive number of employees working under doctors' excuses that was [sic] two and three and four years old[.]" Tr.53.

9 9. The number of employees working less than full duty due to medical restrictions was making it difficult to properly and fully staff the toll barriers.

10 10. To address this problem, Toll Director Maynard instructed the toll plaza supervisors to enforce Parkways Authority Personnel Policy III-5, (See footnote 2) which, in pertinent part, requires an employee who is on less than full-time status to submit an updated doctor's excuse every thirty days ("the medical update policy"). Tr.53.

11 11. The requirement for submission of an updated doctor's excuse every thirty days continues in effect until either the employee's condition improves or is determined to be permanent. Tr.35. As noted, less than full duty status is meant to be transitional, not permanent.

12 12. An updated doctor's excuse helps Parkways ascertain 1) whether the employee in question is still entitled to work at less than full duty, and 2) whether Parkways is complying with all of the appropriate medical restrictions relating to such employee. Tr.37-38.

13 13. There were approximately 45 or 50 employees working less than full duty at the time Toll Director Maynard directed the toll plaza supervisors to enforce the medical update policy. By the time of the Level III hearing, this number had been reduced to approximately 10 or 12. Tr.55.

14 14. The toll plaza supervisors are required to submit the updated medical excuses to Toll Director Maynard's office. This is to ensure that the medical update policy is being enforced. However, Toll Director Maynard does not review the substance of the medical excuses. He leaves the substantive review up to the toll plaza supervisors. Tr.55- 56.

15 15. Only the General Manager of Parkways has the authority to deny an employee's request to return to work at less than full duty. No such request has been denied. Tr.155-56.

16 16. There is a tunnel that toll collectors can use to safely reach the toll booths without having to cross lanes of traffic. Employees who use the tunnel must be able to negotiate stairs. Tr.113.

17 17. When Supervisor Furches was directed to implement the medical update policy, there were a number of employees at Barrier A who “were unable to use the tunnel because they couldn't climb stairs[.]” Based on the safety implications, Supervisor Furches initially focused his attention on obtaining updated medical excuses from the employees who had not been using the tunnel. Tr.107, 119.

18 18. At both Levels III and IV, Supervisor Furches acknowledged that he made a mistake by failing to address the medical update policy with respect to part-time employees, such as Kincaid. Tr.107, 119.

19 19. Supervisor Furches became aware of this mistake when a foreman asked him a question about the applicability of the medical update policy to part-time employees. Tr.120, 143. This discussion took place some time during early or mid-December 2003. Tr.121.

20 20. A vacation and holidays intervened between the realization that he had made a mistake and Supervisor Furches's efforts to properly implement the medical update policy at Barrier A. Tr.120, 135.

21 21. These efforts included sending a letter to Kincaid, dated January 6, 2004, informing her that “[a]ccording to WV Parkways policy III-5 any employee working at lessthan full duty must up-date every 30 days.” Noting that the doctor's excuse on file for her was dated August 26, 2003, Supervisor Furches advised Kincaid that her doctor's excuse needed to be “updated immediately and every 30 days there after [sic].” Resp.Exh.4 at IV.

22 22. Similar letters were sent to two other part-time employees who were not involved in any grievances. Tr.122-23.

23 23. The medical update policy had previously been called to Kincaid's attention by then-General Manager Lawrence F. Cousins. In correspondence to Kincaid, dated March 4, 2002, he stated that “Parkway's Policy dealing with less than full duty requires that the attending physician include a prognosis for the patient when requesting a reduced work schedule.” Resp.Exh.3 at III. He

further advised Kincaid that the same policy requires that the "employee and physician periodically update this prognosis and request extensions if more time is needed[.]" (See footnote 3) Resp.Exh.3 at III.

24 24. It is clear, however, that the medical update policy was not being enforced routinely, if at all, under Toll Director Maynard's predecessor.

25 25. At the time of the Level IV hearing, there were 44 employees at Barrier A, ten of whom were less than full-duty and ten of whom were temporary employees. (See footnote 4)

26 26. Once the medical update policy was properly implemented at Barrier A, the number of employees on less than full duty was reduced from approximately twelve to six. Tr.124-25.

27 27. In or about May 2002, Kincaid filed a grievance relating to promotions. There were a number of delays in the processing of this grievance, chiefly at Kincaid's request. As a result, this grievance was still pending at the time Kincaid received the January 6, 2004, letter from Supervisor Furches informing her she needed to update her medical excuse.

28 28. On January 5, 2004, Gregory C. Barr, General Manager of Parkways, ("General Manager Barr") received correspondence, dated December 30, 2003, from Kincaid relating to her discovery requests in the promotions grievance. At General Manager Barr's request, Carrie Roaché, Parkways's Director of Human Resources, drafted a response to Kincaid's discovery request, which was then reviewed, adopted, and signed by General Manager Barr.

29 29. Kincaid attributes significance to the fact that General Manager Barr received correspondence from her relating to her promotions grievance on January 5, 2004, and that Supervisor Furches wrote to her the next day, January 6, regarding the need to update her doctor's excuse.

30 30. On December 16, 2003, Kincaid and another employee filed a grievance relating to the E-Z Pass. A Level II proceeding in connection with the E-Z Pass grievance was conducted on January 5, 2004.

31 31. Kincaid attributes significance to the fact that the Level II proceeding in one of the grievances she filed took place on January 5, 2004, and that Supervisor Furches wrote to her the next day, January 6, regarding the need to update her doctor's excuse.

32 32. The policies and procedures manual is available to Parkways employees at their work sites. Due to its voluminous nature and the need for frequent updates to the manual, it would not be

feasible to provide a copy of the policy manual to each employee.

Discussion

Kincaid argues that Parkways required her to comply with its medical update policy in retaliation for filing grievances. This is actually a claim of reprisal, which is defined as “the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” W. Va. Code § 29-6A-2(p). This is not a disciplinary grievance. Therefore, Kincaid bears the burden of proving her allegations by a preponderance of the evidence.

A *prima facie* case of reprisal may be established by showing that 1) Kincaid engaged in protected activity, such as filing a grievance, 2) Kincaid was thereafter treated in an adverse manner by Parkways, 3) Parkways had actual or constructive knowledge that she engaged in the protected activity; and 4) there was a “causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.” *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). There is no dispute that Kincaid had filed two grievances before the medical update policy was applied to her. Nor is there any dispute that Parkways was aware that she had filed those grievances.

The points that remain in dispute are whether Kincaid was treated in an adverse manner and, if so, whether such adverse treatment was in retaliation for having availedherself of the grievance process. Kincaid is clearly displeased about being required to update her medical excuse every 30 days. (See footnote 5) However, such requirement does not rise to the level of “adverse treatment” upon which a claim of reprisal can be based. The medical update policy was in existence but not being enforced when Toll Director Maynard moved into the position of toll director in or about October 2002. The policy should have been applied to Kincaid when Toll Director Maynard gave orders for the policy to be given effect. However, Supervisor Furches candidly acknowledged that he failed to properly implement this order.

In this respect, Parkways was, albeit inadvertently, affording Kincaid and other part- time employees at Barrier A a grace period during which they were not called upon to update their medical excuses. Upon recognizing the oversight, Supervisor Furches corrected his mistake. This placed Kincaid in the same position she should have been in if Supervisor Furches had complied fully with Toll Director Maynard's instructions to enforce the medical update policy. Requiring Kincaid to comply

with the same policy that was applicable to her coworkers does not constitute an adverse employment action and, as such, does not support Kincaid's claim of reprisal.

Even if requiring Kincaid to comply with the medical update policy could be considered an adverse action for purposes of establishing a *prima facie* case of reprisal, Kincaid still cannot prevail. To do so, she would need to establish a causal connection between her actions in filing grievances and Parkways's action in requiring her to complywith the medical update policy. Significantly, this was a pre-existing policy that was already being applied to all employees under Toll Director Maynard's supervision. Toll Director Maynard's decision to enforce the policy, although his predecessor had not, was unrelated to Kincaid or her grievances.

The requisite causal connection is lacking, despite Kincaid's view that there was some significance to the timing of the letter from Supervisor Furches informing her that she needed to submit an updated doctor's excuse every thirty days. Supervisor Furches repeatedly explained that the timing of the letter to Kincaid was based upon his discovery that he made a mistake, followed by his vacation, and then followed by the holidays. There was only a coincidental relationship to the timing of any of the events relating to Kincaid's grievances. Because Kincaid cannot establish the causal connection between her grievances and the enforcement of the medical update policy, she cannot establish a *prima facie* case of reprisal.

The question repeated by Kincaid at Levels III and IV was why, for approximately two years, no one had asked her to update her doctor's excuse. Tr.46. At Level III, Human Resources Director Carrie Roaché explained that Supervisor Furches had simply “failed to do so.” Tr.46. This was the same explanation given by Supervisor Furches. This was nothing more sinister than a mistake. Kincaid has failed to establish that requiring her to comply with the medical update policy was an act of reprisal by Parkways.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, the grievant bears the burden of proof. W. Va. Code St. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 2. Kincaid must prove her allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (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 and Human Res.*, Docket No. 92- HHR-486 (May 17, 1993).

3 3. Reprisal is defined as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W. Va. Code § 29-6A-2(p).

4 4. To establish a *prima facie* case of reprisal, a grievant must prove the following:

> (1) that the grievant engaged in activity protected by the statute;
>
> (2) that the grievant's employer was aware of the protected activity;
>
> (3) that, thereafter, an adverse employment action was taken against the grievant by the employer; and
>
> (4) that the adverse action was the result of retaliatory motivation, or the action followed the grievant's protected activity within such a period of time that retaliatory motive can be inferred.*Dunford v. W. Va. Parkways Economic Dev. & Tourism Auth*., Docket No. 97-PEDTA-546 (June 24, 1998). In the oft-cited *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93- 01-543/544 (Jan. 31, 1995), this fourth factor has also been described as a "causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment."

5 5. Kincaid has failed to establish that it was an adverse action for Parkways to require her, along with all similarly situated toll collectors, to comply with a Parkways policy to provide an updated medical excuse every thirty days while she was working at less than full duty.

6 6. Because she has failed to demonstrate that there was an adverse action taken against her, Kincaid cannot establish a *prima facie* case of reprisal.

7 7. Even if requiring Kincaid to comply with the medical update policy could be considered an adverse action, Kincaid has failed to establish a causal connection between such requirement and the fact that she filed one or more grievances.

8 8. Absent such causal connection Kincaid cannot establish a *prima facie* case of reprisal.

9 9. On either or both of the foregoing grounds, Kincaid has failed to meet her burden of proof to establish even a *prima facie* case of reprisal.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filedwithin 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 West Virginia Code section 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.

Date:

June 14, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

References to pages in the Level III transcript shall appear as "Tr.__."

Footnote: 2

Resp.Exh.1 at Level III.

Footnote: 3

The letter did not specifically state that the updates had to be submitted every thirty days.

Footnote: 4

Temporary employees work when needed but without any benefits or any guarantee that they will be given any hours.

Footnote: 5

Contrary to Kincaid's assertion, the policy does not require the employee to actually visit the doctor every thirty days.