THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

MILLARD PRESTON,

Grievant,

v.

DOCKET NO. 05-DOH-319

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant Millard Preston filed a grievance on August 31, 2005, claiming he was 'improperly terminated in that he was injured on the job and placed on limitations as to his employment through workers' compensation and has attempted to return back to work and completed the functional capacity exams." He seeks, "Reinstatement and being placed in a position he is qualified for." A level four hearing was held in the Grievance Board's Charleston office on February 9, 2006. Grievant presented his own case, and Respondent was represented by counsel, Barbra Baxter, Esq. The matter became mature for decision on the deadline for the parties to submit their proposed findings of fact and conclusions of law, May 19, 2006.

Issues and Arguments

Grievant asserts he was improperly terminated because he was injured on the job, even though he attempted to return to work. Respondent objected to bearing the burden of proof, contending the termination was non-disciplinary, but over that objection it was held that Respondent would need to prove its claims by a preponderance of the evidence. Grievant also asserts he should have been selected for a supervisor's position that he was able to perform. Based on a preponderance of the evidence adduced at the hearing and contained in the record, I find the following material facts have been proven:

Findings of Fact

1. Grievant was employed by Respondent as a heavy equipment mechanic in the Transportation Worker 3 classification. He was terminated from this position on September 5, 2005.

2. In its August 22, 2005 letter to Grievant, Respondent stated its reason for terminating Grievant's employment as “failure to report at the expiration of a leave of absence and your inability to perform the essential functions of your position.” Respondent's Exhibit No. 6.

3. Grievant had been injured on the job, and was granted a four-year medical leave of absence, ending September 7, 2004. In August, 2004, Grievant was notified of the upcoming expiration of his leave of absence, and was instructed to return to work or resign his position, or else be dismissed from employment. He was also advised that before he could return to work, he must submit a written statement from his physician indicating he was able to return to work. *See* Respondent's Exhibit No. 1.

4. After a delay that is not explained by the record, and contrary to its argument that its action was not disciplinary, in February 2005 Grievant was given a Notice of Disciplinary Action. The Notice charged Grievant with failure to return to work, andnotified him that District Engineer Wilson Braley would recommend Grievant be dismissed from employment. Respondent's Exhibit No. 2.

5. Mr. Braley met with Grievant on February 14, 2005, at which time Grievant requested a functional capacity examination be made, and that he be given alternate or light duty employment.

6. Mr. Braley agreed to Grievant's request for a functional capacity examination, and after the Workers' Compensation Commission refused to provide one, Respondent agreed to pay the cost of the examination. Respondent's Exhibit No. 4.

7. On April 19, 2005, Grievant was examined to determine his functional capacity. The report of the examination noted significantly decreased abdominal muscle strength, decreased back muscle strength and normal range of motion, and moderate to high levels of pain. The report concluded:

> At the time of the evaluation, Mr. Preston['s] lifting evaluation places him in the sedentary to light work classification, lifting up to 10 pounds infrequently, and 5 pounds lifting on a frequent basis when working in a safe environment and using proper body mechanics. He is currently taking high levels of muscle relaxers Ultram, Neurontin and Lortab. These medications will make it difficult for him to operate machinery.

8. Respondent determined that the results of the examination precluded Grievant from

returning to work in his previous position.

9. Grievant at no time provided Respondent a statement from his treating physician releasing him to return to work in any capacity. 10. After Grievant requested an alternate position, Respondent made an attempt to find an opening for which Grievant would qualify. There was a posted Supervisor 2 position made known to Grievant, and he applied to the position along with one other applicant. Both applicants were interviewed, and Grievant was not selected.

11. James Roberts and George Colegrove interviewed the Supervisor 2 applicants. Although both applicants were qualified, neither interviewer recommended Grievant's hire because, during the interview, he stated he was not interested in the position and only applied because his attorney told him to. Grievant also expressed concerns over whether he could perform the duties of the job because it involved a lot of walking on concrete, and some lifting and climbing.

12. The Nature of Work section of the classification specification for Transportation Worker 3, Grievant's job, is as follows:

> Under limited supervision, at the journey level performs skilled work in the construction and maintenance of highways, related buildings and structures, and erecting and operating a drilling rig. May serve as a working shop leader in a County Garage. Operates a variety of heavy motorized maintenance equipment such as power graders, bulldozer, backhoe, and semi-trailer. Transports equipment across state to construction or maintenance sites; makes major repairs to roads and bridges. Performs major overhaul of gasoline and diesel powered automotive and highway maintenance equipment. Performs full-performance experienced work maintaining and repairing a variety of equipment used in heating, ventilation, cooling and general operation of public buildings. May be exposed to hazardous working conditions and inclement weather. Performs related work as required.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. (See footnote 1) Although Respondent contends Grievant's termination was procedural and not disciplinary, that is really no distinction. He was charged with job abandonment and failure to report to work. Grievant was given a “Notice of Disciplinary Action.” The termination was a disciplinary acton, and Respondent bears the burden of that issue. Grievant's non-selection for the Supervisor position, however, was not a disciplinary action, and Grievant bears the burden of proving he was the most qualified. An agency's decision as to who is the best qualified applicant will be upheld unless shown

by the grievant to be arbitrary and capricious or clearly wrong. (See footnote 2)

As to the dismissal, Respondent has met its burden of proof. Although Grievant made it clear he was willing to return to work for Respondent, he at no time attempted to return to his old position. He provided no evidence he was physically able to return to that job, and the functional capacity examination he requested supported Respondent's impression that he was no longer able to perform the duties of a Transportation Worker 3. Although Respondent was willing to place Grievant in a job with duty requirements that could be performed with his physical limitations, it has had no such openings that Grievantwas willing to fill. Grievant cited no authority that would require Respondent to create a position just for him, or that would require Respondent to remove duties from his TW3 position so he could perform the amended job. Grievant never requested an extension of his leave of absence. “Failure of an employee to report to work at the end of such a leave of absence or to provide proper justification for continued leave is grounds for dismissal. Personal leave is granted at the discretion of the employer, and extensions of leave given for a specific amount of time may be given, at the discretion of the employer based on the needs of the agency.” (See footnote 3)

On the selection issue, Grievant failed to meet his burden of proof. In a selection case, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. (See footnote 4) For this job, Grievant was well qualified, and Respondent believed Grievant could perform the duties. However, it was Grievant who took himself out of contention by expressing doubt that he could withstand the rigors of the job, and by telling the interviewers he was not interested in the job. Under these circumstances, it was very reasonable for Respondent to select someone other than Grievant to fill the position.

The following Conclusions of Law support this decision:

Conclusions of Law

1. 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). "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. This Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *Skeens-Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998). An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. *Thibault v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994).

3. "'W. Va. Code 29-6-15 [1977], requires that dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial or inconsequentialmatters, or mere technical violations of statute or official duty without a wrongful intention.' Syl. Pt. 1*, Oakes v. West Virginia Department of Finance and Administration*, 164 W. Va. 384, 264 S.E.2d 151 (1980)." *W. Va. Dep't of Corrections v. Lemasters*, 173 W. Va. 159; 313 S.E.2d 436 (1984)

4. "Failure of an employee to report to work at the end of such a leave of absence or to provide proper justification for continued leave is grounds for dismissal. [*Hayden v. Dep't of Health and Human Res.*, Docket No. 98-HHR-133 (1999).] Personal leave is granted at the discretion of the employer, and extensions of leave given for a specific amount of time may be given, at the discretion of the employer based on the needs of the agency. DOP Administrative Rule § 14.8(a)." *Harbert v. Dep't of Revenue*, Docket No. 05-TD- 027 (May 24, 2005).

5. Respondent met its burden of proving Grievant failed to return to work after a leave of absence, a dischargeable offense.

6. Grievant did not meet his burden of proving he should have been selected for the Supervisor 2 position.

For the foregoing reasons, 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 days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and StateEmployees 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.

June 21, 2006

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M. Paul Marteney

Chief Administrative Law Judge

Footnote: 1

W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

Footnote: 2

Thibault v. Div. of Rehab. Serv., Docket No. 93-RS-489 (July 29, 1994).

Footnote: 3

Harbert v. Dep't of Revenue, Docket No. 05-TD-027 (May 24, 2005).

Footnote: 4

Thibault, supra.