THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

OKEY SUMNER,
Grievant,

v. **Docket No. 2008-1310-PutED**

PUTNAM COUNTY BOARD OF EDUCATION,
Respondent,

and

CHARLES SUMNER,
Intervenor.

DISMISSAL ORDER

Grievant is currently employed by the Putnam County Board of Education ("PCBOE") as a clerk/driver. His Statement of Grievance reads:

> Grievant is regularly employed by the Respondent as a warehouse clerk/truck driver. He fractured his left ankle in a non work-related accident. Grievant was released to return to work without restriction on January 2, 2008, although he was required to wear a "boot" on his left ankle for approximately two weeks. However, the Respondent refused to allow him to return to work until January 17, 2008 when he was no longer required to wear the protective "boot." The Respondent has permitted other employees to return to work with light duty restrictions, yet refused such accommodations to the Grievant. The Grievant alleges a violation of West Virginia Code § 6C-2-2(g)(ii); and (g)(iii), and additionally asserts that the Respondent has acted in an arbitrary and capricious manner.

The Relief Sought is, "[t]he Grievant seeks the reimbursement of the personal leave used from January 2, 2008 until and including January 16, 2008 into the personal leave accounts on Charles Sumner, Bubby Crouch, and Rodney Johnson. (The Grievant had received personal leave donations from these co-workers.)"

The parties disagree on whether this grievance was timely filed, and this is an issue to be resolved by this Decision. The grievance was denied at Level 1, and mediation was unsuccessful. Grievant filed to Level 3 on June 3, 2008. Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and Rebecca Tinder, Esq., of Bowles Rice McDavid Graff and Love, LLP, represented PCBOE. Charles Sumner requested to intervene on September 4, 2008, and this request was granted without objection from Respondent. A Level 3 hearing was held on September 5, 2008, but Charles Sumner did not attend. This matter became mature for decision on October 8, 2008, when the parties submitted proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserts he asked to come back to work on light duty, but PCBOE would not allow him to do this. He maintains other employees have been allowed to return to work on light duty, and he has been discriminated against.

First, Respondent avers this grievance was untimely filed. If found timely filed, Respondent agrees Grievant did ask about returning to work wearing a protective "boot," but asserts Grievant never submitted the necessary information about his restrictions. Without this information, the availability of light duty could not be assessed for his position.

The undersigned Administrative Law Judge notes Grievant's arguments are somewhat contradictory, as in his Statement of Grievance he states he "was released to return to work without restriction." But, he then argues he was not permitted to return to work on light duty like other employees. For the reasons discussed below, this grievance must be DISMISSED.

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

Findings of Fact

1. Grievant is employed in a 261-day position as a clerk/driver. He works in the warehouse, and his duties consist of filling orders and delivering supplies and furniture. Grievant frequently has to lift objects and regularly operates the forklift and drives the delivery truck. He has been employed with PCBOE for 22 years.

2. On December 2, 2007, Grievant fractured his ankle in a non work-related accident. He did not have enough sick leave to cover the recovery time and discussed this issue with Barbara Brazeau, Director of Personnel. She informed Grievant that he would either need to apply for an involuntary medical leave of absence or seek donated leave to cover his absence.

3. Grievant received donated leave from some co-workers. He received 25 days from his brother, Intervenor Sumner, and two days each from both Bubby Crouch and Rodney Johnson. Grievant did not use all this donated leave, and the remainder was returned to these employees pro rata.

4. On January 2, 2008, Grievant's cast was removed, and his foot was placed in a protective boot. Grievant believed he was still able to perform the duties of his position, but he was slowed down "a little bit." Testimony Grievant at 12, Level 1.

5. On or about January 2, 2008, Grievant called Ms. Brazeau and he asked to return to work in a light duty capacity. Ms. Brazeau informed Grievant that if he were to return to work in a light duty capacity, she would need a statement from his physician specifying his work restrictions.

6. Grievant did not submit a statement from his doctor until Monday, January 14, 2008. This document is dated January 2, 2008, and stated Grievant could return to work "full-time," "with no restrictions" on "1-17-08." Resp. Exh. 1 at Level 1.[1]

7. Grievant turned in a grievance form to Superintendent Harold Hatfield on Friday, February 8, 2008. This document was unsigned, did not specify whether a hearing or conference was desired, did not identify the level of the grievance, and was not sent to the Grievance Board. This document did give Grievant's name, address, the name of his union, and his statement of grievance and relief sought.

8. Ms. Brazeau called Grievant, and he completed the grievance form on Monday, February 11, 2008.

9. Steve Ward was a computer technician with PCBOE. Computer technicians with PCBOE perform a variety of tasks; some are sedentary, and others involve lifting, climbing on ladders and pulling wire.

10. Mr. Ward injured his back at work on Wednesday, July 25, 2007, and his physician stated he could return to work on Monday, July 30, 2007, as he believed Mr. Ward's position was sedentary.

11. On Monday, July 30, 2007, Mr. Ward still did not feel able to perform all the duties of his position, and he returned to the doctor. Mr. Ward explained his typical duties to the doctor. After this visit, Mr. Ward presented PCBOE with a physician's statement

---

[1]Grievant testified that this memo was the second note from his doctor, and the first one said he could return to work on January 2, 2008, on light duty. This alleged document was never given to PCBOE, and Grievant did not produce it at the Level 3 hearing.

which read, "[l]ight duty work (seated) (no lifting over 10 pounds, no ladders, or crawling) or off next 4 days." Resp. Exh. 1 at Level 3.

12. After Mr. Ward submitted this documentation, Assistant Superintendent Robert Hall called him, on or about August 17 or 20, 2007, and told Mr. Ward they had arranged light duty work. (Apparently this took some time as PCBOE did not have a definition of light duty work.) After this phone call, Mr. Ward took off another week, and he returned to work on light duty the last week of August, on or about the 27th.[2] Mr. Ward returned to work without restrictions in either late September or early October 2007. He "always" kept PCBOE informed of his medical status. Testimony Ward at Level 3.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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 employee has not met his burden. *Id.*

I. Timeliness

[2]Mr. Ward did not give dates for these occurrences. His testimony was at times somewhat contradictory, and it appears he may have worked some days in early August 2007, but this is unclear.

PCBOE contends this grievance is untimely filed, as it was not initiated within the time lines contained in W. VA. CODE § 6C-2-4(a). When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4 (1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

The first issue to address is whether Grievant "filed" his grievance on February 8, 2008. W. VA. CODE R. § 156-1-2.1.4 addresses filing and states, "[t]he key to assessing whether a grievance is properly filed is substantial compliance with the statute and rules." Grievant completed the top section of the grievance form stating his name, home and work

addresses, and that he was represented by the West Virginia School Service Personnel Association. He filled in the Statement of Grievance and the Relief Sought sections and hand-delivered the form to Superintendent Hatfield. Grievant did not sign the grievance form or indicate whether he wanted a conference or a hearing. While it is true, Grievant did not complete all the sections listed on the grievance form, the information submitted meets the requirement outlined in the Rules. The undersigned Administrative Law Judge finds this grievance was filed on February 8, 2008, as Grievant substantially complied with the statute and rules.[3]

Respondent also asserts this grievance was untimely filed, as Grievant knew on January 2, 2008, that he could not automatically return to work on light duty, and he should have filed after this notification. Grievant argues W. VA. CODE § 6C-2-3(2) extends the specified time limits in this case. This Code Section states, in pertinent part, that the time for filing a grievance is extended, "whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause for which the grievant has approved leave from employment." Grievant is correct. Grievant was on approved sick leave, and he was not required to file this grievance until his return to work on January 17, 2008.

Next, Respondent asserts this grievance was untimely filed because Grievant filed this grievance sixteen days after his return to work on January 17, 2008. W. VA. CODE § 6C-2-2(c) defines days as "working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or

---

[3]This type of incomplete filing could result in a delay in processing the grievance, and this delay should not be held against a respondent.

practice." The number of working days between January 17, 2008, to February 8, 2008, is sixteen. There was one holiday during this time frame, which does not count in this total. Grievant took an outside school environment day, which does count in this total, as PCBOE's Board office was open, and it was a work day. By these calculations, this grievance was untimely filed.

II. Merits

While this grievance is decided by the timeliness issue, a discussion of the merits of the case may be helpful to the parties.

A. Credibility

An issue that must be addressed is credibility, as Grievant asserted Ms. Brazeau told him there was no light duty. Ms. Brazeau testified she told Grievant he must have a note from his doctor specifying Grievant's restrictions before she could assess if light duty was available in his position.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses, even if she/he did not observe the testimony, but reviewed the testimony by means of a tape or transcript. *See Browning v. Mingo County Bd. of Educ.*, Docket No. 96-29-154 (Sept. 30, 1996); *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-

235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information.[4] *See Holmes v. Bd. of Directors/W.Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*. "[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." *Chin v. Dep't of Treasury*, 44 M.S.P.R. 201 (1990).

In this case, the undersigned Administrative Law Judge finds Grievant, while not being untruthful, misunderstood what Ms. Brazeau told him. She did not say there was no light duty, but she did say PCBOE could not place Grievant in a light duty assignment unless and until it received information from his physician. Even after this information is submitted, PCBOE must assess whether light duty work is available in Grievant's position.

Grievant's assertion that he had two notes from his doctor is not supported by the evidence. This first alleged document, which was supposedly written on or about January

---

[4]The undersigned Administrative Law Judge originally obtained this list of factors to use when assessing credibility from The United States Merit System Protection Board Handbook. Harold J. Asher and William C. Jackson, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-53 (1984).

2, 2008, was not placed into evidence. The only communiqué PCBOE received from Grievant's doctor was dated January 2, 2008, and was received January 14, 2008. It stated Grievant would be released for full duty on January 17, 2008. Grievant never submitted this first alleged document to PCBOE.

B. Discrimination

Grievant alleges he has been discriminated against because he was treated differently than Mr. Ward. Discrimination is defined by W. VA. CODE § 6C-2-2(g)(1) to include "(i) Any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; unless the discrimination is related to the actual job responsibilities of the employee or agreed to in writing by the employee," and "(ii) Any discriminatory or otherwise aggrieved application of unwritten policies or practices of his or her employer. . . ."

The West Virginia Supreme Court of Appeals has clarified that, in order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Educ. Policy Comm., 221 W. Va. 306, 655 S.E.2d 52 (2007)(*per curiam*)[5]; *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005). In *Frymier*, the Court acknowledged what this Board's cases have consistently held, i.e., that the elements of discrimination and favoritism are essentially identical. *See Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004); *Kincaid v. Div. of Corr.*, Docket No. 98-CORR- 144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (Jan. 28, 1990). "[T]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *White, supra*.

Grievant has failed to demonstrate discrimination, or that he was similarly situated to Mr. Ward. First, Grievant did not prove he properly requested light duty. While it does appear he asked about light duty in a phone conversation with Ms. Brazeau, Grievant did not follow up and provide the necessary information. Mr. Ward had a note from his doctor, and he submitted it to PCBOE. This memo specifically stated what Mr. Ward's limitations and restrictions were to be while he was on light duty.

Second, Mr. Ward's computer specialist position was one which had light duty tasks, as he could perform many duties while sitting down. With Grievant's actual job responsibilities such as lifting and operating a forklift, it is unclear what warehouse duties he would be able to perform; thus, making information from his physician all the more important.

---

[5]Although this case addresses discrimination and favoritism as defined by the previous versions of the grievance statute, the prior definitions are virtually identical to those contained in the current statute.

C. Arbitrary and capricious

Grievant has also asserted PCBOE's actions were arbitrary and capricious. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

PCBOE's failure to place Grievant in a light duty assignment in his clerk/driver position without having information from his doctor was not arbitrary and capricious. As stated previously, given Grievant's job duties, it is unclear what he would be able to do in the warehouse without further information. It was not arbitrary and capricious for PCBOE to require an employee, requesting to return to work after an injury and still in a protective "boot," to present a doctor's note clarifying the type of work he could and could not perform before offering light duty.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

2. W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article."

3. W. VA. CODE § 6C-2-4 (1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

4. W. VA. CODE § 6C-2-3(2) extends the specified time limits "whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause for which the grievant has approved leave from employment."

5. W. VA. CODE § 6C-2-2(c) defines days as "working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice."

6. W. VA. CODE R. § 156-1-2.1.4 addresses filing and states, "[t]he key to assessing whether a grievance is properly filed is substantial compliance with the statute and rules."

7. This grievance was filed on February 8, 2008, as Grievant substantially complied with the statute and rules at the time of his initial filing. Grievant's time for filing the grievance was extended until he returned to work after approved sick leave.

8. This grievance was not timely filed, as it was filed sixteen days after his return to work, one day outside the required time lines.

Accordingly, this grievance is DISMISSED as untimely filed.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. VA. 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 W. VA. 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 (eff. July 7, 2008).

Date: March 31, 2009

_____

Janis I. Reynolds
Administrative Law Judge