THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KAREN LESLEY CROWL,
Grievant,

v. **Docket No. 2008-1574-JefCH**

JEFFERSON COUNTY HEALTH DEPARTMENT,
Respondent.

DECISION

Grievant Karen Lesley Crowl asserts a claim of discriminatory treatment against her employer, the Jefferson County Health Department. The May 2, 2008, Statement of Grievance provides:

> Disability discrimination in workplace. Main medical conditions of severe lumbar disc disease; severe left knee degenerative joint disease; spinal stenosis; advanced stages of rheumatoid and psoriatic arthritis. ADA requires reasonable accommodations be made.

As relief, Grievant seeks the following:

> Office with all food and health permit files, supplies, printer with ink that the H.D. purchases (not me). Immediate attention to my medical needs. I want the set-up that was provided to me in 7/07 due to my medical issues. I want to be treated fairly and not DISCRIMINATED against. Please help!

On May 30, 2008, this grievance was denied at level one. A level two mediation, held on August 4, 2008, was unsuccessful. A level three hearing was held before the undersigned Administrative Law Judge in Westover, West Virginia, on December 18, 2008. Grievant appeared in person and by her representative, Gordon Simmons, Steward, UE Local 170. Respondent appeared by Amy Jones, Jefferson County Health Department Administrator. Both parties waived their right to submit proposed findings of fact and

conclusions of law. This matter became mature for decision at the conclusion of the level three hearing on December 18, 2008.

Synopsis

Grievant asserts a claim of discrimination by her employer as a result of being moved from office space that she was allowed to use under a former administrator. Grievant argues that her medical condition requires that she be moved back into her former office in order to make reasonable accommodations for her. County Health Department Administrator Amy Jones counters that the decision to move Grievant to the reception area of the office was in the best interest of the department by utilizing staff more effectively and saving the department money in expenses. While it is undisputed that Grievant suffers from certain medical conditions, which may or may not be recognized as disabilities, numerous changes were made at the work place by the Respondent to meet Grievant's request for reasonable accommodations. Grievant's claim with regard to discrimination in the assignment of her working space is without merit. This grievance is denied.

The following facts are undisputed in this grievance:

Findings of Fact

1. Grievant has been employed by the Jefferson County Health Department as an Office Assistant since July 2006.

2. When Grievant first started working for the Respondent she was provided with her own office that was outfitted with an inkjet printer, and files in close proximity to her desk. This office was located away from the reception area of the Health Department.

At the beginning of her employment, Grievant was primarily responsible for answering health permit questions as part of her food service duties.

3. In October of 2007, Respondent hired Amy Jones as administrator. Ms. Jones moved Grievant from her office to a work location in the main office, with her desk located close to the window where the public present themselves to the Health Department. The reason for the change was to institute a program where all employees were using a laser printer. In addition to a reduction in expenses was the ability of Grievant to assist with all phone calls and customer assistance relating to all aspects of services provided by the Health Department.

4. Grievant offered a series of correspondences to her employer from various medical providers in support of her contention that she should be returned to her old office. The pertinent sections of the letters provide as follows:

February 29, 2008

> Ms. Crowl has a medical impairment associated with her left knee primarily. She has a potential requirement for knee replacement surgery. It will be very helpful for her to perform jobs that do not require a great deal of squatting, kneeling or prolonged standing and walking. Job locations such as back where she had been located would be helpful.

March 6, 2008

> Karen Crowl is a long-standing patient of our practice. She has multiple medical conditions including severe lumbar disc disease, severe left knee degenerative joint disease and last fall, she underwent a left ankle and foot surgery. She was recently diagnosed with advanced rheumatoid and psoriatic arthritis. She is undergoing treatment with a rheumatologist.
>
> It is medically recommended that reasonable accommodations be made at her place of employment to reduce the amount of walking, prolonged standing and lifting so that she is able to complete her job without causing increasing undue physical stress and pain.

March 11, 2008

> Karen Crowl is a patient seen in our office. Due to her medical condition she is to be given reasonable accommadations [sic] at her place of employment. She is to refrain from walking frequently, as well as sitting, or standing for extended periods of time.
>
> At this time, I believe it to be medically necessary and indicated for her to have directly at her work station, files, computer, printer, supplies and anything else required on a daily basis. This will allow her to perform her job effectively and efficiently.

5. In the Fall of 2008, Grievant provided the Health Department with an additional correspondence which spoke to her concern of being placed in a situation where she could be in contact with persons with tuberculosis. The doctor's note mentioned her rheumatoid arthritis and medications used for that condition which may weaken her immune system. It was recommended that Grievant not work in an area requiring her to wait on patients at the window.

6. The likelihood that an active TB case presents to the Health Department is somewhat predictable; thus preventive measures can be employed (such as a face mask) when patients arrive at the department.

7. Grievant was provided with accommodations which allowed her to refrain from walking frequently, as well as sitting, or standing for extended periods of time. Grievant was provided with an inkjet printer at her desk; files were moved to be in close proximity to Grievant; she was encouraged to take breaks as needed to relieve any stiffness.

8. The Respondent provisionally approved Grievant's request for restricted duty; however, they requested additional information from her treating physician through an ADA Medical Inquiry Form. This was an attempt to determine the level of accommodations

needed and the capability of the Respondent to provide them. This information was not provided by Grievant.

Decision

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *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 party bearing the burden has not met its burden. *Id*.

The Respondent argued at the level three hearing that Grievant had not demonstrated she is a qualified person with a disability, and the Americans with Disabilities Act is not applicable to her. The Respondent further argued that even if the Act was applicable to Grievant, the Respondent is not required to allow Grievant to have the office of her choosing; it is only required to offer a reasonable accommodation, which it believes it has done by allowing Grievant to use her own inkjet printer, moving files closer to Grievant, and letting Grievant take breaks as needed to prevent stiffness and discomfort. Grievant is adamant that nothing reasonable about her accommodations will occur until she is returned to her old office; the same office that was reassigned by the current administrator to the nursing personnel.

This Grievance Board has determined that it does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act ("WVHRA" W. VA. CODE §§ 5-11-1, *et seq.*), including a claim of handicap discrimination, or the federal Americans with Disabilities Act ("ADA" 42 U.S.C. §§ 12111, *et seq.*). *Bowman v. W. Va. Educational Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Rodak v. W. Va. Dep't of Tax and Revenue*, Docket No. 96-T&R-536 (June 23, 1997).

> Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination," "favoritism," and "harassment," as those terms are defined in W. VA. CODE § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over handicap-based discrimination claims. *Smith v. W. Va. Bureau of Employment Programs*, Docket No. 94-BEP-099 (Dec. 18, 1996). *See Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

Bowman, supra.

Accordingly, the fact that a grievance may also state a claim under the West Virginia Human Rights Act (in this case, for disability-based discrimination) does not deprive the Grievance Board of jurisdiction. For the Grievance Board to possess jurisdiction, however, the grievance must state a claim under the grievance statutes, in this case W. VA. CODE § 6C-2-2(d).

Discrimination is defined by the current grievance statute as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). 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 Education Policy Comm., 221 W. Va. 306, 655 S.E.2d 52 (2007);[1] *See Board of Education v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

Grievant has not been discriminated against. Grievant has not demonstrated that any other employee with whom she works was treated differently than she was in similar circumstances. The office which she seeks to have returned to her was reassigned to nursing personnel for administrative reasons. While this point was not fully developed at level one or level three, the undisputed classification of each employee would establish conclusively that Grievant and the nursing personnel were not similarly situated. Administrator Jones explained that Grievant is employed as an office assistant, which makes it necessary to be able to respond to the needs of the public. Therefore, it is essential to the operation of the Health Department that Grievant is situated near or at the reception area. Grievant has not met her burden of proof and demonstrated she was treated differently from similarly-situated employees, or that her treatment was not related to her actual job responsibilities.

---

[1]Although these cases addressed discrimination and favoritism as defined by the previous incarnations of the grievance statute, the prior definitions were virtually identical to those contained in the current statute.

Accommodations were made to the Grievant following the receipt of the doctor's notes outlined in the findings of fact. Whether or not the accommodations were reasonable is a question best left to a tribunal having jurisdiction of claims arising under the West Virginia Human Rights Act. It is not the role of a Grievance Board administrative law judge to decide whether the disability laws have been violated, nor to substitute his judgment of what is a reasonable accommodation for the employer's, but instead to decide whether prohibited discrimination has occurred.[2]

The following conclusions of law support the decision reached:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *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 party bearing the burden has not met its burden. *Id*.

2. The fact that a grievance may also state a claim under the West Virginia Human Rights Act (in this case, for disability-based discrimination) does not deprive the

[2]It is beyond this Board's power to determine an employer's liability under the Human Rights Act, Syllabus Point 1, *Vest, supra*, even when the grievance alleges discrimination of the sort the Human Rights Act prohibits.

Grievance Board of jurisdiction. *See Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995). For the Grievance Board to possess jurisdiction, however, the grievance must state a claim under the grievance statutes, in this case W. VA. CODE § 6C-2-2(d). It is beyond this Board's power to determine an employer's liability under the Human Rights Act, Syllabus Point 1, *Vest, supra*, even when the grievance alleges discrimination of the sort the Human Rights Act prohibits.

3. 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 Education Policy Comm., 221 W. Va. 306, 655 S.E.2d 52 (2007); *Board of Education v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

4. Grievant has failed to establish a claim of discrimination.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. 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 WEST VIRGINIA 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 (2008).

Date: January 27, 2009

_____
Ronald L. Reece
Administrative Law Judge