THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BRENDA GRIFFON,
Grievant,

v. **DOCKET NO. 2008-1271-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF MOTOR VEHICLES,
Respondent.

DECISION

This grievance was filed at level three[1] by Grievant, Brenda Griffon, on March 7, 2008, against her employer, the Division of Motor Vehicles. The statement of grievance reads:

> After filing a Workers Compensation Claim on 2-20-08, I have been refused access to my work by my employer. I was refused entrance to my workplace on 2-25-08 and have been off work without pay since that time. Repeated back to work slips have been refused with additional verbal requests for more information. My supervisors agreed to provide my doctors with written instructions only after my third request. I have not been provided with any leave request slips, nor have I been given any indication of the type of leave I am on. Workers' Compensation and EEO claims have been denied due to "lack of injury" and "no disability on record," but I have no written confirmation of this.

As relief Grievant seeks:

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[1] W. VA. CODE § 6C-2-4(a)(4) allows an employee to file the grievance at level three, skipping levels one and two, "upon the agreement of the parties or when the grievant has been discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation or benefits." Grievant's situation did not fit within any of the categories which allowed her to file directly at level three, absent the agreement of Respondent. However, through an oversight, Grievant was allowed to pursue her grievance at level three, and Respondent did not object.

> Payment of all associated Doctor, Attorney, and Documentation fees. Immediate reinstatement at work with back pay, benefits, and work credit. A 5% pay increase and punitive damages compensation in order to compensate the lost benefit.[2]

A level three hearing was held before the undersigned Administrative Law Judge on June 3, 2009, at the Grievance Board's Westover office. Grievant was represented by William C. Gallagher, Esquire, Cassidy, Myers, Cogan and Voegelin, L.C., and Respondent was represented by Gretchen A. Murphy, Assistant Attorney General. This matter became mature for decision on July 23, 2009, upon receipt of Grievant's Reply Brief.

Synopsis

Grievant has some physical limitations, and had received some accommodations from Respondent in order to be able to perform her job duties. Grievant suffered a back sprain and filed a Workers Compensation claim, and took sick leave. She was released by her doctor to return to work, subject to the previous restrictions. Respondent requested additional information from Grievant's doctor, and refused to let her return to work until this

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[2] "It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). New WEST VIRGINIA CODE § 6C-2-6 is entitled, 'Allocation of expenses and attorney's fees.' It specifically states: '(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.'" *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). Further, the Grievance Board does not award punitive damages in making an employee whole. *Spangler v. Cabell County Bd. of Educ.,* Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp*., Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997); *Miker v. W. Va. Univ.*, Docket No. 06-HE-133 (July 18, 2006). *Accord Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n.11 (1995).

information was provided. Respondent had the right to require additional information before deciding whether Grievant should be allowed to return to work.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant was employed by the Division of Motor Vehicles ("DMV") as a Customer Service Representative in the Moundsville Regional Office from 1996, until her retirement at the end of 2008.

2. Customer Service Representatives in the Moundsville Regional Office periodically rotate from one station to another around the office, performing different functions. Grievant, however, had been assigned for four years to one area of the office, working on titles, with little to no customer contact and little to no walking or standing. In August 2007, Grievant was assigned to work in a different area of the office, with different duties than she had been performing. These duties involved a lot of public contact and a lot of standing.

3. In December 2007, Grievant was advised that she would be assigned to the information desk effective January 1, 2008. Grievant told her supervisor that she was concerned that she could not safely perform the duties required of her at the information desk. Grievant was advised by her supervisor that she would need to obtain a statement from a doctor describing her physical limitations. Grievant obtained a Functional Capacity Evaluation, or work assessment, from a doctor, based upon an examination on December 28, 2007. This assessment detailed the limitations on Grievant's ability to perform her job. Respondent made accommodations to the information desk to address the limitations

noted in the Functional Capacity Evaluation, and Grievant was assigned to work at the information desk on January 1, 2008.

4. On February 20, 2008, Grievant had a back spasm while at work, and when she left work that day, she was in pain. Grievant drove to the emergency room at Reynolds Memorial Hospital, and she filed a Workers Compensation claim. This claim was denied, and is on appeal.

5. Grievant called her employer on February 21, 2008, and reported that she had hurt her back, and was filing a Workers Compensation claim, and she would not be coming in to work that day. Grievant also did not report to work on February 22, 2008.

6. Grievant attempted to return to work on Monday, February 25, 2008, having missed two days of work with her injury. Grievant presented her supervisor with a written statement from her physician dated February 22, 2008, which stated that she had suffered a back sprain on February 20, 2008, but she was able to return to work with restrictions "per work assessment." Grievant was told by Tom Johnson, the Manager of the Moundsville Regional Office, that she would not be allowed to return to work until she obtained a new work assessment.

7. Grievant made an appointment with her doctor for February 29, 2008. On the way to this appointment, Grievant was involved in a car accident.

8. Grievant was examined by her doctor on March 4, 2008. Grievant's doctor provided her with two additional statements, both of which stated that Grievant could return to work on March 4, "per the previous work assessment." One of these statements specifically addressed the car accident, finding no evidence of injury as a result of the accident. Grievant provided these statements to Shelia Newbrough, Supervisor of the

Moundsville Regional Office. Grievant was told these statements were insufficient to allow her to return to work, and she was directed to talk to John Haynes, DMV's Regional Office Operations Manager.

9. Grievant's doctor requested authorization from Workers Compensation for a new work assessment, and this request was denied.

10. Mr. Haynes believed a new work assessment was needed before Grievant could be allowed to return to work because she had suffered an injury while working under the set of restrictions stated in the December 2007 work assessment, and a new work assessment would prevent further injury. Mr. Haynes told Grievant he needed her doctor to provide additional information, and that he would need to get this information directly from her doctor. Grievant had to obtain her doctor's fax number for Mr. Haynes, and Mr. Haynes then sent Grievant's doctor four written questions which he asked the doctor to answer.

11. Grievant spoke with Ms. Newbrough by telephone on March 24, 2008. Ms. Newbrough informed Grievant that her supervisor had been trying to reach Grievant to tell her she needed to return to work.[3] At 12:30 p.m. that same day, Grievant received a certified letter also advising her of this.[4]

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[3] Apparently, Grievant was allowed to return to work after her doctor provided some information to Respondent. Both parties, in their post-hearing written argument, referred to a March 20, 2008 note from Grievant's doctor. However, this document was not made a part of the record.

[4] This letter was not made a part of the record, nor did the parties disclose its content.

12. Grievant was allowed to return to work on March 25, 2008, missing 21 days of work. Upon her return to work Grievant was told to complete leave slips requesting leave without pay for the days she had not been allowed to return to work. Grievant refused to do so.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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).

The issue in this grievance is whether Respondent had the authority to refuse to allow Grievant to return to work on February 25, 2008. Respondent relied upon Division of Personnel Rule 14.4(g)(2), and suggested that it should be considered in conjunction with WEST VIRGINIA CODE § 23-4-7. Rule 14.4(g) (143 C.S.R. 1 § 14.4(g)) provides as follows:

> (g) Physician's Statement
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> 1. The Director shall prescribe a physician's statement form to be supplied by all agencies to its employees. All agencies shall use this form or an alternate form or method, approved by the Director, to obtain the necessary information.

> 2. *Any employee requesting sick leave for an absence of more than three consecutive work days* must, within two days of his or her return to work, provide a prescribed physician's statement from the attending physician for the entire absence. If the employee's physician/practitioner has placed restrictions or limitations on the employees work activities, the employee must furnish the prescribed physician's statement immediately upon return to work. The physician's statement form shall specify the period of incapacity and state that the employee was unable to perform his or her job or that the employee's absence was due to reasons provided in Paragraph 14.4(f)(6) of this rule for a member of the employee's immediate family.
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> 3. In the absence of a prescribed physician's statement form, the entire absence shall be charged to unauthorized leave as provided in subsection 14.6 of this rule, and the employee's pay shall be docked the following pay period for the entire period of absence. The appointing authority shall notify the employee in writing that his or her pay is being docked. If the physician statement from the attending physician specifies a period of incapacity that is less than the entire absence, only the period of incapacity shall be charged to sick leave and the remaining absence shall be charged to annual leave, if annual leave is available to the employee and is not otherwise restricted.
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> 4. For extended periods of sick leave, a prescribed physician's statement form confirming the necessity for continued leave must be submitted within thirty (30) calendar days of the commencement of the sick leave and must indicate a date the physician will release the employee to return to work or a date the physician will re-evaluate the employees medical condition. For employees being re-evaluated, an additional physician's statement must be submitted upon re-evaluation. Failure to produce the required statement is grounds to terminate further sick leave benefits and the appointing authority shall immediately place the employee on unauthorized leave and notify the employee in writing of such action as provided in subsection 14.6 of this rule. This written notice shall allow the employee fifteen days to submit the required physician's statement. Failure of the employee to submit the required statement within the fifteen day notice period, except for satisfactory reasons submitted in advance to the appointing authority, is cause for dismissal. The necessity for absence because of exposure to contagious disease must be verified on a prescribed physician's statement form regardless of the length of absence.

(Emphasis added.) No witness was called to provide an interpretation of this Rule. The undersigned does not find this Rule to be applicable to Grievant's situation. Grievant was

absent from work on February 21 and 22, 2008, which is two days. Rule 14.4(g)(2) is applicable to situations where the employee is absent from work for more than three days, and requires the employee to provide proof of his or her illness in order to take sick leave. Assuming that this Rule should have been applied by Respondent to this situation, it further provides that the employee is to present a statement from the physician of any work restrictions upon returning to work, which Grievant did. This Rule does not state that the employee will not be allowed to return to work until Respondent is satisfied with the physician's statement. Respondent did not explain how considering this Rule in conjunction with WEST VIRGINIA CODE § 23-4-7 affected the application of the Rule. That CODE Section relates to the release of medical information to the employer by the physician, without further written consent being needed, when an employee files a Workers Compensation claim. The undersigned fails to see any connection or relevance.

Respondent failed to cite the Division of Personnel Rule which is applicable to this situation. Rule 14.4(h) provides as follows:

> (h) Return at Less Than Full Duty
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> 1. The appointing authority may permit an employee to return to work from sick leave at less than full duty for a period of no more than thirty days, provided, the terms of the return shall be in writing. An employee may request to continue to work at less than full duty beyond the period permitted by the appointing authority. The request must be submitted to the appointing authority at least five days before the end of the period. The appointing authority shall consider the request in the same manner as the original request.
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> 2. The appointing authority, after receiving approval of the Director, may deny the request to return or continue to work at less than full duty under conditions including, but not limited to, the following:
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> (a) the employee cannot perform the essential duties of his or her job with or without accommodation;

(b) the nature of the employee's job is such that it may aggravate the employee's medical condition;

(c) a significant risk of substantial harm to the health or safety of the employee or others cannot be eliminated or reduced by reasonable accommodations; or,

(d) the approval of the request would seriously impair the conduct of the agency's business.

3. Prior to making a decision on an employee's request to return or continue to work at less than full duty, the appointing authority and/or the Director may require additional information from the employee's physician or other physician regarding the employee's ability to perform the essential duties of his or her job, with or without accommodation.

Despite Respondent's oversight, the undersigned cannot simply ignore this Rule, which allows the employer to refuse to allow the employee to return to work at less than full duty. *Channell v. Div. of Corrections*, Docket No. 01-CORR-530 (May 30, 2002). While no information was provided regarding the meaning of "less than full duty," in this case, Grievant's doctor had stated on the return to work form that Grievant could return to work after her injury, but with restrictions. Certainly, if there were restrictions on the work Grievant could perform, this is not full duty. Respondent had the right to request additional information from Grievant's physician, prior to making a decision as to whether she should be allowed to return to work, in order to assure that accommodations could be made by the agency, and that it was taking the necessary precautions to prevent further injury to Grievant. While it may seem that this process took longer than was necessary, the record does not reflect the reason for the delay, and the undersigned cannot speculate on this.

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 grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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).

2. The Division of Personnel's Rule 14.4(h) allows an employer to refuse to allow an employee to return to work at less than full duty. *Channell v. Div. of Corrections*, Docket No. 01-CORR-530 (May 30, 2002). It further allows the employer to request additional information from the employee's physician, prior to making a decision as to whether she should be allowed to return to work. Respondent was acting in accordance with this Rule when it refused to allow Grievant to return to work.

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 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: August 17, 2009