THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LINDA KAY MILLER,
Grievant,

v. **DOCKET NO. 2010-0969-BroED**

BROOKE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed on January 28, 2010, by Grievant, Linda Kay Miller, against her employer, the Brooke County Board of Education. The statement of grievance reads:

> Air quality in classroom for 2 yrs. at Beech Bottom Primary was poor due to airborne mold spores, carpet contaminated with mold.

The relief sought by Grievant is "[o]ne year of health insurance paid by Brooke Co. Bd. of Educ."

A conference was held at level one on February 5, 2010, and a level one decision was issued on February 25, 2010. Grievant appealed to level two on February 27, 2010.[1] A mediation session was held on April 30, 2010. Grievant appealed to level three on May 10, 2010, and a level three hearing was held before the undersigned Administrative Law Judge, in the Grievance Board's Westover office on September 30, 2010. Grievant

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[1] Grievant claimed in her appeal that a level one decision had not been issued. While the letter Grievant received from Respondent did not contain an appeal paragraph, it clearly stated that the grievance was denied at level one. Moreover, Grievant did not pursue her argument that a decision had not been issued, and this claim is deemed abandoned.

appeared *pro se*, and Respondent was represented by David F. Cross, Esquire, Brooke County Chief Assistant Prosecuting Attorney. This matter became mature for decision on October 7, 2010, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant claimed that the multiple respiratory infections and bronchitis she experienced over a two year period were caused by the common mold and mold spores in her classroom. Grievant produced no evidence from which the undersigned can conclude that it is more likely than not that the mold and mold spores found in her classroom were the cause of Grievant's respiratory infections and bronchitis. There is no evidence of the type of virus or viruses Grievant had which caused the respiratory infections, or even the type of respiratory infections Grievant had, nor is there any evidence whatsoever that Grievant is even susceptible to mold or mold spores. Respondent's assertion that this type of claim is not grievable, because it must perform some affirmative act which would constitute a violation, misapplication, or misinterpretation of a statute, policy, rule, or written agreement applicable to the employee in order for the claim to be grievable is rejected. The Grievance Board has long held that this type of claim is grievable.

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

Findings of Fact

1. Grievant was employed by the Brooke County Board of Education ("BBOE") as a classroom teacher for 35 years. Grievant retired on January 30, 2010.

2. During the 2007-2008 and 2008-2009 school years Grievant taught at Beech Bottom Primary School in Room 111. Prior to the 2007-2008 school year she had been assigned to a different school.

3. During the 2007-2008 and 2008-2009 school years Grievant missed more days of school due to illness than she had in previous years, using 35 sick days for personal illness during the 2007-2008 school year, and 45 sick days for personal illness during the 2008-2009 school year. During those school years she had several episodes of bronchitis and respiratory infections which caused her to use sick leave, but she did not keep track of how many days she missed for these ailments. She did take sick leave for the flu during these school years.

4. BBOE employees may use their accumulated sick leave to pay for health insurance when they retire. Two days of accumulated sick leave may be used to pay for one month of health insurance.

5. On April 27, 2009, Grievant notified Richard Whitehead, Principal of Beech Bottom Primary School, and Martin Bartz, Director of Facilities Maintenance, in writing, that she had concerns about the air quality in her classroom, and requested that the air quality be tested. She noted that the temperature in the room was inconsistent, the air conditioner produced a stale, musty odor, and that her "absenteeism the past year and a half could possibly be in conjunction with the air quality of my room." Grievant had previously spoken with Principal Whitehead about this issue.

6. Mr. Bartz did not recall receiving the April 27, 2009 letter. On May 12, 2009, Grievant wrote another letter regarding this issue to Assistant Superintendent John Lyonett. On May 15, 2009, Mr. Bartz, Mark Wetzel, Supervisor for Maintenance, and Steve Mitchell, HVAC Specialist, went to Grievant's classroom. Mr. Bartz did not observe any mold in the classroom. Mr. Mitchell found that the HVAC unit was dripping water onto the linoleum floor and onto some old books that were on the floor. The books smelled musty. A custodian at the school was told to remove the books and he did so. Mr. Bartz, Mr. Wetzel, and Mr. Mitchell went outside the classroom and observed that the grass was wet below a vent that connected to the classroom, and the vent was less than 10 inches off the ground. They determined that gravel should be placed on the ground below the vent in an effort to assure that vent was not pulling in moisture from the wet area, and that a concrete pad should be poured during the summer.

7. Grievant was moved to a classroom on the second floor on or about May 15, 2009. During the 2009-2010 school year Grievant was in another classroom, which was on the second floor.

8. BBOE contracted with AGX Environmental Consultants to perform a limited indoor environmental quality screening survey of Room 111 during the summer of 2009, and a limited mold screening survey. The testing was performed in late August, at a time when the average outdoor temperature was 77.5 degrees and the relative humidity was 72.4%. While the temperature and humidity in Room 111 were both above optimal levels, the report "concluded that the indoor environmental quality of Room 111 based on temperature, carbon monoxide, carbon dioxide, total VOCs (volatile organic compounds),

except for the comfort indicator - relative humidity, was not degraded at the time of the testing."

9. The limited mold screening survey concluded that there was a "high viable total mold concentration and the predominance of Cladosporium species" in the carpeting, indicating "that the carpeting in this room has been affected by mold contamination." It was noted, however, that "Cladosporium is a common mold species, and is generally not considered problematic." Nonetheless, it was recommended that the carpet be removed. The survey also found that "the indoor air quality in Room 111 was degraded, based on airborne mold, at the time of the sampling." Grievant's Exhibit No. 1. The predominant mold spores detected were Aspergillus/Penicillium and Cladosporium, although "[o]ther mold spores were represented by Ascospores, Basidiospores, Pithomyces/Ulocladium, Smuts/Myxomycetes, etc." Aspergillus/Penicillium species, Cladosporium species, Ascospores, and Smuts/Myxomycetes mold spores were also detected in the outdoor air sampling. No visible signs of mold contamination were found.

10. The AGX report stated that "[m]olds produce allergens, irritants and in some cases, toxins, and whether they are viable (living) or non-viable (dead spores) they may cause reaction in humans. Whether or not symptoms develop in people exposed to mold, or the type and severity of symptoms, depend on the types of fungi, the metabolic products being produced by these species, the amount and duration of the individual's exposure to mold parts or products, and the specific susceptibility of those exposed. Susceptibility varies with genetic predisposition, age, state of health, and concurrent exposure. (NYCDH, 1993)."

11. Grievant presented no medical documentation that she was susceptible to mold or mold spores, or a medical opinion that exposure to mold or mold spores was the cause of her bronchitis or respiratory infections. Grievant did not identify the type of respiratory infections she had experienced, or the virus or viruses which had been identified as the cause of her respiratory infections.

12. Respondent did not raise a timeliness defense at level one or at level two.

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).

Respondent argued that Grievant could not bring her claims to the Grievance Board, as her complaint did not meet the definition of grievance. Respondent asserted that it must perform some affirmative act which would constitute a violation, misapplication, or misinterpretation of a statute, policy, rule, or written agreement applicable to the employee. While creative, this argument first ignores that part of the definition of grievance which provides that a grievance includes "[a]ny action, policy or practice constituting *a substantial*

detriment to or interference with the effective job performance of the employee *or the health and safety of the employee*." W. VA. CODE § 6C-2-2(i)(1)(v). Grievant is asserting that the environment in the classroom in which her employer required her to work affected her health. The Grievance Board has long held that this type of claim is grievable. *Adams, et al., v. Harrison County Bd. of Educ.*, Docket No. 03-17-025 (July 21, 2003); *Guerin and Tenney v. Mineral County Bd. of Educ.*, Docket Nos. 92-28-422, 459 (Jan. 31, 1996).

Respondent also raised a timeliness defense for the first time at level three. WEST VIRGINIA CODE § 6C-2-3(c)(1) requires an employer to raise this defense "at or before level two." This defense was not timely raised, and cannot, by statute, be considered by the undersigned.

Grievant claimed that the multiple respiratory infections and bronchitis she experienced were caused by the common mold and mold spores in her classroom. However, Grievant did not produce any evidence from which the undersigned can conclude that it is more likely than not that the mold and mold spores were the cause of Grievant's respiratory infections and bronchitis. There is no evidence of the type of virus or viruses Grievant had which caused the respiratory infections, or even the type of respiratory infections Grievant had, nor is there any evidence whatsoever that Grievant is even susceptible to mold or mold spores. Grievant did not meet her burden of proof.

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).

2. Grievant is asserting that the environment in the classroom in which her employer required her to work affected her health. The Grievance Board has long held that this type of claim is grievable. *Adams, et al., v. Harrison County Bd. of Educ.*, Docket No. 03-17-025 (July 21, 2003); *Guerin and Tenney v. Mineral County Bd. of Educ.*, Docket Nos. 92-28-422, 459 (Jan. 31, 1996).

3. An employer must raise a timeliness defense "at or before level two." This defense was not timely raised by Respondent, and cannot, by statute, be considered by the undersigned. W. VA. CODE § 6C-2-3(c)(1).

4. Grievant did not produce any evidence from which the undersigned can conclude that it is more likely than not that the mold and mold spores in her classroom were the cause of Grievant's respiratory infections and bronchitis. Grievant did not meet her burden of proof.

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: February 22, 2011