THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JEFFREY A. BAKER,
Grievant,

v. **Docket No. 2010-0552-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Jeffrey A. Baker, filed this grievance on November 2, 2009, asserting that:

> I was not allowed to return to work on light or modified duty, but other employees have been allowed to return to modified or light duties.

Grievant seeks full wages and benefits from November 10, 2008, to February 23, 2009, plus interest, the time period he was available for, but denied, light duty. Following an adverse ruling at level one, and a mediation session, Grievant appealed to level three on December 23, 2009. A level three hearing was held before the undersigned Administrative Law Judge on September 9, 2010, at the Grievance Board's Westover office. Grievant appeared in person and by his representative, Gordon Simmons, UE 170, West Virginia Public Workers Union. Respondent appeared by its attorney, Jason Workman, Respondent's Legal Division. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on October 12, 2010.

Synopsis

Grievant alleges that, during the last snow removal and ice control season, the Respondent discriminated against him by not allowing him to return to work under light or

modified duty when others, at various times, were permitted to return to work under modified duty. Respondent counters that Grievant's request to return to work under modified duty in November 2008 was denied because there was no safe or productive work that Grievant could perform while meeting the restrictions specified by his doctor. Grievant failed to prove that Respondent engaged in any act of discrimination against him when it refused to allow him to return to work in a light duty capacity. This grievance is denied.

The material facts are not in dispute and are set forth in the following findings.

Findings of Fact

1. Grievant is employed as a Transportation Worker 2 Equipment Operator in the Marion County Maintenance Department with the Division of Highways.

2. On March 31, 2008, Grievant suffered an on-the-job shoulder injury. At some time after March 31, 2008, and before the end of 2008, Grievant returned to work on modified duty.

3. On August 13, 2008, Grievant underwent shoulder surgery. On November 3, 2008, Grievant was released by his doctor to return to work on November 10, 2008, with the following restrictions and instructions: "May return to Light Duty only. No overhead work, no lifting greater than or equal to 15 lbs, no climbing, no pushing/pulling greater than or equal to 20 lbs, may drive." Grievant's Exhibit 1.

4. On or about November 7, 2008, Michael Roncone, Marion County Supervisor with the Division of Highways ("DOH"), denied Grievant's request to return to work on November 10, 2008, due to Grievant's doctor's November 3, 2008, restrictions.

5. On February 9, 2009, Grievant was released by his doctor to return to work

on February 17, 2009, with the following restrictions and instructions: “OK to return to work to driving only job - no reaching or lifting or climbing trucks - as of 2/17/09.” Grievant’s Exhibit 1.

6. On February 18, 2009, Grievant was released by his doctor to return to work on February 23, 2009, with no restrictions. Grievant returned to work at full duty at that time.

7. Raymond Patrick is employed as a Rehabilitation Counselor with DOH. His job duties include coordinating the Department of Transportation Workers’ Compensation Return to Work Program. Mr. Patrick indicated that whether an employee can be accommodated with modified duty depends on whether they can work safely and productively. In addition, the time of year dictates what types of jobs the organization performs. In general, it is easier to accommodate a worker in the spring and summer months than in the winter. The primary focus of operations during the winter period is snow removal and ice control.

8. Mr. Patrick explained that Grievant’s restrictions prevented him from safely and productively operating and maintaining his snow plow truck.

9. Grievant called a few co-workers to testify at level three on the issue of a return to work on modified duty; however, none of these individuals substantiated Grievant’s claim of discrimination. In fact, Grievant did not provide any evidence of a similarly situated employee that was allowed to return to modified duty during the winter snow removal and ice control season with restrictions similar to the Grievant.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Grievant alleges that Respondent has engaged in discrimination by refusing to allow him to return to work from November 2008 to February 2009. For purposes of the grievance procedure, discrimination is defined 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 a discrimination 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'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant alleges that he was the only employee not allowed to return to work while on a doctor's restrictions during the winter months or snow removal and ice control season; however, this mere allegation alone is insufficient to establish the first criterion. At level three, Grievant was unable to produce evidence which would support his claim that other employees with similar restrictions were allowed to return to modified duty during the winter snow removal and ice control season. The other employees that did testify at level three were classified differently from Grievant. In addition, any employee that was allowed to return to work on restricted duty did so during the spring and summer months when restricted or modified duty job assignments are more readily available. Grievant failed to demonstrate that he is similarly situated to other Marion County employees as it relates to being denied a return to work with modified duties.

The record did establish that Grievant was not permitted to return to work in November 2008, despite Grievant's release from his doctor, because his supervisor did not have work that Grievant could perform in compliance with the work restrictions imposed by Grievant's doctor. Grievant's November 3, 2008, return to work note indicated "[M]ay return to Light Duty only. No overhead work, no lifting greater than or equal to 15 lbs, no climbing, no pushing/pulling greater than or equal to 20 lbs, may drive." As an equipment operator, Grievant's essential job duties require him to climb a ladder attached to the

spreader box on top of his truck to break up any frozen material so the material falls into the spreader box for use in treating roads. Grievant's climbing restriction prevented him from performing this essential duty.

Raymond Patrick, Rehabilitation Counselor for Respondent, opined that Grievant's supervisor properly evaluated Grievant's possible return to work when considering Grievant's essential job duties during snow removal and ice control season and the restrictions imposed by Grievant's doctor. Mr. Patrick explained that the time of the year dictates what types of jobs the DOH performs. In fact, no further doctor's notes appear in the record after November 2008 until February 9, 2009, which restated the restriction against lifting or climbing on his truck. Grievant's restrictions prevented him from safely and productively operating and maintaining his snow plow truck. When Grievant was given a full-duty release by his doctor to return to work on February 23, 2009, he was returned to his position.[1]

The following conclusions of law support the decision reached.

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[1]West Virginia Division of Personnel Administrative Rule 14.4(h), provides, in pertinent part:

> 2. The appointing authority, after receiving approval of the Director, may deny the request to return or continue at work at less than full duty under conditions including, but not limited to, the following:
>
> (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 accommodation; or,
> (d) the approval of the request would seriously impair the conduct of the agency's business.

Conclusions of Law

1. 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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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).

2. In order to establish a discrimination 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'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. Grievant has failed to establish that he was the victim 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 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 (2008).

Date: January 28, 2011

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Ronald L. Reece
Administrative Law Judge