**THE WEST VIRGINIA PUBLIC EMPLOYEES**
**GRIEVANCE BOARD**

**TERRY D. POWELL,**
**Grievant,**

**v.** **Docket No. 2010-0261-DOT**

**DIVISION OF HIGHWAYS,**
**Respondent.**

## DECISION

Grievant, Terry Powell, filed this grievance on August 31, 2009, against his employer, Division of Highways, alleging the refusal of requested medical accommodation. Grievant seeks to be made whole, including acceptance of accommodation. This grievance was denied at level one by Decision dated March 8, 2010, and authored by Harold M. Jones, Level One Grievance Evaluator. Level two mediation was conducted on August 24, 2010. Thereafter, the grievance was placed in abeyance until September 23, 2010, to allow the parties additional time to negotiate a possible settlement. Grievant appealed to level three on September 24, 2010. A level three hearing was conducted before the undersigned Administrative Law Judge on February 1, 2012, in the Grievance Board's Charleston office location. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170. Respondent appeared by its counsel, Jason C. Workman. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on March 19, 2012.

### Synopsis

Grievant has been diagnosed with chronic obstructive pulmonary disease, and had received some accommodations from Respondent in order to be able to perform his job

duties. Grievant's doctor sent Respondent a subsequent note indicating further restrictions. Thereafter, Respondent discontinued the assignment that required Grievant flag traffic as an accommodation. Respondent requested additional information from Grievant's doctor, and refused to let him return to work until this 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 based upon the record developed at level one and level three.

**Findings of Fact**

1. Grievant was employed as a Transportation Worker 2, Equipment Operator for the Doddridge County Division of Highways.

2. The Division of Highways ("DOH") received a physician's note in August 2009, which indicated that Grievant could not perform hard labor in his job due to chronic obstructive pulmonary disease ("COPD"), but he could operate equipment.

3. The Transportation Worker 2 classification not only requires that an employee operate equipment, but also requires labor associated with road maintenance and the maintenance of the equipment.

4. After receipt of the physician's note, Grievant was placed in the reasonable accommodation process. This is an interactive process that begins by the employee providing a list of medical providers that can establish the status of the employee as it relates to any disability. The employee signs an authorization to allow DOH to communicate with those providers.

5. Grievant was initially accommodated by way of a position which required that

he flag traffic. However, after DOH received a subsequent note from Grievant's physician indicating additional restrictions, DOH could no longer continue to accommodate Grievant in that position.

6. The restriction provided that, "[Grievant] cannot do activities for more than 6 minutes at a time per his Cardio-Pulmonary Stress Test." Respondent's Exhibit 6, level three.

7. On October 26, 2009, Grievant was notified that he was being placed on medical leave of absence without pay until DOH could assess the extent of his medical condition, the resulting work restrictions, and whether a reasonable accommodation could be made.

8. DOH sent the Medical Information Request Form by certified mail to Grievant's physician, Dr. Salam Rajjoub, on November 13, 2009. The form was sent back to DOH as unclaimed. The Medical Information Request Form was sent again by certified mail on February 17, 2010, to the current address for Dr. Rajjoub. Despite this letter being claimed, the DOH did not receive a response. Consequently, another attempt was made on March 25, 2010, which was also signed for by the doctor's office.

9. Dr. Rajjoub completed the Medical Information Request Form and returned the document to DOH. After reviewing the form, it was determined that Grievant could not be accommodated in his classification of Transportation Worker 2, Equipment Operator.

10. As an accommodation, Grievant was notified on October 19, 2010, that an Office Assistant 3 vacancy existed in the Taylor County Headquarters. Grievant was also informed that he would need to complete an application to allow the Division of Personnel to make a determination of his qualifications. Grievant was notified that additional updated

information was needed to make the qualification determination due to his initial application not being sufficient in assessing qualifications. After failing to provide the requested information, Grievant was removed from the process for noncompliance.

11. Jeff Black, Human Resource Director, continued to monitor potential job openings for which Grievant was qualified. Grievant was notified of a gas house position at the district headquarters when it became open. DOH received correspondence from Dr. Rajjoub that Grievant could perform the required duties of the gas house position. Grievant accepted the position as a reasonable accommodation.

**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 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 October 26, 2009. Grievant argued that Respondent failed to offer credible evidence that it could not have placed Grievant in another position prior to his return to work on May 9, 2011. Respondent relied upon Division of Personnel

Rule 14.4(h), which provides as follows:

(h) Return at Less Than Full Duty

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.

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:

(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.

This Rule clearly allows the employer to refuse to allow the employee to return to work at less than full duty. *Griffon v. Div. of Motor Vehicles*, Docket No. 2008-1271-DOT (Aug. 17, 2009). Grievant's doctor had stated on the return to work form that Grievant could return to work with his COPD condition, but with restrictions. The doctor noted that office work would be a reasonable accommodation. Respondent demonstrated that

Grievant could not perform the essential duties of the Transportation Worker 2 classification. Respondent had the right to request additional information from Grievant's physician, prior to making a decision as to whether he should be allowed to return to work, in order to assure that accommodation 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 reflects that the delay was caused by the failure of Grievant and his physician to make the necessary information available to Respondent.

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 his 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. *Griffon v. Div. of Motor Vehicles*, Docket No. 2008-1271-DOT (Aug. 17, 2009). It further allows the employer to request

additional information from the employee's physician, prior to making a decision as to whether he 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 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: April 30, 2012**

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**Ronald L. Reece**
**Administrative Law Judge**