THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SAM CASSELLA,
Grievant,

v. **Docket No. 2011-0379-CONS**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Sam Cassella, filed a number of grievances ending on September 3, 2010, against his employer, Division of Highways. Grievant claims that the Respondent failed to comply with a medical accommodation request and that his supervisor informed him that he would be demoted in classification and pay upon his return to work. Grievant requests to be made whole, including restoration to his original classification with all back pay with interest and benefits, as well as back pay with interest he would have earned on restricted duty.

The procedural history of this consolidated grievance is murky. Numerous grievances were filed by Mr. Cassella challenging the denial to return to work on restricted or light duty. Most of them were filed at level one and placed in abeyance for a period of time. Some were consolidated at level one, and one was filed at level three and subsequently remanded to level one. On September 16, 2011, Respondent's counsel filed a Motion to Consolidate the following grievances: 2010-1500-DOT, 2011-0281-DOT, 2011-0379-CONS, 2012-0269-DOT, and 2012-0271-DOT. The intent of the consolidation ordered on September 30, 2011, was to hear all of those grievances at a level three

hearing. It would appear that one of the consolidated docket numbers, 2012-0271-DOT, involved a suspension and was not addressed during the level three hearing. The parties will need to be contacted, discuss this snafu and the matter of scheduling a level three hearing on the issue of discipline. All grievances on the various issues concerning a medical accommodation were heard before the undersigned Administrative Law Judge on March 27, 2012 and September 18, 2012, at the Grievance Board's Westover office location. Grievant appeared in person, and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Jason Workman, Esquire. This matter became mature for consideration upon receipt of the parties' proposed findings of fact and conclusions of law on November 7, 2012.

Synopsis

Grievant suffered an injury while on the job in September 2010. He was placed on restrictions by his treating physician that made it impossible to perform his job duties safely and productively. Grievant later had surgery on his injured shoulder and was placed on restrictions by his treating physician that required he be off work. In this instance, the Respondent was authorized to refuse to allow the Grievant to return to work at less than full duty.

Upon his return to work, Grievant notified his supervisor that, notwithstanding his full duty return to work note, he had further limitations. His supervisor sent him home with the admonition that he provide a doctor's note concerning the new restrictions. Respondent had the right to require additional information before deciding whether Grievant should be allowed to return to work. The grievance is denied.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant is currently classified as a Transportation Worker 2, Craft Worker, in Monongalia County, District Four, with the Division of Highways.

2. Grievant was injured on the job on September 2, 2010. Following the injury, Grievant was initially limited to ten pounds left arm and hand restriction, and limited to one to three hours of left arm pushing, pulling, reaching and fine manipulation.

3. On September 9, 2010, the limitations were modified to no lifting greater than five pounds and no overhead reaching.

4. On October 18, 2010, the limitations were changed to no overhead lifting or reaching, and no lifting more than ten pounds.

5. During December 2010, Grievant's limitations were again adjusted to provide for no lifting greater than five pounds with left arm, and no climbing or reaching.

6. Following Grievant's January 14, 2011, exam, documentation was provided which removed Grievant from work for the period of January 14, 2011, until February 21, 2011, without any option for return to work at less than full duty.

7. On February 14, 2011, Grievant's condition limited him to no overhead work, no lifting greater than 15 pounds, no push or pull greater than fifteen pounds and no climbing. In addition, Grievant was being scheduled for surgery on his injured shoulder.

8. On April 14, 2011, Grievant was taken off work until June 15, 2011, as a result of surgery with no option to return to work at less than full duty.

9. Following Grievant's May 26, 2011, doctor's appointment, Respondent received documentation that Grievant remained totally temporarily disabled until July 18, 2011.

10. On July 18, 2011, Grievant's doctor indicated that he could return to work with no lifting, pushing or pulling greater than twenty pounds and was limited to no overhead work.

11. Respondent's Return to Work Coordinator, Raymond Patrick, reviews modified duty limitations with the injured employee's supervisor to determine if the employee can work safely and productively. Mr. Patrick had a discussion with Grievant's supervisor each time Grievant's restrictions changed to determine if he could work safely and productively with the medical restrictions.

12. A restriction of ten pounds for a Transportation Worker Classification makes it difficult for the worker to perform his duties safely and productively because the majority of any objects that they would have to handled typically weigh more than ten pounds. Grievant's fifteen pound lifting restriction, which included no climbing, prevented Grievant from working safely and productively during the snow removal and ice control season of the winter months.

13. Respondent believed that Grievant could work safely and productively with the limitations provided on the July 18, 2011, physician's slip for the period of time of August 1, 2011, to September 12, 2011.

14. Monongalia County Division of Highways' Supervisor, Larry Weaver, contacted Grievant to discuss bringing him back to work under modified duty on July 27, 2011. Grievant refused to come in to review the return to work agreement.

15. Grievant was issued a full duty return to work slip that provided a return date of September 12, 2012. After arriving for work on that date, Grievant told Mr. Weaver that he had further limitations despite the full duty release. Grievant was informed that any

limitation would need to be in a physician's note and would need to be reviewed before he could return to work.

16. Grievant returned to work with a full duty release on September 19, 2012. Mr. Weaver was unaware of any problem with Grievant's shoulder following the full duty release, but informed Grievant to alert him if an issue developed. Grievant did not express any physical problems concerning his assignments.

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).

Grievant argues that Larry Weaver prevented Grievant's return to work under modified duties in July 2011, and Mr. Weaver altered his conditions of employment with respect to duties. In addition, Mr. Weaver was incorrect in claiming that no safe and productive work for Grievant under the physician's requested modified duties existed prior to July 2011. The record of this grievance does not support any of these claims.

Respondent relied upon Division of Personnel Rule 14.4(h), which 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;
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> (b) the nature of the employee's job is such that it may aggravate the employee's medical condition;
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> (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,
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> (d) the approval of the request would seriously impair the conduct of the agency's business.
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> 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).

Respondent demonstrated that Grievant could not perform the essential duties of the Transportation Worker 2 classification. In this instance, the Respondent was authorized to refuse to allow the Grievant to return to work at less than full duty. The record demonstrated that Grievant was offered a return to work under modified duty on July 27, 2011. For unknown reasons, Grievant refused to come in to review the return to work agreement. 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. Nothing in the record supported Grievant's claim that he was demoted. The record did not establish that Grievant could perform the essential duties of his position, and the nature of his injury tended to demonstrate that his condition would not allow him to return to work safely and productively.

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).

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: December 18, 2012

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Ronald L. Reece
Administrative Law Judge