THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LARRY A. KIMBLE,

Grievant,

v. **Docket No. 2012-0062-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Larry A. Kimble, filed a Level One grievance against his employer, Respondent Division of Highways ("DOH") on July 16, 2011, stating as follows: "[f]avoritism and discrimination practices." As relief sought, Grievant seeks the following: "'[t]o be whole', reimbursement of lost wages, reinstatement of my tenure at work and any entitlements due to me. There will not be any retaliation or harassment against me, any witness, or representative involved in this hearing or it will be reopened."

The Level One hearing was conducted on August 29, 2011, and September 23, 2011. The grievance was denied by decision dated October 14, 2011. The Level Two appeal was perfected on October 27, 2011. A Level Two Mediation was conducted on March 21, 2012. On April 5, 2012, Grievant perfected his appeal to Level Three. A Level Three hearing was held on September 4, 2012, before the undersigned administrative law judge at the Grievance Board's Westover, West Virginia, office. Grievant appeared in person, and with his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Jason C. Workman, Esquire. This matter became mature for decision on October 10, 2012, upon

receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant sustained a work-related injury to his shoulder which required him to be off from work for a period of time. Grievant presented his supervisor with a doctor's slip allowing him to return to work with the following restrictions: "no use of LUE [left upper extremity], if cannot accommodate pt [patient] will need to remain off work." Respondent did not allow Grievant to return to work on light, or modified duty. Grievant was later allowed to return to work when he could return at full duty. Respondent allowed another employee to return to work on light, or modified duty following a work-related injury to his elbow. Grievant asserts that Respondent discriminated against him and engaged in favoritism in its refusal to allow him to return to work on modified duty. Respondent denies Grievant's claims. Grievant failed to meet the burden of proving his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, Larry Kimble, is employed as a Mechanic 3 in DOH District 8.

2. Dana Roy is also employed as a Mechanic 3 in DOH District 8.

3. Grievant sustained a work-related injury to his left shoulder on July 28, 2009.

4. Grievant presented a doctor's slip dated March 26, 2010, which placed Grievant off work from March 12, 2010 to April 4, 2010, and indicated that he could

attempt to return to work on April 5, 2010. The doctor's slip listed the following restrictions for Grievant's return to work: "no use LUE[1], if cannot accommodate pt [patient] will need to remain off work."

5. Raymond Patrick is the DOH Return to Work Coordinator.

6. Upon receiving Grievant's doctor's slip, Mr. Patrick met with Grievant's supervisor, Tom Karlen, to determine whether Grievant could return to work in a safe and productive manner with the stated medical restrictions.

7. Mr. Patrick and Mr. Karlen determined that there was no safe and productive work that Grievant could do while he was under the restrictions imposed by his physician. As such, Mr. Patrick and Mr. Karlen did not allow Grievant to return to work on April 5, 2010, on light or modified duty.

8. Grievant was released to return to full-duty work without restrictions on November 1, 2010.

9. Dana Roy sustained a work-related injury to his left elbow on June 15, 2011.

10. Mr. Roy's doctor's slip indicated that he could return to work with the following restrictions: "could not lift more than 50 lbs." At the time, Mr. Roy's elbow was in a stationary case. Mr. Patrick and Mr. Karlen allowed Mr. Roy to return to work with modified duties on June 27, 2011.

Discussion

As this is not a disciplinary matter, Grievant bears the burden of proving his

[1] LUE is an abbreviation for "left upper extremity." The doctor's slip does not further detail, or explain, Grievant's limitations, and does not define, or elaborate on, the statement, "no use LUE."

grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "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). "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 and Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence supports both sides equally, the Grievant has not met his burden. *Id.*

Grievant argues that Respondent discriminated against him because Respondent granted another employee who had sustained an arm injury to return to work with modified duties, but did not grant Grievant the same opportunity. Grievant asserts the same is favoritism, as well. Respondent denies Grievant's claims, and asserts that it complied with the applicable Division of Personnel ("DOP") policies regarding returning to work following a work-related injury.

In the grievance process, 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). Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee." W. VA. CODE § 6C-2-2(h). In order to establish

discrimination and favoritism claims under the grievance statutes, an employee must prove the following by a preponderance of the evidence:

> (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., 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 suffered a work-related injury to his left shoulder on July 28, 2009. Dana Roy, another Transportation Worker 3 Mechanic, suffered a work-related injury to his left elbow on June 15, 2011. Respondent allowed Mr. Roy to return to work on light, or modified, duty. However, Respondent did not allow Grievant to so return. Grievant asserts that, in failing to allow him to return to work on light, or modified duty, Respondent discriminated against him and engaged in favoritism. Given Grievant's argument, the undersigned must first determine whether Grievant and Mr. Roy are similarly situated employees.

Both Grievant and Mr. Roy are Mechanic 3s in DOH District 8. Further, both received work-related injuries that caused them to be off work for periods of time. Grievant injured his left shoulder; Mr. Roy, his left elbow. Both received doctors' slips allowing them to attempt to return to work on light, or modified duty, with restrictions. Grievant's doctor's slip indicated that he could attempt to return to work on April 5, 2010, with the following restriction: "no use of LUE [left upper extremity], if cannot accommodate pt [patient] will need to remain off work." Mr. Roy's doctor's slip indicated

that he could return to work on June 27, 2011, with the following restriction: “could not lift more than 50 lbs.” Grievant was not allowed to return to work on light, or modified duty. Mr. Roy was returned to work on light, or modified duty with his elbow in a stationary cast. While Grievant and Mr. Roy are similar in many ways, their injuries were different, as were the restrictions imposed by their treating physician. “No use of LUE” is certainly a greater restriction than “could not lift more than 50lbs.” Further, “no use of LUE” is broad, and not as specific as the restriction placed upon Mr. Roy. Given that Grievant and Mr. Roy had different injuries and different restrictions, the two cannot be considered similarly situated. Accordingly, the undersigned cannot find that Respondent discriminated against Grievant or engaged in favoritism.

The undersigned notes that while Grievant offered a great deal of evidence concerning the tasks he could have performed if he had been allowed to return to light or modified duty, and about Mr. Roy requiring assistance when he returned to work, such does not change the restrictions imposed by Grievant’s doctor. The Respondent had to work with the restrictions imposed by Grievant’s doctor, and “no use of LUE” is a significant restriction. If Grievant disagreed with the Respondent’s interpretation of the restriction as written, he could have discussed the same with his doctor and asked his doctor to clarify the restriction.

For the reasons set forth herein, the undersigned finds that Grievant has not met his burden of proving his claims by a preponderance of the evidence. Therefore, this grievance is denied.

The following Conclusions of Law support the decision reached:

Conclusions of Law

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

2. 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).

3. Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee." W. VA. CODE § 6C-2-2(h).

4. In order to establish a claim of discrimination or favoritism under the grievance statutes, an employee must prove the following by a preponderance of the evidence:

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

5. Grievant is not similarly situated to the employee to whom he has compared himself.

6. Grievant did not meet his burden of proving his claims of discrimination and favoritism by a preponderance of the evidence.

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 (eff. July 7, 2008).

DATE: March 29, 2013.

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Carrie H. LeFevre
Administrative Law Judge