THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARCIA L. BOOKER,

Grievant,

v. **Docket No. 2022-0701-DOA**

PUBLIC EMPLOYEES INSURANCE AGENCY,

Respondent.

DECISION

Grievant, Marcia L. Booker, filed a grievance dated March 31, 2022, against her employer, Respondent, Public Employees Insurance Agency (PEIA), stating as follows: "[m]eeting March 10 with Charlotte Stover Director of Operation[s]. Policies, rules regulations that have been violated are as follows: I experienced unfair treatment, discrimination because of my protected characteristics, unfair evaluations, I was denied the protection of a classified employee as my Handbook stated. I was told [by] Charlotte my computer problems could be a direct result of my inability to operate a computer."[1] As relief sought, Grievant seeks, "[t]o stop any discriminatory practices and take steps to preven[t] discrimination in the future. Remedy should be to place me in the position of the benefits and the time used due to the pain and suffering because of the discrimination. My goal was to be one of PEIA best employees if given the ability to do so."[2]

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[1] On March 31, 2022, Grievant filed a grievance form with the Grievance Board on which she indicated that she was filing her grievance at all levels of the grievance process, levels one, two, and three. "An employee may proceed directly to level three upon agreement of the parties; or when the grievant has been discharged, suspended without pay, or demoted or reclassified resulting in a loss of compensation or benefits. Level one and two proceedings are waived in these matters." W. VA. CODE § 6C-2-4(a). As such, by Order entered April 4, 2022, this matter was to be opened on the level one docket.

A level one hearing was held on April 21, 2022, and the grievance was denied by a decision dated May 6, 2022. Grievant appealed this decision to level two of the grievance procedure on May 19, 2022, and the grievance was mediated on June 23, 2022. Grievant perfected her appeal to level three on July 6, 2022. On this statement of grievance form, Grievant referred to the allegations as stated on her original statement of grievance but amended the "relief sought" section to state, "I would like the time during this painful time given back, I would like the increase in salary because I was not allowed the same opportunities for advancement."[3]

A level three hearing was conducted on September 20, 2022, before the William B. McGinley, Administrative Law Judge, at the Grievance Board's Charleston, West Virginia, office. This grievance was reassigned to the undersigned administrative law judge for administrative purposes on November 10, 2022. At the level three hearing, Grievant appeared in person, *pro se*. Respondent appeared by counsel, Bill Hicks, Esquire, General Counsel, and by its agency representative, Jason Haught.

At the commencement of the level three hearing, ALJ McGinley asked the Grievant to clarify her grievance and the relief she was seeking. In response to ALJ McGinley's questions, Grievant stated that she was grieving poor employee

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[2] While the relief sought is not entirely clear from Grievant's statements, it appears that she is seeking, at least, some tort-like damages. "Damages such as medical expenses, mental anguish, stress, and pain and suffering are generally viewed as 'tort-like' damages which have been found to be unavailable under the Grievance Procedure. *Dunlap v. Dep't of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 20, 2009). *Spangler v. Cabell County Board of* Education, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997)." *Stalnaker v. Div. of Corr.*, Docket No. 2013-1084-MAPS (Mar. 26, 2014). *See Vest v. Bd. of Educ.*, 193 W. Va. 222, 227, 455 S.E.2d 781, 786, n. 11 (1995).

[3] Grievant has clarified that the "time" she is seeking returned is accrued leave she argues she had to use because of the treatment she alleges in her statement of grievance.

performance appraisals (EPAs) alleging that Respondent set standards she could not meet because of her computer problems, and claimed Respondent created a hostile work environment. Grievant also stated that she was seeking all the leave time she had used due to the treatment she received because the same caused her to become very upset and unable to work, so she had to leave. Grievant indicated that she was unsure of how many hours she was seeking to have returned, but the time spanned three years.[4] Grievant also stated that she was seeking an increase in her salary because of what had happened in the workplace. Grievant further clarified that she was not seeking a new computer, asserting that the computer problems she was having resulted from problems with her "credentials," and that she had tried working on other computers without success.[5]

This matter became mature for decision on October 21, 2022, upon receipt of the Grievant's post-hearing proposal. Respondent did not avail itself of the opportunity to submit post-hearing proposals. It is noted that Grievant's written post-hearing submission appears to contain allegations, statements, and information that were not made, or presented as evidence, during the level three hearing and were not otherwise

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[4] ALJ McGinley inquired as to the number of leave hours Grievant was seeking returned and she was unable to provide him a number at that time. ALJ McGinley noted that he would need to know the number of leave hours sought and that Grievant would have the opportunity to present that evidence.

[5] Respondent, by counsel, did not raise an objection at the time Grievant amended her statement of grievance to change the relief she was seeking. During the level three hearing, Respondent's counsel objected to the amended relief being considered and moved for the relief sought be limited to only what was addressed in the level one decision. ALJ McGinley overruled Respondent's objection and denied its motion because Respondent had notice that Grievant amended the relief she was seeking in her level three appeal but filed no objection, also noting that the grievance process is not "to be a procedural quagmire where the merits of the cases are forgotten." *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 730, 391 S.E.2d 739, 743 (1990).

included in the record of this grievance. Similarly, attached to Grievant's post-hearing submission is a certificate that was not presented at level three, and is also not included in the record. The record of this grievance closed at the conclusion of the level three hearing on September 20, 2022. This ALJ is only allowed to consider evidence that is contained in the record of this grievance. Claims raised, and documents and information submitted after the record has closed may not be considered in deciding a grievance. Accordingly, any new claims raised in, or documents submitted with Grievant's written post-hearing submissions will not be considered herein.

Synopsis

Grievant is employed by Respondent as a Customer Service Representative II. Grievant asserts that Respondent has discriminated against her by causing her to experience persistent technological problems that hamper her ability to perform her job duties, and by failing to correct those problems. Respondent denies all of Grievant's claims and asserts that it has taken all reasonable steps to resolve the technological problems that Grievant is experiencing. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, the 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 is employed by Respondent as a Customer Service Representative II. Grievant has been employed by Respondent since 2017. Grievant was employed by Respondent as a contract employee before being hired as a regular employee.

2. Jenny Manhart is employed by Respondent and served as Grievant's immediate supervisor from 2018 until March 2022. As of the date of the level three hearing, Trina Sweeny was Grievant's immediate supervisor and had been since March 2022. Charlotte Stover is employed by Respondent as the Director of Operations. Neither party called Ms. Stover as a witness at the level three hearing; however, she is named in the statement of grievance, and she testified at the level one grievance hearing.

3. Grievant has had persistent telephone and computer system problems since 2018-2019 that have never been completely resolved.[6] There have been various types of problems which have involved both computer hardware and software.[7] These technological problems have, at times, prevented Grievant from accessing telephone and computer systems and applications essential to performing her duties, or made performing her job duties extremely difficult. Grievant did not experience any such technological problems when she worked as a contract employee.

4. When Grievant was not experiencing the persistent technological problems, she performed well, completed tasks, and met minimum production goals.[8]

5. Grievant and Respondent have sought the assistance of the Office of Technology (OT) and the telephone system vendor, to resolve the various, persistent technological problems Grievant has had, and is still having. Matthew Beckett, OT Field Tech, has worked to resolve these problems since 2018-2019. Mr. Beckett has repeatedly attempted to resolve Grievant's technological problems in numerous ways,

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[6] *See*, testimony of Grievant; testimony of Matthew Beckett, OT Field Technician.
[7] *See*, Grievant's Exhibit 4, OT Incident Reports, 2020-2022.
[8] *See*, testimony of Amy Stalnaker; testimony of Trina Sweeny.

but nothing has fully resolved them. It appears that other OT employees have worked to resolve the problems as well.[9] The telephone system vendor has also made efforts to resolve some of the problems involving its system. From the evidence presented, it appears only OT can fix the problems that remain.

6. OT and Respondent have had Grievant work on different computers, but the problems persisted.

7. Ms. Manhart performed an Employee Performance Appraisal 3 (EPA 3) for Grievant on November 4, 2021, for the rating period October 1, 2020, to September 30, 2021. In her comments in the "Performance Factors and Standards" portion of the EPA 3, Ms. Manhart noted, "I acknowledge that Marcia has had computer issues," but also noted that Grievant "takes the fewest calls, less tha[n] ½ of the lowest other agent in the unit." However, Ms. Manhart noted that Grievant "completes assignments as required" and "meets deadlines as needed." Overall, Grievant was rated as "Meets Expectations."[10]

8. On or about March 10, 2022, prior to the filing of this Grievance, Charlotte Stover, Director of Operations, met with Grievant and, at some point during their meeting, commented that some of the technological problems Grievant was having could be the result of operator error. However, as demonstrated by the testimony of Mr. Beckett at the level three hearing, OT does not share in that belief.[11]

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[9] *See*, Grievant's Exhibit 4, OT Incident Reports, 2020-2022.

[10] Grievant failed to present the full November 4, 2021, EPA 3 document at the level three hearing. The EPA 3 Grievant presented as her Exhibit 1 consisted of three pages, the numbering on which indicates that only pages one, three, and five of six were presented. Grievant introduced no other EPAs from her time at PEIA.

[11] *See*, testimony of Matthew Beckett.

9. Trina Sweeny became Grievant's supervisor after Ms. Manhart left that position. Ms. Sweeny has taken a proactive approach to finding a resolution to Grievant's ongoing technological problems by working directly with Grievant so that Ms. Sweeny could see the problems as they occurred and attempting to troubleshoot them. Ms. Sweeny appears to have created a process for addressing the various technological problems as they arise. Grievant appears to report any problems she is experiencing to Ms. Sweeny, who tracks them, then addresses them directly with Mr. Beckett to try to resolve them. Ms. Sweeny's process has ensured that she remains informed of all the various problems, the attempts to resolve them, and any resolutions.

10. As witnessed by Ms. Sweeny, there have been times when Grievant was the only employee in her unit, or at PEIA, experiencing certain technological problems while trying to use the telephone and computer systems and applications to perform her essential duties, and these problems were not the result of operator error.[12]

11. As of the date of the level three hearing, Grievant was still having technical and computer problems, but they had improved somewhat since Ms. Sweeny became involved. Mr. Beckett indicated that as of the date of the level three hearing he did not know how to fully resolve the problems. However, Mr. Beckett acknowledged that one possible solution would be to assign Grievant new credentials,[13] and start over.

12. Ms. Sweeny performed an EPA 2 for Grievant on an unknown date in 2022, after the filing of this grievance. This EPA 2 was not presented at the level three hearing. Additionally, this EPA 2 was not mentioned at the level one hearing. Nonetheless, it is undisputed that Ms. Sweeny noted in this EPA 2 that Grievant was not

[12] *See*, testimony of Trina Sweeny.
[13] *See*, testimony of Matthew Beckett.

meeting her production goals and that the same was a performance issue, but Ms. Sweeny acknowledged therein that Grievant's technological problems were affecting her performance. Ms. Sweeny rated Grievant as "needs improvement" on this EPA 2.

13. There has been no evidence to suggest that Grievant grieved the EPA 2.

14. Grievant presented no evidence pertaining to her employee handbook.

15. Grievant did not identify any policies, rules, or regulations she asserts were violated, nor did she present any evidence of the same at level three.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

In her statement of grievance, Grievant asserted that Respondent discriminated against her because of her "protected characteristics," treated her unfairly, gave her unfair evaluations, and denied her "the protection of a classified employee as [her] handbook stated." While Grievant did not clearly identify the protected characteristics to which she was referring, during the course of this grievance, she has suggested that it was race. However, during the level three hearing, Grievant testified that she had not been given the same opportunities as her coworkers because of her difficult relationship with Ms. Manhart, not because of a protected classification like religion or race.

Instead, Grievant explained that she and Ms. Manhart had problems working together at the beginning of her employment and appeared to assert that Ms. Manhart's personal feelings toward her contributed to the poor treatment Grievant alleges she has received from management. At level three, Grievant argued that Respondent could have fixed the persistent technical telephone and computer system and application problems she has been experiencing for years, and the failure to do so constitutes discrimination. Grievant asserted that if it were any other employee having these problems, Respondent would have fixed them. Grievant testified that during the last three years of dealing with these persistent problems, management has "talked to [her] in terrible ways," "made [her] life miserable," and that such treatment has affected her family.

Respondent denies all of Grievant's claims. At level three, Respondent, by counsel, acknowledged that Grievant has had persistent technological problems for years, but asserts that it has done everything possible to resolve those problems by having OT address them. Respondent also argued that some of Grievant's claims were the result her misconstruing Ms. Stover's statement about operator error possibly causing some of the problems. Respondent asserts that Grievant took this statement as an insult when it was not meant to be.

It is noted that in her written post-hearing submission, Grievant makes allegations of racial discrimination involving co-workers not previously mentioned in her statements of grievance or during the level three hearing. Also in her written submission, Grievant appears to raise claims against Respondent not previously alleged, including violations of the Whistleblower Law, denial of training, improper removal of duties, privacy violations, bullying by members of management, reprisal,

sabotage, improper hiring practices, and favoritism. Grievant did not attempt to amend her statement of grievance to include these claims before the level three hearing, and it does not appear that she attempted to raise them during the same, even though such is not allowed by the grievance statutes and procedure. The new claims Grievant appears to raise in her post-hearing submission, after the record of this grievance had closed, cannot be considered in this grievance. Grievant also submitted a document attached to her written post-hearing submission that was not introduced during the level three hearing, or otherwise included in the record of this grievance. Accordingly, this ALJ cannot consider it in deciding this matter.

Discrimination for purposes of the grievance process has a very specific definition. "'Discrimination' means 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). Therefore, to establish a discrimination claim 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);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (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). Further, the Supreme Court of Appeals of West Virginia has stated that,

> [t]he Grievance Board can entertain grievances claiming that a particular employment action was the result of discrimination based on sex or any of the other prohibited motivations listed in the Human Rights Act. If a grievant can prevail on the claim that she has been the victim of "discrimination," "harassment," or "favoritism," it necessarily follows that the employee also can prevail by showing that the "discrimination," "harassment," or "favoritism," was motivated by sexual, racial, or some other invidious ground. Conversely, an employment decision that treats an employee differently because of the employee's race or gender, etc., is, by definition, not one that is related to the actual job responsibilities of the employee. *W. Va. Code § 18-29-2(m)*.

Vest v. Board of Educ., 193 W. Va. 222, 225, 455 S.E.2d 781,784 (1995). Therefore, Grievant must prove the elements of her discrimination claim by a preponderance of the evidence; the motive for the alleged discrimination is irrelevant.

Grievant clearly proved that technological problems exist and have so for years, that they affect, and have affected, her performance, and that these problems are not caused by operator error. However, Grievant has failed to prove by a preponderance of the evidence that same constitutes discrimination. While it is seemingly unfathomable that Grievant has had to endure such significant, performance-affecting technological problems for years, Grievant has not proved that Respondent caused these problems or deliberately failed, or refused, to fix them. It appears that Ms. Sweeny has been more involved in trying to resolve the problems than Ms. Manhart, but that does not prove discrimination. Largely, Grievant's discrimination claim was supported almost entirely by her own testimony, without any other substantiating evidence. Without such other evidence, Grievant has only made allegations as to the *cause* of the technological problems and the *reason* they have not yet been resolved. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of*

Trs./W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.,* Docket No. 93-BOD-400 (Apr. 11, 1995)).

The same is true for Grievant's claim that she was denied the same opportunities other employees were given. Grievant made allegations but presented no substantial evidence during the level three hearing to identify any such opportunities, employees who received them, or when the same occurred. Further, no such evidence can be found within the record of this grievance. Similarly, Grievant did not prove that the EPAs she received were unfair. Grievant did not grieve the EPA 2 Ms. Sweeny performed, and she did not appear to contest it at level three. The EPA 3 performed by Ms. Manhart lists Grievant's rating as "meets expectations." It was not a poor evaluation, Grievant received no "needs improvement" ratings in any of the factors or standards listed therein, and no actions were taken to attempt to improve Grievant's performance, other than the ongoing attempts by OT to fix the technological problems. Further, Grievant did not appear to challenge her rating on the EPA 3 at the level three hearing and did not mention it in her post-hearing submission. For the reasons explained herein, this grievance is DENIED. As such, the relief Grievant is seeking will not be addressed further.

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. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. Discrimination for purposes of the grievance process has a very specific definition. "'Discrimination' means 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 employee." W. VA. CODE § 6C-2-2(d).

3. To establish discrimination 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 employee(s); and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

See 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).

4. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.,* Docket No. 93-BOD-400 (Apr. 11, 1995)).

5. Grievant has failed to prove her discrimination claims by a preponderance of the evidence. Further, Grievant has failed to prove by a preponderance of the evidence her claims of unfair treatment, unfair evaluations, denial of opportunities other employees were given, and denial of protection as a classified employee. Lastly,

Grievant has failed to prove by a preponderance of the evidence her claim that Respondent violated any policies, rules, or regulations.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.[14] Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: December 8, 2022.

Carrie H. LeFevre
Administrative Law Judge

[14] On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.