THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JANELLE PEKAREK,

Grievant,

v. **DOCKET NO. 2022-0838-CONS**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILD SUPPORT ENFORCEMENT,**

Respondent.

DECISION

Grievant, Janelle Pekarek, was employed by Respondent, Department of Health and Human Resources (DHHR). On August 24, 2021, Grievant filed a grievance against Respondent, under Docket No. 2022-0149-DHHR, alleging "misconduct including misrepresentation, discrimination, retaliation, and harassment after stating the need for an ADA accommodation." On December 27, 2021, Grievant filed a second grievance under Docket No. 2022-0480-DHHR, alleging "misconduct including policy violations, DOP rule violations, a breach of employment contract and ADA discrimination for the dismissal on December 5, 2021." In each grievance, Grievant requested "relief including any and all benefits to which a grievant is entitled to."

On September 14 and September 30, 2021, a level one hearing occurred on the first grievance, resulting in a level one decision on October 22, 2021. On January 14, 2022, a level one hearing occurred on the second grievance, resulting in a level one decision on February 7, 2022. Grievant appealed the first to level two on November 5, 2021, and the second on February 24, 2022. A level two mediation was held for the first on February 3, 2022, and the second on April 28, 2022. Grievant appealed the first to

level three on March 1, 2022, and the second on May 17, 2022. On June 8, 2022, the grievances were consolidated under the current action.

A level three hearing was held remotely with the undersigned over three days: July 20, 2022; October 18, 2022; and November 18, 2022. Grievant appeared and was self-represented. Respondent appeared by David Alter, Attorney for the Bureau of Child Support Enforcement, and was represented by Katherine A. Campbell, Assistant Attorney General. This matter matured for decision on January 27, 2023, upon receipt of each party's Proposed Findings of Fact and Conclusions of Law (PFFCL).[1]

Synopsis

Grievant was diagnosed with agoraphobia and given a work at home ADA accommodation. When Grievant's doctor later deemed Grievant permanently unable to perform her job duties even with an accommodation, Respondent terminated Grievant's employment. Grievant does not seek reinstatement but requests a different position, backpay, future pay, lost wages, medical expenses, removal of both her prior discipline and dismissal, $100,000 for each act of discrimination, and $35,000 for each dollar of lost income to compensate for her emotional distress. Respondent proved good cause for dismissal due to Grievant's inability to perform even with an accommodation. Respondent was justified in ending Grievant's medical leave of absence since this inability was permanent. Respondent acted reasonably in its discretionary denial of a personal leave of absence. Thus, claims related to conditions of employment and prior

[1]Respondent acquiesced to Grievant's request for an extension of the original January 20, 2023, mature date. After receiving Grievant's PFFCL, Respondent objected to referenced evidence from level one that was not submitted at the level three hearing. As the undersigned directed the parties during the hearing to resubmit any desired evidence from level one, said exhibits will be excluded.

discipline are moot. Grievant failed to prove her dismissal was discrimination; that she was entitled to wages, benefits, or a different position; or that she was entitled to use of paid leave. Further, the Grievance Board lacks authority to award the tort-like relief requested. Accordingly, 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, Janelle Pekarek, was employed with Respondent, the Bureau of Child Support Enforcement (BCSE), as a Child Support Specialist at the time of the occurrences herein.

2. On March 19, 2020, with the onset of the Covid-19 Pandemic, BCSE began allowing its most vulnerable employees to work from home.

3. Grievant informed her immediate supervisor that she was going home and not returning until the Covid-19 Pandemic was over. Grievant was informed that BCSE would take this declaration as a self-report of her comprised status and was sent home.

4. By March 23, 2020, West Virginia Governor Jim Justice issued a stay-at-home order for all state employees due to the Covid-19 Pandemic.

5. Whereupon changes were implemented to ensure day-to-day operations of the office continued. One of these changes was that an employee was made responsible for working from the office each day to handle the mail. Initially, this was an employee who did not have internet at home. By August 2020, this employee obtained internet and began working at home like everyone else.

6. The office began a rotation list of all employees, including the Grievant, who were assigned to take turns in the office. Grievant did not tell anyone this was a problem. Thus, her first shift in the office was scheduled for August 3, 2020. At 12:26 a.m. that day, Grievant emailed her supervisor stating she was sick and could not report to the office. At 4:35 p.m. that afternoon, Grievant again emailed that she was sick and unable to report to the office the following day.

7. Other staff were assigned to cover for Grievant and her assignment in the rotation was moved to the following week of August 10, 2020.

8. At 11:41 p.m. on August 9, 2020, Grievant emailed BCSE that she would not be in the office the following day. The next morning, Grievant told her supervisor she was seeking a doctor's note to explain her situation. Grievant was taken out of the rotation to avoid further disruption.

9. Grievant was permitted use of Intermittent Family Medical Leave (FMLA). The initial approval period was for June 15, 2020, through December 15, 2020, and was later extended to June 14, 2021. Grievant was approved for one day per episode up to five times a month. Grievant continued to work from home and was not placed back into the rotation. (Respondent's Exhibit 2 & 3).

10. On September 25, 2020, Grievant was rated "meets expectations" on her Employee Performance Appraisal (EPA) for the period between September 1, 2019, and August 31, 2020. (Grievant's Exhibit 4).

11. In April 2021, Governor Justice ordered all state employees back to their offices. Grievant was in the last wave brought back in June 2021.

12. Grievant was informed that she would need to submit a request for an Americans with Disability Act (ADA) accommodation to continue working from home.

13. Grievant was advised that until an ADA accommodation request was received and approved, she would need to report to work on June 1, 2021. (Grievant's Exhibit 22).

14. When Grievant failed to report to the office on June 1, 2021, without submitting an ADA accommodation request, she was forced to stop telework and to instead take annual leave. (Grievant's Exhibit 23).

15. On June 2, 3, and 4, 2021, Grievant used FMLA leave, after which BCSE approved Grievant to work from home until her ADA request was received and reviewed.

16. On June 4, 2021, Grievant emailed BCSE documentation signed by her doctor on May 26, 2021, setting forth Grievant's need for a work at home accommodation. (Respondent's Exhibit 4).

17. On July 13, 2021, BCSE sent Grievant a letter of written reprimand detailing numerous performance issues including the lack of communication in not keeping her supervisor advised of her situation regarding her ADA accommodation. (Grievant's Exhibit 11).

18. On August 4, 2021, BCSE issued Grievant a performance improvement plan restating the specifics of the letter of reprimand. (Grievant's Exhibit 12).

19. Grievant did not grieve the written reprimand or performance improvement plan. She did tangentially address the matter in her first grievance filed on August 24, 2021, months before her dismissal. The grievance alleged "misconduct including misrepresentation, discrimination, retaliation, and harassment after stating the need for

an ADA accommodation" and requesting "relief including any and all benefits to which a grievant is entitled to."

20. On August 17, 2021, BCSE approved Grievant for six to twelve months of telework pursuant to her ADA accommodation request of June 4, 2021. (Respondent's Exhibit 11).

21. On August 24, 2021, Grievant's doctor examined Grievant and documented his findings on a DOP-L3 form. Therein, he stated that the period of incapacity was "indefinite" but that Grievant's restrictions are "unknown – may be permanent." He went on to state: "Patient has been accommodated by being allowed to work from home. She is no longer able to do this due to increased anxiety/panic." The doctor checked "yes" in response to the prompt, "Will this condition permanently prevent the employee from performing his/her duties?" (Grievant's Exhibit 15).

22. On October 7, 2021, Respondent sent Grievant a letter stating, in relevant part:

> Your healthcare provider has now placed you on a continuous leave of absence as of **August 24, 2021 and your** FMLA (480 hours) will exhaust on **October 14, 2021**. This includes the intermittent time taken as of *June 15, 2021*.
>
> You will **NOT** be eligible for a Medical Leave of Absence or (MLOA) since your healthcare provider indicates that your condition is permanent and that you will not be able to return to your duties with DHHR. Your intermittent absences along with your continuous leave have been calculated and tracked on a spreadsheet and your 480 hours will exhaust on October 14, 2021. If you are unable to return to work and you have not been approved for a Personal Leave of Absence, you will be in a "failure to return from a leave of absence" status.
>
> If you wish to apply for a Personal Leave of Absence, you must contact your supervisor or human resources representation and apply with him/her prior to the date your

> FMLA will exhaust. The approval or denial of a PLOA is at the discretion of your local supervisory staff and bureau.
>
> Division of Personnel Administrative Rule: 14.8.d.3.: *Failure of the employee to report to work promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to and approved by the appointing authority, is cause for dismissal. An employee dismissed for failure to return from leave of absence without pay is not eligible for severance pay*.

(Respondent Exhibit 6).

23. On October 12, 2021, Grievant requested a Personal Leave of Absence without pay but was denied. (Respondent's Exhibit 7).

24. By letter dated October 22, 2021, BCSE requested that Grievant state her intentions in relation to her employment, providing, in relevant part:

> Beginning August 24, 2021 you were placed on a continuous FMLA leave of absence, which exhausted on October 14, 2021. You were informed that you were not eligible for a Medical Leave of Absence under DOP's *Administrative Rule* because medical documentation stated that you were permanently unable to perform your job duties.
>
> Although you have a balance of accrued sick and annual leave, anything accrued after your last day worked is not available to use until you return to work. Further, DOP Rule 14.4.f. provides that sick leave may not be granted when a disability renders the employee permanently unable to work with or without an ADA accommodation; however, an employee may use up to 12 weeks of leave while an ADA accommodation is being considered.
>
> Because you already have been approved to telework as an ADA accommodation, and your physician has stated that you are now permanently unable to work at all for at least 10 more months, it is futile to pursue an ADA accommodation at this time. There is no accommodation that would permit you to work under these conditions.
>
> On October 12, 2021, you requested a Personal leave of absence for at least 10 more months. For the reasons stated

> above, BCSE has chosen not to approve your request. Your absence from work beginning October 15, 2021 has not been approved and is being charged as unauthorized leave.
>
> As a result, it is necessary for you to return to work at your regularly scheduled time by November 8, 2021. Upon return you are required to provide a Physician's/Practitioner's Statement (Form DOP-L3), releasing you to full or restricted duty. Your return to duty cannot be permitted absent documentation of your medical release.
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> Unfortunately, if you are unable or do not intend to return to work by November 8, 2021, the agency will have no other option but to consider termination of your employment in accordance with provisions set forth in section 14.8.d.3. If that becomes necessary, a predetermination conference will be held at 10:00 a.m. on November 8, 2021 to provide you with the opportunity to provide input in the decision process. …

(Grievant's Exhibit 17).

25. On October 26, 2021, Grievant's doctor completed a DOP-L5 form again stating the "ongoing-undetermined" duration of Grievant's condition. Regarding Grievant's inability to perform, the doctor wrote that "anxiety has become too overwhelming for her to even work from home," "she is unable to concentrate and function well enough to perform job duties," "unable to work at all currently," and "currently [sic] functioning is impaired to [sic] much to work at all." Her doctor indicates the deteriorating nature of Grievant's condition, writing, "employee continues to decline" and "employee's symptoms of panic, PTSD, and anxiety continue to increase." However, the doctor also filled in the blanks for the period of incapacity as from August 19, 2021 to March 21, 2022, and again provided March 21, 2022, after the given prompt of "Patient was or may be able to resume full duty employment with no restriction in work activities, on _____." On November 9, 2021, the document was resubmitted with "March 21, 2022," whited out and replaced with "January 14, 2022." Nevertheless, on both versions of the DOP-L5 form,

Grievant's doctor checked "yes" in response to the prompt, "Will this condition permanently prevent the employee from performing his/her duties?" (Grievant's Exhibits 18 & 19).

26. Grievant did not report to work by November 8, 2021, as directed, but did appear telephonically at the predetermination conference that day.

27. Grievant was dismissed from her employment with BCSE, effective December 5, 2021, by letter dated November 19, 2021, which stated, in relevant part:

> You will be paid for all annual leave accrued and unused as of your last workday.
>
> Your dismissal is the result of your failure to return to work after all available leave and FMLA was exhausted and request for a Personal Leave of Absence was denied. …
>
> On July 8, 2021, an ADA accommodation was made to permit you to telework through May 2022. Beginning August 24, 2021, you were placed on a continuous FMLA leave of absence which exhausted on October 14, 2021. You were informed that you were not eligible for a Medical Leave of Absence under DOP's *Administrative Rule* because medical documentation stated that you were permanently unable to perform your job duties.
>
> On October 12, 2021, you requested a Personal Leave of Absence for at least 10 months and you were informed by letter dated October 22, 2021 that BCSE chose not to approve your request for the reasons stated above. In that same letter, you were advised that your absence from work beginning October 15, 2021, was not approved and was being charged as unauthorized leave. Further, you were advised of the necessity to return to work at your regularly scheduled time by November 8, 2021.
>
> You did not contact any member of management, nor did you return to work by November 8, 2021. On November 8, 2021, you telephonically participated in a predetermination conference … The purpose of that conference was to inform you that disciplinary action was being considered and to give you an opportunity to explain yourself and the circumstances

> involved. In response, you stated that your doctor had not released you to return to work. …

(Respondent's Exhibit 10).

28. BCSE did not drop Grievant from payroll until December 5, 2021.

29. Grievant never applied for unemployment and has not worked since her dismissal. Respondent has provided Grievant approximately 50% of her salary through short-term and long-term disability insurance.

30. Grievant testified that she is not seeking reinstatement.

31. BCSE determined that it could not be without Grievant's service as a Child Support Specialist for long.

32. Grievant had exhausted her FMLA leave by October 14, 2021.

Discussion

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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*.

Respondent contends that it had good cause to dismiss Grievant after her doctor deemed her permanently unable to perform her job duties even with an ADA

accommodation. Respondent has the burden of proving that dismissal was justified. The Division of Personnel (DOP) Rule states, "An appointing authority may dismiss any employee for cause." W. VA. CODE R. § 143-1-12.2.a. (2016). Where an employee cannot perform the essential duties of her position as reasonably required by the employer, there exists good cause for dismissal. *Adkins v Division of Labor*, Docket No. 04-DOL-071 (Jan. 25, 2005). Note the absence of any requirement that this inability be permanent. The focus on the permanent nature of Grievant's inability to perform her duties is only significant in that it prevents Grievant from utilizing a medical leave of absence or sick leave to extend her employment.

Grievant claims that her inability to perform her job duties was not permanent and that the most recent physician statement from October 26, 2021, only deemed her "currently" unable to perform her duties. Yet, in the same physician statement, her doctor checked "yes" next to the prompt, "Will this condition permanently prevent the employee from performing his/her duties?" Grievant did not present evidence showing that this declaration of her permanent inability to perform job duties had been retracted. The October 26, 2021, statement makes clear that Grievant's condition had deteriorated from her last exam on August 24, 2021. The doctor writes that "employee continues to decline," "employee's symptoms of panic, PTSD, and anxiety continue to increase," and her "anxiety has become too overwhelming for her to even work from home."

Grievant argues that, even though no accommodation would allow her to perform her duties as a Child Support Specialist, Respondent should have found her a different position. She also claims that Respondent should have allowed her to use paid leave or granted her request for an unpaid personal leave of absence. Grievant alleges

discrimination, retaliation, policy and rule violations, breach of contract, and harassment. She requests backpay, future pay, lost wages, medical expenses, removal of both her prior discipline and dismissal, $100,000 for each act of discrimination, and $35,000 for each dollar of lost income to compensate for her emotional distress.

It was within Respondent's discretion to deny Grievant an unpaid personal leave of absence or use of paid annual or sick leave. Respondent notified Grievant in its October 22, 2022, letter that "[a]lthough you have a balance of accrued sick and annual leave, anything accrued after your last day worked is not available to use until you return to work" and that "DOP Rule 14.4.f. provides that sick leave may not be granted when a disability renders the employee permanently unable to work with or without an ADA accommodation." Respondent proved that Grievant's inability to work was permanent. Grievant did not prove that any of her accrued annual leave was from prior to her last day worked. Regarding an unpaid personal leave of absence, the DOP Rule states that "[a]n appointing authority may, at his or her discretion based upon agency's personnel needs, grant a permanent, probationary, or provisional employee a leave of absence without pay for a specific period of time which would not normally exceed one (1) year." W. VA. CODE R. § 143-1-14.8.a. (2016).

"'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (per curiam). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is

narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), aff'd Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001), aff'd Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), appeal refused, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003). BCSE determined that it could not be without Grievant's service as a Child Support Specialist any longer and therefore denied her a personal leave of absence. Grievant did not prove that this decision was arbitrary and capricious.

Grievant had exhausted her FMLA by October 14, 2021. Thus, the only remaining leave that Grievant had a right to use if unable to perform her duty was an unpaid medical leave of absence. But this was only available if her inability to perform was not permanent. The DOP Rule states that "[a]n injured or ill permanent classified employee upon written application to the appointing authority shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve-month period provided: . . . [t]he disability, as verified by a physician/practitioner, is not of such nature as to render the employee permanently unable to perform his or her duties. Though not eligible for medical leave of absence under this subsection, the employee may be eligible for leave under FMLA." W. VA. CODE R. § 143-1-14.8.c.1.D. (2016).

Ultimately, it is undisputed that Grievant was unable to perform her job duties at the time of her dismissal. Grievant did not prove that she could use any outstanding leave or that Respondent was unreasonable in finding that her inability to perform her duties was permanent in justifying its denial of a medical leave of absence. Grievant was given

every opportunity to return to work but did not do so. "Failure of the employee to report to work promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to and approved by the appointing authority, is cause for dismissal." W. VA. CODE R. § 143-1-14.8.d.3. (2016). Grievant's failure to return was not approved. Respondent proved good cause to dismiss Grievant.

Thus, Grievant's claims related to conditions of employment and prior discipline, including the alleged retaliatory reasons for prior discipline, are moot. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Burkhammer v. Dep't of Health & Human Res*., Docket No. 03-HHR-073 (May 30, 2003) (*citing Pridemore v. Dep't of Health & Human Res*., Docket No. 95-HHR-561 (Sept. 30, 1996)).

Further, Grievant failed to grieve her prior discipline. "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin*., Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), aff'd, Monongalia Cnty. Cir. Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), appeal refused, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000).

Grievant failed to present evidence that she was not provided wages or benefits to which she was entitled or that she was entitled to a different position. "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)).

Grievant asserts that BCSE discriminated against her. 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). Grievant did not compare herself to any similarly situated employee and thus failed to prove discrimination.

The Grievance Board lacks authority to award tort-like and punitive 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). Thus, the Grievance Board lacks authority to award the requested monetary relief for discrimination, emotional distress, and therapy.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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. "An appointing authority may dismiss any employee for cause." W. VA. CODE R. § 143-1-12.2.a. (2016). Where an employee cannot perform the essential duties of her position as reasonably required by the employer, there exists good cause for dismissal. *Adkins v Division of Labor*, Docket No. 04-DOL-071 (Jan. 25, 2005).

3. Respondent proved by a preponderance of the evidence that dismissal was justified.

4. Grievant did not prove by a preponderance of the evidence that she was owed wages or benefits or that she should have been offered a different position.

5. "Sick leave may not be granted in advance of the employee's accrual of the leave or when the employee's disability, as verified by a physician/practitioner on a prescribed physician's/practitioner's statement form, is of such a nature as to render the employee permanently unable to perform his or her duties with or without accommodation; provided the employee may continue to utilize available sick leave

during the accommodation consideration process not to exceed twelve (12) weeks." W. VA. CODE R. § 143-1-14.4.f. (2016).

6. "An injured or ill permanent classified employee upon written application to the appointing authority shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve-month period provided: . . . [t]he disability, as verified by a physician/practitioner, is not of such nature as to render the employee permanently unable to perform his or her duties. Though not eligible for medical leave of absence under this subsection, the employee may be eligible for leave under FMLA." W. VA. CODE R. § 143-1-14.8.c.1.D. (2016).

7. Respondent proved that Grievant's inability to work was permanent and that Grievant was therefore barred from use of a medical leave of absence or sick leave.

8. Grievant did not prove that she had accrued annual leave from prior to her last day worked to extend her employment.

9. "Personal Leave. - An appointing authority may, at his or her discretion based upon agency's personnel needs, grant a permanent, probationary, or provisional employee a leave of absence without pay for a specific period of time which would not normally exceed one (1) year." W. VA. CODE R. § 143-1-14.8.a. (2016).

10. "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (per curiam).

11. Grievant did not prove by a preponderance of the evidence that Respondent was arbitrary and capricious in denying her a personal leave of absence.

12. Grievant did not prove by a preponderance of the evidence that she was entitled to paid or unpaid leave after October 14, 2021.

13. 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).

14. Grievant failed to prove discrimination by a preponderance of the evidence.

15. "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).

16. The Grievance Board lacks authority to award the requested monetary relief for discrimination, emotional distress, and therapy.

17. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Burkhammer v. Dep't of Health & Human Res*., Docket No. 03-HHR-

073 (May 30, 2003) (*citing Pridemore v. Dep't of Health & Human Res*., Docket No. 95-HHR-561 (Sept. 30, 1996)).

18. Grievant's claims related to conditions of employment and prior discipline are moot.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals.[2] 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: March 17, 2023

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Joshua S. Fraenkel
Administrative Law Judge

[2]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.