THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MONICA MARIE ROBINSON,
Grievant,

v. **Docket No. 2024-0460-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Monica Marie Robinson, was employed by Respondent, Division of Highways. On December 18, 2023, Grievant filed this grievance against Respondent stating,

> Ms. Robinson bases her grievance off the agency's failure to cooperate and provide the accommodations necessary for her to be able to return to work, which resulted in termination of her employment and the reason noted for termination the exhaustion of leave resulting in the termination of employment.
>
> A detailed explanation in terms of a statement of grievance will be provided by her representative Lori Waller in a separate correspondence that will follow. This correspondence will provide details of the iniquity endured to the board for the basis of Ms. Robinson's claim.

For relief, Grievant seeks:

> To be made whole in any and every way including but not limited to:
>
> - Removal of any and all in reference to dismissal or letters regarding noncompliance with ADA or failure to return to work from all personnel records/files and any other records - specifically but not limited to letters dated 08/10/23; 09/20/23; 10/27/ 23; 11/09/23; 11/22/23; 12/4/23.
> - Reinstatement to position terminated from with accommodations requested granted with no reflection in personnel file, including but not limited to no bearing on future promotions, advancements, pay increases or

hiring in this position or any other position within the agency or any other state agency.

- Backpay for time from time accommodations requested effective 08/01/23 including interest.
- Adjustment to credit for state employee service time from time accommodation requested 08/01/23, including any accrual of sick and annual leave that is applicable in conjunction with the accommodation.
- Service Credit from date of accommodation request 08/01/23.
- Front & Back Pay; Compensatory & Punitive Damages
- Reimbursement of any and all costs associated with this grievance and correspondence during the process to request accommodations; including but not limited to certified mail fees, attorney fees and associated legal costs incurred.
- Reinstatement and back pay of raise received 09/21 rescinded without notice 11/2021, including interest.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on May 20, 2024, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and was represented by counsel, Lori Waller, Legal Aid of West Virginia. Respondent appeared by Rebecca McDonald, Deputy General Counsel to Human Resources, and Kathryn Hill, Human Resources Employee Manager, and was represented by counsel, Lori Counts-Smith. This matter became mature for decision on July 8, 2024, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Training and Development Specialist. Due to a serious medical condition, Grievant was granted an unpaid leave of absence for two years. Near the expiration of her leave of absence, Grievant requested a temporary return to work at less than full duty, which was denied pursuant to Respondent's discretionary policy. At the expiration of her leave of absence, when Grievant indicated

she was still not able to return to work at full duty, Respondent attempted to engage in the interactive process to determine if Grievant was entitled to a reasonable accommodation under the Americans with Disabilities Act. Grievant failed to engage in the interactive process. Respondent terminated Grievant's employment per its policy for failure to return to duty at the expiration of her leave of absence. Respondent proved it was justified in terminating Grievant's employment for failure to return to duty after Grievant failed to engage in the interactive process for reasonable accommodation under the Americans with Disabilities Act. Accordingly, 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 was employed by Respondent as a Training and Development Specialist and had been so employed since 2018.

2. From August 2020 to September 2021, Grievant worked intermittently due to a serious health condition.

3. Beginning on September 14, 2021, after exhausting all leave, including job-protected FMLA leave, Grievant was placed on a leave of absence without pay.

4. Respondent's Attendance, Leave, and Overtime Policy DOT 3.10 section 8.0 provides leave of absence without pay. Employees are entitled to a six-month medical leave of absence if the policy's conditions are met. After the expiration of the medical leave of absence, Respondent may, but is not required to grant additional personal leaves of absence. However, a leave of absence without pay for non-Workers Compensation illness or injury is limited to twenty-four consecutive months total. Before returning to

work after the leave of absence, the employee is required to furnish a statement from their physician indicating the employee's ability to return to work. The policy allows, but does not require, Respondent to allow a return to work at less than full duty. Failure to return to work at the expiration of leave is cause for dismissal.

5. By WVDOT Physician's/Practitioner's Statement dated June 29, 2023, Grievant's physician requested a temporary period of return to work at less than full duty from July 10, 2023, through September 30, 2023, stating, "Monica can perform telework 16 hours per week. It is feasible for her to start easing back into the work force slowly. I do see her returning full time in the future." The statement also stated that Grievant's tentative return to full duty would be October 1, 2023.

6. By letter dated August 10, 2023, Natasha B. White, Director, Human Resources Division, informed Grievant that her request for temporary medical accommodation was denied after review by the Medical Accommodation Committee. The request was denied "based on several factors, including the needs and objectives of the agency, the essential functions of your job classification, and the impact of your absence to the agency and/or unit." The letter further states that Respondent would consider accommodations that would allow Grievant to return to work in person and provided instructions to request any further "recommendations, suggestions, or additional requests for accommodation…."

7. Grievant did not respond to the August 10, 2023, denial of accommodation.

8. By letter dated September 20, 2023, Director White informed Grievant that her leave of absence without pay was expiring and Grievant was required to return to work on or before October 5, 2023, resign, or be dismissed. The letter further stated that

Grievant would be required to submit a Physician's/Practitioner's Statement "indicating your ability to return to work and the date this is to occur."

9. On October 5, 2023, Grievant emailed a letter to Director White responding to the September 20, 2023, letter. Although her physician's statement had previously indicated a tentative return to full duty by October 1, 2023, Grievant stated, "At this time the only physician statement that I can provide still consists of the medical accommodations to be able to temporarily work from an alternative work location with reduced hours." Grievant asserted that she had emailed regarding the denial of her accommodation and objected to the answers received, although this email was not produced for the record. Grievant protested that she had not been informed that her request would be reviewed by a committee and that she had not been provided with the new policies. Grievant asserted that policy 3.2 had not been extended to her. Grievant's only request in the letter was to be provided with a copy of her personnel file.

10. Grievant did not return to work.

11. By letter dated October 27, 2023, Director White informed Grievant that she was not eligible for accommodation under the Medical Accommodation Policy 3.2, but that she may qualify for accommodation under the Americans with Disabilities Act. The letter explained that, because Grievant had exhausted all paid and unpaid leave, Grievant "must seek determination of whether you qualify for a reasonable accommodation under the ADA in order for you to return to work." The letter further detailed the process and made clear that Grievant would be required to complete the enclosed packet, including signing a medical authorization form.

12. Neither party introduced policy 3.2 into the record.

13. On November 9, 2023, Director White sent a Final Notice by certified mail instructing Grievant to return the packet within two weeks. The letter appears to be a form letter in that, in addition to information regarding the ADA reasonable accommodation process, it also discusses paid leave and medical leave of absence without pay, which the prior letter stated Grievant had already exhausted.

14. On November 22, 2023, Tonya Harrison, Assistant Director, Human Resources Division, sent Grievant a Notice of Closure stating that Grievant's request for accommodation was denied as Grievant had failed to complete the necessary forms to engage in the ADA reasonable accommodation interactive process. The letter mistakenly states that Grievant's physician had requested an accommodation for Grievant's permanent medical condition.

15. On December 1, 2023, Grievant sent a letter to Director White in response to the November 22, 2023, closure letter. Grievant denied that she or her physician had made a request for accommodation for a permanent medical condition. Grievant asserts that it was not her failure to comply but the failure of the agency that did not allow her to comply. Grievant states she had no suitable opportunity and protests that Respondent failed to offer an ADA accommodation process in the August 10, 2023, letter or address the September 20, 2023, letter. Grievant again requested her personnel file and also a copy of her position description. Grievant did not state that she was available to return to work or request any particular accommodation.

16. By letter dated December 4, 2023, Director White notified Grievant that her employment would be terminated effective December 19, 2023, for failure to return to

work from her leave of absence. The letter informed Grievant of her right to provide reasons why the termination was not warranted.

17. On December 15, 2023, Kathryn Hill, Human Resources Employee Manager, emailed Grievant regarding her request for her personnel file and provided instructions to obtain the same.

18. By letter on December 18, 2023, Grievant, by counsel, responded to the termination letter explaining her concerns with the accommodation process, including her assertion that the release of medication information form was overly broad, and her request to reopen the accommodation process.

19. By letter on December 22, 2023, Grievant, by counsel, as a follow-up to a previous discussion between she and Deputy General Counsel McDonald, stated that Grievant "does not wish to renew her ADA request" and would proceed with the grievance process.

20. Despite Grievant's statement that she did not wish to renew her ADA request, on January 12, 2024, Director White again sent the same form letter that was sent on November 9, 2023.

21. On January 12, 2024, Respondent direct deposited $764.53 to Grievant's account for wages paid from donations from other employes through Respondent's leave donation program.

22. On January 16, 2024, Grievant, by counsel, sent a letter to Deputy General Counsel McDonald referencing a January 10, 2024, letter that does not appear in the record. Grievant asserts that Grievant's ADA request was considered and denied and

that Grievant's employment was subsequently terminated. Grievant asserted her intent to proceed with the grievance process.

23. By letter to Deputy General Counsel McDonald on January 25, 2024, Grievant, by counsel, stated that she would not complete the packet for ADA accommodation as she was ineligible due to the termination of her employment.

Discussion

This case involves an unusual circumstance in which Grievant asserts her employment was terminated and Respondent denies that Grievant's employment was terminated. This impacts the burden of proof in that there are differing burdens of proof regarding disciplinary and non-disciplinary matters.

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his 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.*

Therefore, initially, it is Grievant's burden to prove that her employment was terminated. The December 4, 2023, letter clearly terminates Grievant's employment effective December 19, 2023. Although the letter did provide an avenue for Grievant to

protest the termination decision prior to the effective date by contacting Director White, the letter did not state that the termination would be automatically stayed upon such protest. Grievant, by counsel, appeared to attempt to protest the termination in her letter to Executive Director Bill Robinson[1] on December 18, 2023, and she had further discussions with Deputy General Counsel McDonald; however, the termination letter was never rescinded. Therefore, Grievant proved that her employment was terminated, and the burden now shifts to Respondent to prove that the termination of Grievant's employment was justified.

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.2 (2022).

Grievant asserts Respondent improperly terminated Grievant's employment because she was entitled to an accommodation under the Americans with Disabilities Act ("ADA"). Although the Grievance Board has no authority to determine liability under the ADA, consideration of the act is still relevant in the grievance process to determine whether a Respondent's actions were proper. *See Martin v. W. Va. Dep't of Health &*

[1] Executive Director Robinson was not the appropriate person to appeal the termination as he is the Executive Director of an unrelated subordinate agency of the Department of Transportation. Further, the letter had specifically stated any response was to be made to Director White.

Human Res./Jackie Withrow Hosp., Docket No. 2011-1590-DHHR (May 18, 2012), *aff'd*, Kanawha County Circuit Court, Civil Action No. 12-AA-79 (December 7, 2012); *Ruckle v. W. Va. Dep't of Health & Human Res./Office of Maternal and Child Health*, Docket No. 04-HHR-367 (December 22, 2005); *Cf. Vest v. Bd. of Educ.,* 193 W. Va. 222, 455 S.E.2d 781 (1995). In this case, if Respondent violated the ADA in terminating Grievant's employment, then the termination was not justified.

The ADA prohibits employment discrimination against "qualified individuals with a disability because of the disability of such individual." 42 U.S.C.A. § 12112(a). Employers are required to provide reasonable accommodation to allow individuals with a disability to perform the essential functions of their jobs. 42 U.S.C. § 12112(b)(5)(A). Reasonable accommodation is determined through an interactive process between the employer and the employee. 29 C.F.R. § 1630.2(o)(3). The parties must communicate and act in good faith during the process. *Allen v. City of Raleigh*, 140 F. Supp. 3d 470, 483 (E.D.N.C. 2015) (citing *EEOC v. Kohl's Dep't Stores. Inc*., 774 F.3d 127, 132 (1st Cir. 2014)).

At the time of the termination of her employment, Grievant had been on unpaid leave of absence from her job for more than two years. Near the expiration of her leave of absence, Grievant submitted a statement from her physician requesting a temporary return to work at less than full duty. Grievant's physician stated she could only return to work remotely and for only 16 hours a week from July 10, 2023, to September 30, 2023, with an anticipated return to full duty on October 1, 2023. Respondent reviewed the request to return at less than full duty under its discretionary policy and determined it could not accommodate Grievant's return to less than full duty with the restrictions set by

Grievant's physician. Grievant did not respond to the denial of her request although the letter clearly provided the opportunity to respond.

It was only when Respondent notified Grievant that she was required to return to work at full duty or face termination of her employment that Grievant responded. Although Grievant's physician had stated that she could tentatively return to full duty beginning October 1, 2023, when Grievant responded on October 5, 2023, she indicated she was still unable to work without restriction. Respondent then attempted to engage Grievant in an interactive process to allow Grievant to present additional medical information to determine what, if any, ADA accommodations were necessary and available. Grievant failed to respond to either letter inviting her to provide information to engage in the interactive process.

Although Grievant now complains that the medical release she was required to sign was overly broad, during the interactive process Grievant did not respond to Respondent to protest the medical release. Grievant did not attempt to provide any other medical information or indicate in any way she was interested in pursuing an ADA accommodation. In fact, in response to the letter closing the interactive process, Grievant responded that neither she nor her physician had requested accommodation for a permanent medical condition. Although she complained that there was no ADA accommodation request process offered in the letter denying the request for temporary accommodation, again, Grievant still did not specifically request an accommodation under the ADA, provide any further information on why she would need an accommodation, or announce any intent to return to work.

Therefore, under Respondent's policy, Respondent was justified in terminating Grievant's employment for failure to return to work following her two-year leave of absence. Grievant's assertion that Respondent is prevented from terminating Grievant's employment because she was entitled to accommodation under the ADA fails. Grievant's doctor stated that she was tentatively able to return to full duty on October 1, 2023. After October 1, 2023, when Grievant appeared to indicate she was not able to return to work at full duty, Respondent, in good faith, attempted to engage in the interactive process with Grievant. It was Grievant who failed to engage in the process with Respondent as she was required to do. Therefore, the grievance must be denied.

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 his 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. Grievant proved that her employment was terminated.

3. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.2 (2022).

4. Although the Grievance Board has no authority to determine liability under the ADA, consideration of the act is still relevant in the grievance process to determine whether a Respondent's actions were proper. *See Martin v. W. Va. Dep't of Health & Human Res./Jackie Withrow Hosp*., Docket No. 2011-1590-DHHR (May 18, 2012), *aff'd*, Kanawha County Circuit Court, Civil Action No. 12-AA-79 (December 7, 2012); *Ruckle v. W. Va. Dep't of Health & Human Res./Office of Maternal and Child Health*, Docket No. 04-HHR-367 (December 22, 2005); *Cf. Vest v. Bd. of Educ.,* 193 W. Va. 222, 455 S.E.2d 781 (1995).

5. The ADA prohibits employment discrimination against “qualified individuals with a disability because of the disability of such individual.” 42 U.S.C.A. § 12112(a). Employers are required to provide reasonable accommodation to allow individuals with a disability to perform the essential functions of their jobs. 42 U.S.C. § 12112(b)(5)(A). Reasonable accommodation is determined through an interactive process between the employer and the employee. 29 C.F.R. § 1630.2(o)(3). The parties must communicate and act in good faith during the process. *Allen v. City of Raleigh*, 140 F. Supp. 3d 470,

483 (E.D.N.C. 2015) (citing *EEOC v. Kohl's Dep't Stores. Inc*., 774 F.3d 127, 132 (1st Cir. 2014)).

6. Respondent proved the termination of Grievant's employment was justified because Grievant failed to return to work at the expiration of her leave of absence and failed to engage in the interactive process to determine a reasonable accommodation.

Accordingly, the grievance is **DENIED.**

"The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed." W. VA. CODE § 6C-2-5(a) (2024). "An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with §51-11-4(b)(4) of this code and the Rules of Appellate Procedure." W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

DATE: August 19, 2024

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Billie Thacker Catlett
Administrative Law Judge