

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**LORI A. SARVER,
Grievant,**

Docket No. 2016-1466-DHHR

v.

**WEST VIRGINIA DEPARTMENT of HEALTH and HUMAN RESOURCES/OFFICE of
HUMAN RESOURCE MANAGEMENT
and EDUCATION REIMBURSEMENT LEAVE PROGRAM,
Respondents.**

DECISION

Grievant, Lori Sarver has been employed by the Bureau for Child Support Enforcement ("BCSE") as a Training Manager at all times relevant to this grievance. Ms. Sarver filed a grievance against Respondents West Virginia Department of Health and Human Resources ("DHHR"), the Office of Human Resource Management ("OHRM") and the Education and Expense Reimbursement Leave program on or about March 29, 2016, at Docket No. 2016-1466-DHHR, stating:

"My EER/L Application was denied and extenuating circumstances were not considered. The extenuating circumstance was a death in my immediate family. There is no internal process. A previous A-1 Form was accepted late in November 2015. I have been approved for seven reimbursements for classes taken toward my Public Administration degree since August 2014, with a 4.0 GPA."

The relief sought was:

"Reversal of EER/L Application Denial Decision and payment of \$1,400 toward the costs of the two classes, Public Fiscal Management and Public Administration Ethics and Theory that cost \$1,920 in tuition from Southern New Hampshire University."

This grievance proceeded to a Level One hearing on April 12, 2016. On or about May 3, 2016, the Level One grievance evaluator, Christina Bailey, ordered the DHHR's EERL Program to be joined as a Respondent to the grievance.¹ The grievance proceeded to Level Two on July 25, 2016. A Level Three hearing was held before the undersigned on October 26, 2016, at the West Virginia Public Employees Grievance Board in Charleston, West Virginia, Grievant appeared *pro se* at the hearing and Assistant Attorney General Michael Bevers represented Respondent, DHHR. At the conclusion of the hearing, the parties declined to submit post-hearing arguments. Therefore, this grievance became mature for decision on October 27, 2016.

Synopsis

Grievant asserts that Respondents improperly denied her EERL A1 Application to obtain education expense reimbursement under DHHR's Employee Education Expense Reimbursement/Subsidized Education Leave Program ("Program"), which was submitted beyond the 30-day deadline clearly specified in the process and procedures for the Program. Grievant asserts that DOP's Education Expense Reimbursement/Leave Program Policy, which states that, " ... funds shall be expended ... in a fair and equitable manner consistent with the mission of the agency and the agency's present and future staffing needs," requires Respondents to make an exception to the deadline in this instance, due to the difficult circumstances she faced at or about the time of the prescribed deadline, specifically a family death, a minor illness and pressing employment duties.

¹ However, the undersigned notes that DHHR's EERL Program was listed as a Respondent on the Level One Grievance Form and that the EERL Program appeared at the Level One hearing by Ms. Linda Leighton-Clark, Director of Employee Development and Careasa Nichols, EERL Program Specialist.

Grievant failed to prove that Respondents violated any applicable policies or procedures when her application was denied on the basis that it was not timely submitted.

The following findings of facts are made based upon the entire record developed in this grievance. Ms. Linda Leighton-Clark, Director of Employee Development and Ms. Careasa Nichols, EERL Program Specialist, and Grievant appeared and testified at hearing.

Findings of Fact

1. Grievant, Lori Sarver, has been employed by the Bureau for Child Support Enforcement ("BCSE") as a Training Manager at all times relevant to this grievance.

2. DHHR has an Employee Education Expense Reimbursement/Subsidized Education Leave Program ("Program"). Under the Program, DHHR may, *inter alia*, reimburse employees of participating agencies for their employment-related education expenses if the agency approves the courses as relevant to the employee's position and the employee fully complies with the prescribed process and procedures of the Program.

3. In order to obtain education expense reimbursement under the Program, the applicant must submit a completed EERL A1 Application to the OHRM/EERL within thirty-days of the earliest class start date. The thirty day deadline is clearly and prominently displayed on the application form.

4. The OHRM/WV DHHR Employee Education Expense Reimbursement/Subsidized Education Leave Program, Process and Procedures, states, in pertinent part:

II Requirements ...

F. Deadlines are specific for each program. Employees who do not meet the requirements of the program accept full responsibility for payment of financial obligations incurred. Date received (submitted) at OHRM will be indicated by the OHRM office date stamp on the received application. (p.1)

It further states,

III. Education Expense Reimbursement Process:

A. The process of applying to the ... Program begins with the applicant submitting the completed application form (EER/L A1) directly to the EER/L Program Specialist in the Office of Human Resources Management (OHRM).

1. It is the applicant's sole responsibility to submit a completed, original EER/L A1 form and tuition or account statement to the address indicated on the form so that it is received at OHRM *no later than thirty (30) calendar days following the earliest class start date* indicated on the ... form. (p. 5) (*Emphasis added.*)

(Level One, Respondent's Exhibit 5.)

5. DOP's Policy on Education Expense Leave Program Reimbursement also provides, in pertinent part,

III Policy –

A. ... an appointing authority ... may reimburse employees for employment-related education expenses and/or grant subsidized education leave subject to the terms and conditions of this policy and/or relevant statute when sufficient funds are available and when in the best interest of the agency....

2. Such funds shall be expended ... in a fair and equitable manner consistent with the mission of the agency and the agency's present and future staffing needs.

(Level One, Joint Exhibit 1.)

6. Prior to filing this grievance, Grievant had been a participant in the EER/L program since August 2014, and had received seven reimbursements, having applied timely many for many semesters of study, with the below-noted exception in 2015.

(Respondent's Level One, Exhibit 4).

7. Grievant's Summer A 2016 courses began on February 8, 2016.

8. On March 18, 2016, Ms. Careasa Nichols, the EERL Program Specialist, sent an e-mail to Grievant, in which Grievant's A1 application was denied on the basis that that it was received after the prescribed deadline for submission, as dictated by relevant DOP and OHRM policy. The missed deadline for Grievant's submission of the A1 application was March 9, 2016, i.e., thirty-days after the February 8, 2016, start date of her courses. However, the A1 application was received thirty-nine (39) days after the earliest class start date.

9. Grievant promptly appealed to Ms. Linda Leighton-Clark, the Director of Employee Development, for a review of this denial, given extenuating circumstances cited by Grievant, which Grievant contended prevented her from timely submitting the A1 application. Specifically, Grievant's infant nephew, tragically, passed away on February 22, 2016. Additionally, she was ill and absent from work for a few days with fever and had pressing work duties prior to the submission deadline.

10. Grievant did not make Respondent aware of the circumstances that prevented her from timely filing her application, until after the deadline passed, when she made her appeal of the denial of payment of her tuition. These circumstances certainly added to Grievant's confusion about the deadline.

11. Grievant was further confused by the fact that the deadline to submit another form required by the educational reimbursement process, the EER/L A2 form, is due no later than sixty (60) calendar days after the latest class end date. The A2 must be submitted with the participant's grade report and an updated invoice or account/tuition statement reflecting all charges, credits and grants for the classes. Grievant confused the two deadlines, believing she had sixty (60) rather than thirty-days from the first class start

date to submit the EER/L A1 form. (See Level One-Respondent's Exhibit 5, "OHRM/DHHR/Employee Education Expense Reimbursement Subsidized Education Leave Program, Process and Procedures").

12. On or about November 4 or November 5 of 2015, the EERL Program approved a late request for education expense reimbursement from Grievant.

13. Ms. Nichols explained that this late request was approved in error; in violation of applicable DOP and EERL Program policies and had been unrecognized until Grievant pointed it out. Grievant was not asked to return the tuition monies that had been paid in error.

14. The EER/L forms and their deadlines are readily found online by employees and employees also call the EER/L Program administrators/employees for clarification as needed, and have specifically called when uncertain about the respective thirty (30) and sixty (60) day deadlines for submission of the EER/L A1 and A2 forms. (Level One, Respondent's Exhibit 11 and Level One testimony of Ms. Nichols.)

15. As a further basis for its denial of Grievant's appeal, Respondent also pointed to the requirement that EERL policies must be equitably applied to all employees. (Level One testimony of Ms. Nichols and Ms. Leighton-Clark.)

16. In her e-mail of March 22, 2016 to Grievant, Ms. Leighton-Clark stated that from January of 2015 through March 22, 2016, ten (10) reimbursement denials were issued due to missed deadlines. She further explained that, "the policy is not meant to be punitive; however, we do have to have parameters in which to administer the program. I can find no way to overturn the denial without setting a precedent [sic] which nullifies the requirement for any application deadline at all. If we extend the deadline to allow for nine

days over-in your case, then where is the next cut off when the next person may be 10 days over?" (Respondent's Level One, Exhibit 4.)

17. Other employees, to avoid late application for reimbursement of educational expenses, have made extraordinary efforts to timely file their applications, such as taking a half-day of leave to deliver the form to OHRM on the last day permissible.

Discussion

In non-disciplinary matters, Grievant bears the burden of proving her 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. Dep't of Human Services*, Docket No. 89-DHS-72 (Nov. 29, 1990); *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). "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 and Human Res.*, Docket No 92-HHR-486 (May 17, 1993). A preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

Firstly, Grievant seems to assert that because Respondent mistakenly approved one of her previous EER/L A1 applications, which she submitted late, they must do so again now. However this prior mistake does not require Respondents to accept Grievant's late A1 application of March 17, 2016. See *Thewes/Thompson v. Dep't of Health and Human Res./Pinecrest Hospital*, Docket No. 02-HHR-366 (September 16, 2003); *Walker v. Dep't of Transportation*, Docket No. 01-DOH-450 (September 19, 2001).

In addition, though Grievant does not allege that Respondents have improperly interpreted or applied the clearly stated thirty-day deadline prescribed by the Process and Procedures for the Program, she asserts that DOP's Education Expense Reimbursement/Leave Program Policy, which states that, "... funds shall be expended ... in a fair and equitable manner consistent with the mission of the agency and the agency's present and future staffing needs," requires Respondents to make an exception to the deadline in this instance, due to the difficult circumstances she faced at or about the time of the prescribed deadline. This language does not permit the conclusion that, due to the Grievant's circumstances, Respondents must ignore the patently clear thirty-day deadline to submit the EER/L A1 application, which is set forth in the process and procedures for the Program.

Though Grievant did not specifically allege discrimination, she elicited testimony from Ms. Nichols and Ms. Leighton-Clark regarding whether any other employees were excused from meeting the A1 deadline due to extraordinary circumstances or confusion. In response, Ms. Nichols described situations wherein other employees were in difficult circumstances, or had forgotten the deadline until the last minute, yet those employees managed to submit their EER/L A1 applications on time. Additionally, from January 2015, through February 2016, reimbursement was denied to ten employees who failed to meet the deadline. Therefore, the thirty-day deadline has heretofore been uniformly enforced.² Respondent accurately explained that to fail to enforce the applicable submission

² This is accurate, but for the mistake of reimbursing Grievant's prior late submission of her EER/L A-1, which was previously addressed by the undersigned.

deadline under these circumstances would be inequitable to other employees who have been denied tuition reimbursement because they failed to timely submit their applications.

In conclusion, the process and procedures of the EERL Program provide no exception to the requirement that the EER/L A1 form must be submitted within thirty-days of the start date of the first class in order to qualify the applicant for participation in the Program and reimbursement of tuition. Grievant failed to show that Respondents did not equitably expend funds for education reimbursement under DOP's Education Expense Reimbursement/Leave Program Policy when EERL Program administrators declined to accept Grievant's late application of the EER/L A1 form, despite Grievant's circumstances, or that Respondents otherwise violated any applicable policies, rules or procedures in denying her application as untimely.

The Grievance Board has no authority to order a state agency to make a discretionary change in its policy, or to substitute its management philosophy for that of the agency. *Streets, et al., v. Dep't of Health and Human Resources/Sharpe Hospital*, Docket No. 03-HHR-039 (June 25, 2003); *Skaff v. Pridemore*, 200 W.Va. 700, 490 S.E.2d 787 (1997). While the undersigned is most sympathetic to Grievant's loss that distracted her from timely applying for tuition reimbursement, Respondent properly and uniformly applied the process and procedures for education reimbursement in this instance and the grievance is therefore denied.

Conclusions of Law

1. In non-disciplinary matters, Grievant bears the burden of proving her 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. Dep't of Human Services*,

Docket No. 89-DHS-72 (Nov. 29, 1990); *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). “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 and Human Res./Colin Anderson Center.*, Docket No 92-HHR-486 (May 17, 1993). A preponderance “is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it.” *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. The process and procedures of the Employee Education Expense Reimbursement/Subsidized Education Leave Program provide no exceptions to the requirement that the EER/L A1 form must be submitted within thirty-days of the start date of the first class in order to qualify the applicant for participation in the program and reimbursement of tuition thereunder.

3. DOP’s Education Expense Reimbursement/Leave Program Policy states, “... funds shall be expended ... in a fair and equitable manner consistent with the mission of the agency and the agency’s present and future staffing needs.”

4. Grievant failed to meet her burden of proving by preponderance of the evidence that Respondents failed to equitably expend funds for education reimbursement under DOP’s Education Expense Reimbursement/Leave Program Policy when EERL Program administrators declined to accept Grievant’s late application of the EER/L A1 form, despite Grievant’s circumstances, or that Respondents otherwise violated any applicable statutes, policies, rules or procedures in denying her application as untimely.

5. The Grievance Board has no authority to order a state agency to make a discretionary change in its policy, or to substitute its management philosophy for that of the agency. *Streets, et al., v. Dep't of Health and Human Resources/Sharpe Hospital*, Docket No. 03-HHR-039 (June 25, 2003); *Skaff v. Pridemore*, 200 W.Va. 700, for 490 S.E.2d 787 (1997).

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: December , 2016

Susan L. Basile
Administrative Law Judge