THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

AMY DILLON,
Grievant,

v. **Docket No. 2018-0244-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

Grievant, Amy Dillon, filed this action at Level Three on August 15, 2017, after being demoted with prejudice as an accommodation because she could no longer perform the essential functions of her job. In her Statement of Grievance, she claims a "[f]unctional demotion with loss of pay upon accommodation" and for relief she seeks "[t]o be made whole in every way including back pay with interest." A Level Three evidentiary hearing was conducted before the undersigned on January 25, 2019, at the Grievance Board's Westover office. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Brandolyn N. Felton-Ernest, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on March 22, 2019.

Synopsis

Grievant is employed as an Office Assistant II, pay grade 5, with the Department of Health and Human Resources at Sharpe Hospital. Prior to the issues in this case,

Grievant was employed as a Health Service Assistant, pay grade 7. Due to a medical condition, Respondent made a determination, based upon Grievant's physician, that she could no longer engage in direct patient care as a Health Service Assistant. In an effort to accommodate Grievant's condition to enable her to perform the essential functions of her job she was placed in another position that was a lower pay grade. This action by Respondent resulted in a demotion with prejudice. Respondent established by a preponderance of the evidence that this action was not in violation of any law, rule or policy and was not arbitrary and capricious. Accordingly, this grievance is denied.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant is employed as an Office Assistant II, pay grade 5, with the Department of Health and Human Resources at Sharpe Hospital. Prior to the issues in this case, Grievant was employed as a Health Service Assistant, pay grade 7.

2. Harold Stewart, Human Resources Assistant, indicated that the accommodation process started when Grievant brought in a doctor's slip regarding light duty. At the time this grievance was filed, Mr. Stewart was the acting interim Human Resources Director.

3. Mr. Stewart received on April 26, 2017, an Application for Leave for Federal Family and Medical Leave, State Parental Leave, and/or Medical Leave of Absence Without Pay completed by Grievant. Mr. Stewart indicated that the application date for the leave request was April 21, 2017, and the period of leave requested was from March 2017 through June 2017. Receipt of this document would have started the process for determining the need for an Americans with Disability Act accommodation.

4. Mr. Stewart explained that this is an interactive process between the employee and the facility when there is a need for accommodation.

5. Mr. Stewart also received a Job Analysis form which was to be completed by the Grievant's supervisor and to be remitted to Carlotta Gee, EEO/Civil Rights Officer for the Department of Health and Human Resources Management. In this document it is stated that the employee "must be able to have direct interaction with patients and be in patient care areas of the hospital." Respondent's Exhibit No. 2.

6. Mr. Stewart indicated that the Functional Job Description for the Health Service Assistant (Programmer) position was to routinely interact with patients.

7. Ms. Gee acknowledged receiving FMLA information, and felt she could help the situation with an ADA accommodation.

8. Grievant was notified by letter dated May 1, 2017, that the Office of Human Resources Management had received information from Sharpe Hospital that she may have required a modification of her work area or assignments due to medical reasons. Grievant was also informed that if she had a medical condition that made her unable to perform the essential duties of her job assignment, as a Health Service Assistant, she could be considered for a reasonable accommodation under the ADA.

9. The letter advised Grievant that she needed to have her supervisor complete the Job Analysis form, take the form, Medical inquiry and DOP-L3 to her physician to complete, and return the paper work by May 17, 2017. Ms. Gee confirmed receipt of these documents by the date listed in the letter.

10. The physician informed the parties that Grievant "may return to restrictive duty, meaning that she requires medically necessary oxygen at all times, however she

can perform all other tasks as usual as of 5/8/17." Based upon this document, Grievant was accommodated by being allowed to do other work outside of direct patient care. Grievant's Exhibit No. 2.

11. On May 5, 2017, the Department's Medical Inquiry Form in Response to an Accommodation Request was completed. In this document it is stated that Grievant had a physical or mental impairment and that the impairment was that the Grievant had oxygen dependent COPD (Chronic Obstructive Pulmonary Disease). It is also stated that the impairment is permanent and that the impairment did not substantially limit a major life activity. It was stated that there were no limitations interfering with job performance or accessing a benefit of employment, that the employee's physical or mental impairments did not limit her ability to perform the essential functions of her job, and the employee's limitations would not interfere with her ability to perform the job functions. It further stated the Grievant "simply needs to wear her O2, that's it." Grievant's Exhibit No. 3.

12. On May 5, 2017, another form was also completed by the physician which stated that Grievant was released to perform work approved with the modification that she "must wear oxygen via nasal canula [sic] continuously" and the duration of the restriction was permanent. Grievant's Exhibit No. 4.

13. On August 7, 2017, Grievant completed a Division of Personnel Application for Examination. In that document, Grievant stated "DHHR is making me fill out a new application" and "I can perform all job duties as a HSA without difficulty." Grievant's Exhibit No. 6.

14. On August 28, 2017, another Department Medical Inquiry Form in Response to an Accommodation Request was received. In that document, dated August 28, 2017, Grievant's medical provider indicates that she has a physical or mental impairment of using oxygen 24/7, that the impairment is permanent and that the impairment substantially limits a major life activity as compared to most people in the general population. This document also includes that the major life activity affected is breathing and the major bodily function affected is respiratory. It is also stated that the employee's impairments limit her ability to perform the essential functions of her job as Grievant could not work in direct patient care while on oxygen. The suggestion regarding possible accommodations to improve job performance was to allow Grievant to work in an office setting which would allow Grievant to work safely.

15. On the same date, a letter was sent to Ms. Williams, Director of the Office of Human Resources Management, from Ms. Gee seeking authority to deny the accommodation so that the agency could search for another position. The letter stated that Grievant was a Health Service Assistant, she had recently been released back to restrictive duty work, that Health Service Assistants work directly with patients, that the paperwork from her physician states that she requires oxygen 24/7 and that Grievant may not work in direct care with patients. It is also stated that the hospital was temporarily accommodating Grievant in a position that did not require patient contact and that the request was being made for approval to deny the accommodation under the ADA because the employee could no longer perform the duties of a Health Service Assistant.

16. On September 5, 2017, Ms. Gee sent Grievant a letter informing her that as a Health Service Assistant, pay grade 7, she had been accommodated under the ADA by

being placed temporarily in an Office Assistant II position since August 14, 2017. On August 28, 2017, Grievant's doctor stated that Grievant was permanently unable to perform the essential functions of the Health Service Assistant position. Since Grievant could not perform the essential functions of the position, and there were no vacant positions of equal value for which Grievant was qualified into which she could be placed as a permanent accommodation, she was offered the position in which she had been accommodated temporarily, which was a lower pay grade.

17. The letter also informed Grievant that although she was able to keep her Health Service Assistant salary while being accommodated temporarily in the Office Assistant II position, because the Office Assistant II position is a pay grade 5, Grievant would receive a seven percent decrease in pay. Grievant was also informed that it was Ms. Gee's understanding that Grievant would continue to receive her higher pay until such time as the personnel transactions effectuating the change in positions had been completed.

18. Ms. Gee sent Grievant a letter on December 20, 2017, informing Grievant that according to her desire to continue to work at Sharpe Hospital, she was being placed into an Office Assistant II position permanently as an ADA accommodation. Grievant was also informed that the Office Assistant II position was a pay grade 5, which was lower than her present pay grade and Grievant would receive a seven percent decrease in pay.

19. By letter dated January 24, 2018, the Human Resources Director of Sharpe Hospital drafted a letter to Grievant. The letter advised Grievant of the decision to demote her effective February 3, 2018, from her position of Health Service Assistant, pay grade 7, to Office Assistant II, pay grade 5, with the Department. The letter also indicated that

the action constituted a demotion with prejudice, and was being taken as an accommodation under the ADA because Grievant could no longer perform the essential functions of a Health Service Assistant. Grievant was notified that the accommodation would allow Grievant to return to full-time employment while following her physician's restrictions to use oxygen at all time.

20. Kerri Nice, Assistant Director of Employee Relations with the Division of Personnel, indicated that in Grievant's circumstances, her options were to transfer to a posted position or fill a position based upon a demotion with prejudice. Ms. Nice explained that appointing authorities, subject to posting requirements, may transfer a permanent employee from a position in one organizational subdivision of the same or another agency at any time. If Grievant would have gone with a transfer, she would have had to apply for the available position and compete with any other applicant for the job and be chosen for the position as the most qualified candidate.

21. Ms. Nice explained that filing a position based upon a demotion with prejudice carves out an exception to vacancy posting requirements. This is a means to move an employee without competing for a posted job.

22. Ms. Nice understood that Grievant accepted the demotion with prejudice to be moved into the Office Assistant II position and the position did not need to be posted.

23. Concerning the demotion with prejudice, the appointing authority is required to reduce the pay rate of an employee who is demoted with prejudice by at least one increment, currently seven percent, as established by the Personnel board and the employee's pay rate will not exceed the maximum of the new compensation range.

24. Ms. Nice indicated that there was a requirement for a reduction in pay in this case. The reduction may be to any pay rate within the compensation range of the job class to which the employee is demoted. The demotion with prejudice was approved by the Division of Personnel as an accommodation in this case, and completed in accordance with Division of Personnel rules and policy.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant alleges a functional demotion with a loss of pay following accommodation. Demotion is governed by the Division of Personnel *Administrative Rules*. There are two types of demotion, demotion with prejudice and demotion without prejudice. A demotion with prejudice is a reduction in pay and/or change in job class to a lower job class due to the inability of an employee to perform the duties of a position or for improper conduct. A demotion without prejudice is a change in job class of an employee to a lower job class, a transfer of an employee to a lower job class, or a reduction in the employee's pay due

to business necessity. W. VA. CODE ST. R. § 143-1-11.4 (2012). It has been recognized by the Grievance Board that a "functional demotion" may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement. *Gillespie v. W. Va. Dep't of Corrections*, 89-CORR-105 (Aug. 29, 1989); *Dudley v. Bureau of Senior Services*, Docket No. 01-BSS-092 (July 16, 2001).

In the instant case, the record does not support a finding that a functional demotion took place. Grievant was reassigned duties of less number and responsibility, as an Office Assistant II, with a salary reduction, as an accommodation because she could not perform the essential functions of her Health Service Assistant position. Grievant's ability to obtain future job advancement was not impacted. Grievant was demoted with prejudice as addressed in the Division of Personnel *Administrative Rule*. Grievant's classification also changed, accordingly, she was not working the Health Service Assistant classification in name only. The record does support a finding that Grievant was demoted with prejudice and agreed to the new position in which she was placed.

The record established by a preponderance of the evidence that the Respondent worked with Grievant by engaging in an interactive process to determine whether a reasonable accommodation was necessary to enable her to perform the essential functions of her Health Service Assistant.[1] Respondent determined that Grievant could

[1]It is well-settled that the "Grievance Board does not have jurisdiction to determine whether the ADA has been violated, based upon the West Virginia Supreme Court of Appeal's holding in *Vest v. Board of Education of [the] County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995). *Adkins v. [Div.] of Labor*, Docket No. 04-DOL-071 (Jan. 25, 2005); *Teel v. Bureau of Employment Programs Workers' Compensation Div.,* Docket

not perform the essential functions of her Health Service Assistant job as she could not conduct direct patient care while using oxygen, thereafter, the hospital temporarily accommodated Grievant in a position that did not require direct patient care.[2] Grievant was temporarily placed in the Office Assistant II position, which was a pay grade 5. Respondent determined that the medically necessary oxygen at all times was not permitted on the units out of safety concerns, and prevented Grievant from performing the essential functions of her Health Service Assistant position. Pursuant to Grievant's

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No. 01-BEP-466 (June 10, 2002). *See Prince v. Bd. of Trustees/W. Va. Univ.*, Docket No. [9]7-BOT-276 (Nov. 5, 1997); *Keatley v. Mingo County Bd. of Educ.*, Docket No. 95-29-257 (Sept. 25, 1995)." *Ruckle v. Dep't of Health and Human Res.*, Docket No. 04-HHR-367 (Dec. 22, 2005).

[2]The Grievance Board has found that "[t]he basic requirements of the ADA applicable to this case are also required in the [Division of Personnel's] administrative rule." *Everson v. Div. of Highways,* Docket No. 2014-0150-DOT (Apr. 17, 2015). The Division of Personnel's administrative rule regarding when a state employer may decline to allow an employee to return with restrictions states:

> The appointing authority may deny the request to return or continue to work at less than full duty or with restrictions under conditions including, but not limited to, the following:
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> A. the employee cannot perform the essential duties of his or her job with or without accommodation;
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> B. the nature of the employee's job is such that it may aggravate the employee's medical condition;
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> C. a significant risk of substantial harm to the health or safety of the employee or others cannot be eliminated or reduced by reasonable accommodation; or,
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> D. the approval of the request would seriously impair the conduct of the agency's business.

W. Va. Code St. R. § 143-1-14.4.h.3.

desire to remain employed at Sharpe Hospital, and after she limited the search for positions to Sharpe Hospital, she was placed into the Office Assistant II position as her accommodation.

Prior to being placed in the Office Assistant II position permanently as an accommodation, Grievant was placed in the position temporarily, and was made aware that there were no other vacant positions at the facility of equal value for which she was qualified. Grievant indicated that she was willing to accept the Office Assistant II position as a permanent accommodation. Evidence was also presented that Grievant received her higher rate of pay throughout the interactive process, but since the Office Assistant II position was a pay grade 5, she would receive a seven percent decrease in pay. Respondent established that, under the Division of Personnel *Administrative Rules*, their action was not in violation of any law, rule or policy and was not arbitrary and capricious.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp.*

v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (*citing Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)).

3. A demotion with prejudice is a reduction in pay and/or change in job class to a lower job class due to the inability of an employee to perform the duties of a position or for improper conduct. A demotion without prejudice is a change in job class of an employee to a lower job class, a transfer of an employee to a lower job class, or a reduction in the employee's pay due to business necessity. W. VA. CODE ST. R. § 143-1-11.4 (2012).

4. It has been recognized by this Grievance Board that a "functional demotion" may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement. *Gillespie v. W. Va. Dep't of Corrections*, 89-CORR-105 (Aug. 29, 1989); *Dudley v. Bureau of Senior Services*, Docket No. 01-BSS-092 (July 16, 2001).

5. Respondent met its burden of proof to establish that the accommodation provided to Grievant, which led to a demotion with prejudice, was reasonable and did not violate any law, rule or policy.

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* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: April 15, 2019

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Ronald L. Reece
Administrative Law Judge