

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**PAMELA MCNEELY,
Grievant,**

v.

Docket No. 2019-0673-MAPS

**DIVISION OF CORRECTIONS AND
REHABILITATION/BUREAU OF PRISONS/
SOUTHWESTERN REGIONAL JAIL AND
CORRECTIONAL FACILITY,
Respondent.**

DECISION

Pamela McNeely, Grievant, is employed by Respondent, Division of Corrections and Rehabilitation (“DC&R”) at the Southwestern Regional Jail and Correctional Facility. Grievant is in the Correction Officer 2 (“CO 2”), classification. On December 11, 2018, Officer McNeely filed a grievance directly to level three¹ alleging that she was “Improperly taken off work for over a month.” As relief she seeks “to be put back to work” and “back pay for lost time.”

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on March 22, 2019. Grievant personally appeared and was represented by Paul M. Stroebel, Esquire, Stroebel & Johnson, P.L.L.C. Respondent appeared through Timothy King and was represented by Briana J. Marino, Esquire, Assistant Attorney General. This matter became mature for decision on May 1, 2019, upon receipt of the Proposed Findings of Fact and Conclusions of Law.

¹ Grievant alleged she had been suspended without pay and was authorized to file at level three pursuant to W. VA. CODE § 6C-2-4(a)(4). Respondent argued that Grievant was not subjected to discipline, but did not object to expediting the grievance to level three.

Synopsis

Grievant was working as a Correctional Officer 2 at the Southwestern Regional Jail after returning to work from a severe work-related injury. Grievant had been placed on light duty for a month upon return to work and was only assigned to the Central Control post. After the month expired, Grievant was assigned to additional posts in the Jail including the tower. An incident occurred related to Grievant's ability to perform essential functions of her position. Respondent placed Grievant off work where she stayed because she was unable to procure a doctor to complete a Functional Capacity Form required by Respondent. Grievant alleges she was placed off work as a disciplinary measure and the Respondent violated the provisions of its Return to Work Policy. Grievant did not prove that Respondent placed her off work as discipline. Grievant did prove that Respondent violated its own policy.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Pamela McNeely, is employed as a Correctional Officer 2, by Respondent Division of Corrections and Rehabilitation. She has been assigned to the Southwestern Regional Jail and Correctional Facility for more than ten years.
2. In 2013, Grievant suffered a severe injury to her left knee² while on the job at the Southwestern Regional Jail for which she received Workers Compensation.

² Grievant has no cartilage in her right knee and has a permanent limp. (Respondent Exhibit 4), Grievant's incident report dated October 26, 2018.

3. Grievant returned to work in August 2017. Her treating physician gave her a "Return to Work" report form releasing her to return to work with the limitation "full duty except no steps or stairs." (Respondent Exhibit 1).

4. Pursuant to the limitation placed upon Grievant's return to work, Grievant was placed on light duty for one month from August 10, 2017 through September 10, 2017, by letter dated August 11, 2017 from April Darnell, Director of Human Resources for the Regional Jails. The letter explained that Grievant would be placed at the Jail's Central Control post and would "not be permitted to perform any type of work in the secure area of the facility other than the control post." (Respondent Exhibit 2).

5. Grievant was also advised in the letter that if she was unable to return to full duty after one month, she would need to request additional light duty or utilize medical leave. Grievant signed an acknowledgement stating that she had read the letter and understood the accommodation and the limitations set thereon. *Id.*

6. Grievant did not initially request additional time on light duty after September 10, 2017. No official action regarding the end of her light duty was documented, yet after that date Grievant was assigned to posts other than the Jail's Central Control, including assignments in the tower.

7. It is difficult for Grievant to climb the stairs and when she is going down there is the danger of her knee giving out causing her to fall. Consequently, Grievant cannot perform the duties as a pod rover or core rover.

8. When a CO is assigned as a pod rover, he or she is required to patrol the pod and go to various places within the pod to deal with issues with the inmates. The pod has more than one floor and the pod rovers are required to go up and down the stairs to

perform these duties. The stairs in the pod do not have rails on each side that are close enough together for Grievant to use both her hands for stabilization and support when she uses the stairs.

9. On October 26, 2018, Grievant was assigned to work the tower in one of the pods at the jail. The CO working the tower monitors the activities in the pod, as well as opens and closes all doors. Grievant was able to climb the stairs to the tower because there are handrails on both sides which allow her to place most of her weight on her arms. This reduces her reliance on her knee for stability as well.

10. CO3 Roman Castle³ was working as a core rover on October 26, 2018. He sent a message for Grievant to switch assignments with a CO2 who was in the pod rover assignment. Grievant told CO3 Castle that due to her knee injury she could not serve as a pod rover because it required her to climb stairs.

11. CO3 Castle notified his supervisor, Sergeant Ranson, about the situation with Grievant. He and Grievant were instructed by Sergeant Ranson to submit separate incident reports describing the event. (Respondent Exhibits 3 & 4). The incident Reports were forwarded to Lieutenant Vance.

12. Grievant's incident report stated the following:

In the year 2013, while performing duties of my job, this officer sustained permanent damage to my right knee effecting my ability to climb stairs. I have no cartilage in my right knee and will have to wear a hinged knee brace for possibly the rest of my life. The issue with climbing up and down stairs is stability of my knee. It will pop out of place which will result in more time off work and possibly another knee surgery, not to mention the stress on the other knee.

³ CO3 is a corporal in the West Virginia correctional system. CO3 Castle was Grievant's immediate supervisor during the 11:00 p.m. to 7:00 a.m. shift on October 26, 2017.

13. In the “Disposition or Recommendation” area of Grievant’s incident report, Lieutenant Vance wrote; “Told Cpl. Castle she could not be a rover due to this matter.” (Respondent Exhibit 4).

14. The incident reports were forwarded to Assistant Human Resources Director for the Southwestern Regional Jail, Lilly Frye. Assistant H. R. Director Frye contacted the Central Office of the DC&R for guidance. On October 27, 2018, Grievant was placed off work pending medical documentation that she could perform the essential functions of her job and any physical restriction on her performing those functions.

15. Grievant requested to be placed on light duty again as she had been in the past, rather than being placed on leave and obtaining medical documentation regarding her ability to perform her position⁴. She felt she could be placed in the control room on a permanent basis and avoid stairs. Grievant was not returned to light duty but no response to her request was presented.

16. Light duty in the Jail’s Central Control Room was available for Grievant to perform during the entire time this matter was pending.⁵ However, on rare occasions an CO assigned to Central Control could be called to respond to an emergency in the Jail requiring the CO to perform more strenuous functions of the job including climbing stairs or restraining patients.

⁴ There was no document presented indicating that Grievant made a written request to be placed on light duty. However, the testimony of the witnesses made it clear that Grievant had made the request and Respondent’s agents were aware that was what Grievant was seeking.

⁵ Unlike the majority of correctional facilities in West Virginia, Southwestern Regional Jail has not suffered staffing shortages which routinely require the shuffling of assignments for absent COs.

17. Grievant was provided with several forms to be completed by her and her physician related to her physical condition and restrictions, as well as forms related to leave, she was entitled to. Those forms included: DOP-L4, DOP-L5, DOP-L9,⁶ Federal Family and Medical Leave Act (“FMLA”) eligibility forms and forms for a Medical Leave of absence without pay. The nature of these forms was explained to Grievant and she was assisted in filing out applications. (Respondent Exhibits 6 & 7). Grievant wanted to return to work rather than take leave.

18. Grievant’s physician filled out a form related to FMLA and Medical Leave of Absence entitled *Supplemental Certification of Health Care Provider for Employee’s Serious Health Condition*. (Respondent Exhibit 5). The form was completed by Dr. Padmanaban, an orthopedic surgeon and signed November 8, 2018.

19. The physician answered specific questions about any restrictions Grievant may have in performing her duties as a Correctional Officer. Those questions and answers include the following:

- Is the employee unable to perform any of his/her job functions due to the condition?
“Yes” – “No stairs or steps. No squatting.”
- Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions?
“Yes”
- Is it medically necessary for the employee to be absent from work during the flare-ups?
“Yes” – “Knee swelling, knee pain, knee effusion. She has to take time off work until it gets better.”
- If unable to return to full duty employment, can the patient return to less than full duty?

⁶ The “DOP” designation indicates these are forms provided by the West Virginia Division of Personnel. These forms relate to reporting of leave and Medical verification when necessary.

“Yes” – “Permanent restrictions – no steps, no stairs, no squatting, work on first floor unless elevator.”

- Describe in detail any limitations or restrictions on the ability of the employee to work. List any assistive devices or equipment or any accommodation the employee requires to perform his/her job.
“Double hinge knee brace with stronger hinge so it won’t break. Follow the restrictions – no steps, no stairs, no squatting, work on first floor if there is no elevator.
- Will this condition permanently prevent the employee from performing his/her duties?
“Yes.”

(Respondent Exhibit 5).

20. Grievant asserts that she can perform all assignments of the CO 2 position except the pod rover or core rover assignments. However, climbing the stairs to the tower position is not permitted based upon her doctor’s findings.

21. Grievant brought the form to the Southwestern Jail shortly after receiving it. She was not returned to work due to the restrictions placed on her job by her doctor. These restrictions prevented her from performing the assignments of pod rover or core rover which are standard assignments for CO2’s in the facility. Grievant used her accumulated sick and annual leave while she was off work to maintain her benefits.

22. Grievant and Assistant H. R. Director Frye kept in touch through text messages regarding Grievant’s possible return to work while the DC&R central office determined what needed to be done. (Respondent Exhibit 9).

23. April Darnell is the Assistant Director Division of Administrative Services – Human Resources & Payroll for the Department of Military Affairs and Public Safety (“DMAPS”). This division provides general supervision of HR functions for all agencies within DMAPS including DC&R and the Southwestern Jail. Ms. Darnell sent an e-mail dated December 4, 2018, to Ms. Frye and Lisa Vance instructing them that Grievant had

to have her doctor complete a Functional Capacity Assessment form so a proper determination could be made regarding her limitations related to performing the essential functions of her job. The form was attached to the e-mail. (Respondent Exhibit 8).

24. Grievant was instructed that she would have to pay any amount not covered by insurance for an examination necessary for completing of the Functional Capacity Assessment form by her doctor.

25. When Grievant gave the form to her orthopedic physician, he refused to complete it due to what he believed to be problems with Workers' Compensation rules and unspecified standards of practice. Grievant's physical therapist would not complete the form either.

26. Grievant has not returned the completed form to Respondent's agents and they have not cleared her to return to work. Grievant ran out of paid leave and has been on unpaid medical leave since February 23, 2019.

27. The Division of Personnel Classification Specifications for the Position of Correctional Officer 2 list the following items under the heading of *Knowledge, Skills and Abilities*:

- Ability to run, jump, climb stairs, and physically restrain violent residents.
- Ability to use appropriate physical force to control offenders when necessary.

Under the section titled *Conditions of Employment*, it is specified that "Applicant" must successfully complete a medical examination prior to appointment and annually thereafter." (Respondent Exhibit 11).⁷

⁷ The WVRJA "Return to Work" policy requires the Human Resources Director to "set forth a list of essential functions of the employee's job . . . and provide the same to the Director of Risk Management" to determine if the employee may be returned to work with

28. The West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement number 3055 related to “Return to Work” contains the following policy statement:

It is the policy of the West Virginia Regional Jail Authority (WVRJA) to maintain a mechanism that provides WVRJA employees with an opportunity to continue as valuable members of its workforce while recovering from a work-related injury. The WVRJA wants to minimize any adverse effects of an on-the-job injury or illness and ultimately return the employee to his/her original pre-injury job as quickly and safely as possible. This program is intended to benefit an injured employee by promoting a speedy recovery, while keeping his/her work patterns and income consistent. The Return to Work Program is not intended as a long-term job assignment for the affected employee and should normally be successful in returning the employee back to his/her preinjury job position without restrictions within **thirty (30)** to **sixty (60)** days and should not exceed **ninety (90)** days. Extensions may be granted on a case-by-case basis. (Emphasis in Original)

(Respondent Exhibit 12).

29. The WVRJA “Return to Work” policy also states:

The Regional Jail Authority retains the right to require an employee seeking a modified duty status to submit, **at the Agency’s expense**, to and Independent Medical Examination. (Emphasis Added).

Id.

30. Grievant has not been given any notice that her request for light duty was been denied nor that she dismissed because she could not perform the essential duties of her position. Grievant has been off work because she has not had a doctor complete and return the Functional Capacity Assessment form required by Respondent.

modified duties. (Respondent Exhibit 12, page 3). No evidence was provided regarding this policy provision or “essential functions” listed by the Human Resources Director.

Discussion

Grievant alleges that placing her off work was a punitive measure amounting to discipline. The action took place immediately after she was unable to assume a pod rover assignment which may have irritated the Sergeant who gave her that order. However, the incident reports were given to Lieutenant Vance who made no recommendation for discipline. Rather the issue was referred to Human Resource to determine if Grievant could perform the essential duties of her job. No misconduct was alleged. The action to remove Grievant from employment related to her physical condition and was not disciplinary.

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant alleges that Respondent improperly placed her off work when light duty work was readily available to her without causing any disruption to Respondent's operation. Additionally, Grievant argues that Respondent violated its own policies related to determining whether an employee could perform the essential duties of her position and return to work.

Respondent counters that it has an obligation to ensure that employees are fit to perform all essential functions of their position. An employee who cannot perform their

job could endanger their own safety as well as their colleagues and the inmates, as well as the public at large. Respondent points out that under The Division of Personnel (“DOP”) Administrative Rule the agency has discretion as to whether to return the employee to work at less than full duty for a limited period of time. Since this is discretionary the agency does not have to grant such a request. W. VA. CODE ST. R. § 143-1-14.4(h).

The DOP Rule also allows Respondent to “require additional information from the employee’s physician/practitioner or other physician/practitioner regarding the employee’s ability to perform the essential duties of his or her job, with or without accommodation.” *Id.* at 14.4(h)(4). The WVRJA “Return to Work” policy echoes the DOP Rule but adds an important provision.

The Regional Jail Authority retains the right to require an employee seeking a modified duty status to submit, **at the Agency’s expense**, to and Independent Medical Examination. (Emphasis Added).

While the DOP Rule is silent on who pays for the Independent Medical Examination, the Agency assumes the payment requirement in its policy. “An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs,” even if those procedures are generous beyond the requirements that bind such agency. *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dep’t. of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994); *Layne v. Dep’t of Health & Human Res.*, Docket No. 2008-0172-DHHR (Jan. 8, 2009). Respondent correctly points out that the Grievance Board has upheld the employer’s right to seek additional information regarding an employee’s physical condition prior to returning the employee to full duty. See *Cassella v. Div. of Highways*, Docket No. 2011-0379-CONS (Dec. 18, 2012); *Griffin v. Div. of Motor*

Vehicles, Docket No. 2008-1271-DOT (Aug. 17, 2009). However, Respondent's policy places the responsibility for arranging and paying for an Independent Medical Examination with the Agency.

Grievant worked as a CO2 in the Southwestern Regional Jail for more than a year after the expiration of her specific light duty assignment on September 10, 2017. Because of the incident when she was assigned to be a pod rover, she was put off work pending a statement from her doctor which she provided on or about November 8, 2018. Respondent's agent April Darnell determined that a Functional Capacity Assessment form had to be completed by a doctor before Grievant could return to work and provided that form to Grievant on December 4, 2018. Grievant advised Respondent that neither her doctor nor physical therapist would complete the form. Since that time, Grievant has been kept from returning to work because the examination has not been completed. Respondent has made no effort to find an independent doctor to perform the examination at the agency's expense.

The difficulty in this case is that the employee has been back at work for more than a year before any action was taken about her fitness for duty after her compensable injury. Prior Grievance Board cases such as *Cassella* and *Griffin* address the respective rights of the parties when the employee is seeking to return to work not a year later. In fact, Respondent started the return to work process when Grievant initially returned to work in August of 2017. At that point Grievant was placed on light duty and limited to the control tower post for one month. Once that took place the policy states:

1. In order to ensure complete understanding of the Return to Work Program and to ensure [the employee] is aware that modified work is available, the employee **is expected** to

provide the [WVRJA's] Return to Work Packet to the treating physician at the initial medical visit.

2. If physically able, the employee is expected to return to the worksite the next day to perform his/her normal job or modified duty.

3. In assessing possible modified duty the employee shall not be relieved from performing the essential functions of his/her job.

4. It shall be the responsibility of the Human Resources Director to set forth the list of essential functions of the employee's job, including attendance and available for work, and provide the same to the Director of Risk Management. Because of the nature of most work within the RJA, it is expected that most positions shall fall within the light to sedentary work without modification. The Human Resources Director will notify the facility Human Resource Manager of the decision, who will notify the facility Administrative Sergeant.⁸

The Return to Work policy sets out six discrete factors that should be considered in determining whether a duty or activity is an "essential function" of a job. The factors include such things as: 1. whether the position exists to perform the function; 2. whether the function can only be performed by a limited number of employees; 3. whether the function is a highly specialized skill; 4. Time typically spent performing the function; 5. the consequence of failing to perform the function; and, 6. work experience of people who have held the position in the past. (Respondent Exhibit 12, page 2 of 7). Public employer personnel regulations and laws are to be strictly construed in favor of the employee. *Smith, et al. v. West Virginia Div. of Rehabilitative Services and Div. of Personnel*, 208 W. Va. 284, 540 S.E.2d 152 (2000). Cited in, *Ferrell et al. v. Reg. Jail & Corr. Facility*

⁸ Emphasis set out in the policy provision above are in the original.

Auth., Docket No. 2013-1005-CONS (June 4, 2013) and *Beaton et al. v. Dep't of Health & Human Ser.*, Docket No. 2013-0496-CONS (Dec. 20, 2013).

On August 8, 2017, Grievant provided the return to work report form from her doctor which stated that she could return to work at “full duty except no steps or stairs.” (Respondent Exhibit 1). Based upon that report Grievant was placed on light duty on August 10, 2017. At that point, the process appears to have ended. It was apparent that Grievant would need modified duty but there is no evidence that the Human Resources Director established a list of essential functions for the Correctional Officer position for the Director of Risk Management. Given the factors set out in the policy, the essential functions for the position are not synonymous with the “Skills, Knowledge, and Abilities” set out in the DOP Classification Specifications which are used to determine if the employee initially qualifies for the job. In the return to work process, factors like the number of other employees available to perform the function and the amount of time the employee actually performs the function indicate some flexibility in deciding if the function is truly essential, or may be modified to allow an employee to continue to work.

Undoubtedly, Respondent may require Grievant to submit, at the Agency's expense, to an independent medical examination since she was and is seeking a modified duty status. (Respondent Exhibit 12, page 5 of 7). However, this examination should have taken place during the return to work process, not more than a year later. Additionally, Respondent may at some point determine that Grievant is unable to meet the essential functions of the CO position, but their policy must be followed in making that determination. Respondent failed to follow its own “Return to Work” policy regarding Grievant. Grievant has proved by a preponderance of the evidence that she has been

placed off work, exhausted leave, and required to take unpaid leave due to Respondent's violation of the WVRJA Return to Work policy. Accordingly, the Grievance is **GRANTED**. Because it is Respondent's initial responsibility, it would be inappropriate to return Grievant to full duty. The best remedy in this situation is to return the parties to their respective positions prior to the policy violation so that the appropriate "return to work" procedures may be implemented.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs," even if those procedures are generous beyond the requirements that bind such agency. *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dep't. of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994); *Layne v. Dep't of Health & Human Res.*, Docket No. 2008-0172-DHHR (Jan. 8, 2009).

3. An employer has the right to seek additional information regarding an employee's physical condition prior to returning the employee to full duty. See *Cassella v. Div. of Highways*, Docket No. 2011-0379-CONS (Dec. 18, 2012); *Griffin v. Div. of Motor Vehicles*, Docket No. 2008-1271-DOT (Aug. 17, 2009).

4. Public employer personnel regulations and laws are to be strictly construed in favor of the employee. *Smith, et al. v. West Virginia Div. of Rehabilitative Services and Div. of Personnel*, 208 W. Va. 284, 540 S.E.2d 152 (2000). Cited in, *Ferrell et al. v. Reg. Jail & Corr. Facility Auth.*, Docket No. 2013-1005-CONS (June 4, 2013) and *Beaton et al. v. Dep't of Health & Human Ser.*, Docket No. 2013-0496-CONS (Dec. 20, 2013).

5. Grievant has proved by a preponderance of the evidence that she has been placed off work, exhausted leave, and required to take unpaid leave due to Respondent's violation of the WVRJA Return to Work policy.

Accordingly, the Grievance is **GRANTED**.

In order to return the parties to their respective positions prior to the policy violation, Respondent is **ORDERED** to place Grievant on "light duty" for a period of not less than thirty days, restore all leave and pay Grievant lost as a result of being placed off work and follow its "Return to Work" policy and procedures in determining Grievant's ability to return to work as a Correctional Officer at the Southwestern Regional Jail and Correctional Facility.

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 (2008).

DATE: May 30, 2019.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**