THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARY SUE MILLER,
Grievant,

v. **Docket No. 2018-1428-MrnED**

MARION COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Mary Sue Miller, employed by the Marion County Board of Education as an aide, filed a Level One grievance form dated June 22, 2018, alleging the following:

> Respondent refused Grievant the opportunity to return to work on light duty from April 11, 2018 through May 17, 2018. On May 21, 2018, another aide at the school, Marci Sailor, was permitted to return to work with restrictions. Grievant sought an explanation and relief through the chain of command, finally meeting with county superintendent Gary Price on June 4, 2018. On or about June 18, 2018, Grievant's representative, Frank Caputo, was advised that no action would be taken to restore sick leave and/or pay to Grievant. Grievant alleges a violation of 6C-2-2 (favoritism and discrimination), 18A-4-5b and local policies/practices of the Respondent.

For relief, Grievant sought the following:

> Grievant seeks: (a) reinstatement of sick/personal utilized from April 11, 2018 through May 17, 2018 and/or compensation for all lost wages and all benefits, pecuniary and nonpecuiary, with interest for that time period.

A Level One conference was held in this case on August 24, 2018. The grievance was denied by decision issued September 27, 2018, by Mason Neptune. A Level Two mediation session was conducted on December 18, 2018. Grievant perfected her appeal to Level Three on December 26, 2018. A Level Three evidentiary hearing was conducted before the undersigned on March 26, 2019, at the Grievance Board's Westover office.

Grievant appeared in person and by her counsel, John Everett Roush, American Federation of Teachers - WV, AFL-CIO. Respondent appeared by its counsel, Richard S. Boothby, Bowles Rice LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on May 3, 2019.

Synopsis

Grievant was employed by Respondent as a special education aide at East Fairmont High School. Grievant was absent from work for an injury that did not occur at work. Grievant learned that a similarly-situated employee, who suffered an injury, was permitted to return to work with some restrictions. Grievant was not permitted to return to work with minor restrictions. Grievant was forced to use personal leave as a result of Respondent's action. Grievant established by a preponderance of the evidence that she was the victim of discrimination. Respondent is ordered to compensate or reinstate Grievant for the twenty-two days of personal leave with cause (or sick) used as a result of her time away from work. Respondent's argument that the grievance was not timely filed is without merit.

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

Findings of Fact

1. Grievant was employed by Respondent as a special education aide at East Fairmont High School. Since August of 2018, Grievant has been working at West Fairmont Middle School. Grievant holds the multi-classification title of Autism Mentor/Aide.

2. Among Grievant's aide duties are transferring children from school transportation to the school building, transferring children from their wheelchairs to other surfaces, lifting students, and changing student's diapers.

3. Grievant was absent from work beginning February 5, 2018, for an illness or injury that did not occur at work and was unrelated to her work.

4. On or about April 16, 2018, Grievant sought to return to work with some restrictions. Grievant would have been able to perform her job with only some assistance from fellow employees.

5. Respondent refused to allow Grievant to return to work with any restrictions. Accordingly, Grievant was unable to return to work until May 17, 2018.

6. Grievant utilized twenty-two personal leave with cause (or sick) days as a result of her absence continuing through May 17, 2018.

7. Marci Sailor was also employed as an aide at East Fairmont High School during the 2017-2018 school year. Ms. Sailor holds the multi-classification title of Sign Support Specialist/Aide.

8. Ms. Sailor missed several days of work in mid-May 2018 due to an illness or injury that did not occur at work and was unrelated to her work. Ms. Sailor returned to work on or about May 17, 2018.

9. On or about May 21, 2018, Grievant learned that Ms. Sailor was permitted to return to work while wearing a cast or similar wrap on her hand/wrist area. Ms. Sailor could not perform one of her duties, lifting a child, in the manner she normally lifted the child. Because of her restrictions, Ms. Sailor could only lift the legs of the child while another employee lifted the torso of the child.

10. Grievant would have been able to return to work a month earlier had she been accorded the same accommodation provided to Ms. Sailor.

11. On or about May 21, 2018, Grievant spoke with her principal, Mr. Nuzem, and her vice principal, Ms. Conover, about the reason for the difference in treatment between Ms. Sailor and herself. Grievant did not receive an explanation, thereafter, she contacted Frank Caputo of AFT-West Virginia.

12. Mr. Caputo arranged a meeting with Mason Neptune, Respondent Human Resources administrator. The meeting took place on or about May 25, 2018. Again, failing to receive a satisfactory reply, Grievant and Mr. Caputo sought a meeting with Superintendent Gary Price.

13. Mr. Price met with Grievant and Mr. Caputo on or about June 4, 2018. Mr. Price indicated that he would look into the matter and advise.

14. Mr. Caputo had confidence that Mr. Price would give serious consideration to the problem and a hope that an acceptable solution to the problem might be achieved with Mr. Price. Grievant sought the return of over twenty days of paid sick days that she used between April 16, 2018, and May 21, 2018.

15. On or about June 18, 2018, Mr. Price advised Mr. Caputo that he could do nothing to provide any relief to Grievant's complaint that she had been treated differently than Ms. Sailor.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *Holly v. Logan*

County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 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). In other words, "[t]he 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).

The first issue to discuss in this grievance is one of timeliness. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the most recent occurrence of a continuing practice. W. VA. CODE § 6C-2-4(a)(1); *Seifert v. Hancock*

County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002). The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

It is well settled that a Grievant will not be barred for filing a grievance on the basis of timeliness, where he or she has made a good faith effort to resolve the matter with the appropriate officials of the agency, institution, or board of education, reasonably believed the matter could be rectified, and filed a grievance after denial of relief. *Steele v. Wayne County Bd. of Educ.*, Docket No. 50-87-062-1 (Sept. 29, 1987).

The West Virginia Supreme Court of Appeals has consistently held that "where there is substantial compliance on the part of the party in regard to a procedure, a mere technical error will not invalidate the entire procedure." *West Virginia Alcohol Beverage Control Admin. v. Scott*, 205 W. Va. 398, 402, 518 S.E.2d 639, 643 (1999) (per curiam). *See also State ex rel. Catron v. Raleigh County Bd. of Educ.,* 201 W. Va. 302, 496 S.E.2d 444 (1997) (per curiam) (finding substantial compliance in filing grievance); *Mahmoodian v. United Hosp. Ctr., Inc*., 185 W. Va. 59, 404 S.E.2d 750 (1991) (finding substantial compliance with rules for revoking physician's medical staff appointment privileges); *Hare v. Randolph County Bd. of Educ.*, 183 W. Va. 436, 396 S.E.2d 203 (1990) (per curiam) (finding substantial compliance with termination procedure); *Duruttya v. Board of Educ. of County of Mingo*, 181 W. Va. 203, 382 S.E.2d 40 (1989) (finding substantial compliance in seeking grievance hearing); *Vosberg v. Civil Serv. Comm'n of West Virginia*, 166 W. Va. 488, 275 S.E.2d 640 (1981) (holding that violation of grievance procedure by

employer was merely technical and that there was substantial compliance with the procedure).

The Grievance Board has directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'"*Harmon v. Fayette County Bd. of Educ.*, Docket No. 98-10-111 (July 9, 1998), citing *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v.Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). *See Watts v. Lincoln County Bd. of Educ.*, Docket No. 98-22-375 (Jan. 22, 1999).

The issue of timeliness can be resolved by the undersigned by identifying the date upon which the fifteen working days in which Grievant had to initiate a grievance began to run. The undersigned agrees with counsel for Grievant that date is June 18, 2018, when she was unequivocally informed by Mr. Price that Respondent would not offer her redress for the discriminatory treatment which she alleges. Grievant filed a grievance well within fifteen working days of that date.

The record established that Grievant and Mr. Caputo were following the method utilized in the county by following the chain of command to see if the problem could be resolved locally. Although Mr. Price did not give an iron-clad assurance that he would rectify the situation, his assurance that he would look into the matter was very close to such an assurance. In any event, if the date that started the fifteen-day clock running is designated as the date of the initial meeting with Mr. Price, the grievance is still timely filed. The undesigned denies Respondent’s request to deny this case on the basis of timeliness.

Turning to the merits of this grievance, Grievant asserts that she has met her burden of establishing a case of discrimination. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

Grievant was able to establish by a preponderance of the evidence that she suffered discrimination as a result of the difference in treatment between her and Ms. Sailor. The record established that Grievant and Ms. Sailor held the same classification category. Grievant and Ms. Sailor worked in the same school and classroom. Grievant and Ms. Sailor had similar duties. Grievant and Ms. Sailor could have performed their duties with some minor accommodation. Grievant and Ms. Sailor were slightly impaired as a result of physical conditions that were unrelated to a compensable injury. Grievant did not agree to the difference in treatment, either in writing or otherwise. In addition, the difference in treatment was unrelated to their job duties.

As noted by counsel for Respondent, the one distinction is that Grievant's physician noted that Grievant had some restrictions, whereas Ms. Sailor's physician did not. However, the record clearly established that Ms. Sailor continued to suffer from some degree of temporary impairment. The undersigned agrees with Grievant's counsel that, while it was not difficult to work around Ms. Sailor's minor temporary disability with the help of fellow employees, the same would have been true of Grievant had she been given that same opportunity.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.,* Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.,* Docket No. 33-88-130 (Aug. 19, 1988). "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. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 221 W. Va. 306, 655 S.E.2d 52 (2007); *Board of Education v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

3. Grievant established a claim of discrimination by a preponderance of the evidence.

Accordingly, this grievance is **GRANTED**.

Respondent is **ORDERED** to compensate or reinstate Grievant for the twenty-two days of personal leave with cause (or sick) used as a result of her time away from work which could have been avoided if she had been treated in the same manner that a similary-situated employee was treated.

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 WEST VIRGINIA 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 (2018).

Date: May 24, 2019

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Ronald L. Reece
Administrative Law Judge