THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RANDALL MORRISON,
Grievant,

v. **Docket No. 2019-0786-MU**

MARSHALL UNIVERSITY,
Respondent.

DECISION

Grievant, Randall Morrison, filed this action directly to Level Three against his employer, Marshall University, on January 22, 2019. Grievant alleges that Marshall University's January 10, 2019, suspension of him and revocation of his modified duty was arbitrary and capricious, contrary to law, rules and policies. This action by Respondent was in violation of Grievant's due process rights and was excessive. Grievant seeks full back pay, and to be returned to work on modified duty. Grievant seeks removal of all documents regarding his suspension and revocation of modified duty. A Level Three evidentiary hearing was conducted in this matter on July 10, 2019, at the Grievance Board's Charleston office before Administrative Law Judge Carrie H. LeFevre. Grievant appeared in person and by his counsel, Mark Barney. Respondent appeared by its counsel, Anna L. Faulkner, Assistant Attorney General. This matter became mature for consideration on August 19, 2019. The case was reassigned for administrative reasons to the undersigned on September 19, 2019.

Synopsis

Grievant was employed as a Campus Service Worker at Marshall University. Grievant suffered an on-the-job injury and was on workers' compensation. Grievant suffered another on-the-job injury subsequently, and was once again on workers' compensation. Grievant suffers from other health issues. Grievant was placed back on the job in an administrative transitional position. For reasons not entirely clear in the record, Grievant was suspended for five days related to an allegation of falsification of sick leave applications. Grievant was also informed after this suspension that he would not be returned to work due to the discipline and work performance concerns. Respondent failed to establish the charge by a preponderance of the evidence that led to Grievant's suspension. Grievant established by a preponderance of the evidence that Respondent's failure to return him to his transitional administrative position was arbitrary and capricious. This grievance is granted.

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

Findings of Fact

1. In March of 2016, Grievant was hired into a full-time, classified service position as a Campus Service Worker at Marshall University.

2. Grievant is the father of two young children, with whom he has full custodial responsibility.

3. Grievant is a retired veteran who was honorably discharged from the United States Marine Corps.

4. Grievant has suffered from health issues in the past, and suffers from chronic prostatitis, which causes him great discomfort.

5. To treat his prostatitis, Grievant's physician, Dr. David Whitmore, directed that he sit in a hot tub to relieve the pain and discomfort. Grievant's Exhibit No. 11.

6. In December of 2016, Grievant sustained a workplace injury in the course of his employment as a Campus Service Worker. Sometime thereafter, Grievant sustained a second workplace injury in the course of his employment. Grievant's workplace injuries required that he undergo two surgical procedures.

7. In late October or early November 2018, Grievant was released to return to work on light duty.

8. On October 29, 2018, Grievant and Marshall University entered into a *Temporary Transition to Work Agreement*. Grievant was placed into an administrative position in Marshall University's College of Information Technology and Engineering department.

9. Grievant's supervisor in the College of Information Technology and Engineering department was Cammy Holley. Ms. Holley acknowledged that there was not a written procedure for employees to follow when utilizing sick leave.

10. Marshall University Board of Governors Policy No. HR-12, entitled *Performance Assessment, Classified and Nonclassified Employees*, provides that Marshall University will assess employee performance on a regular basis. Grievant's Exhibit No. 4.

11. While an employee in the College of Information Technology and Engineering department, Grievant did not receive a performance evaluation. Grievant was not disciplined by Ms. Holley or otherwise negatively evaluated because of his performance. When placing him in the position, Marshall University's Director of Human

Resources, Bruce Felder, informed Grievant that he would be given specific training. Grievant was not given any specific training.

12. On Monday, November 26, 2018, while at work, Grievant received a call from his son's school. The school advised that his son was not feeling well and that Grievant would need to pick him up from school. Grievant took sick leave and left work to pick his son up from school.

13. On that same date, Grievant was not feeling well. Grievant picked his son up from school and thereafter, went to Marshall University's REC Center to use the hot tub to try and get relief from his pain and discomfort. Grievant arrived at the REC Center a little past 2:00 p.m. Grievant got in the hot tub and was told by a REC Center employee that the aquatic area was closed. Grievant left the REC Center.

14. After returning from the REC Center, on November 26, 2018, Grievant and his son went to Valley Health for treatment. Grievant provided Marshall University a medical slip reflecting the treatment on this date. Grievant likewise provided Marshall University a medical slip for his son's treatment on this date.

15. From December 17, 2018, to December 21, 2018, Grievant was ill. Grievant was having pain and discomfort. During this time frame, Grievant treated with Dr. David Whitmore, with Valley Health, and Dr. Alan D. Wild, a chiropractor. He provided Marshall University medical slips for this five-day period.

16. On Tuesday, December 18, 2018, Grievant checked into the REC Center around noon. The purpose of this visit was to use the hot tub to get relief from his pain and discomfort.

17. Bruce Felder, Director of Human Resources, received a report from a Marshall University employee that Grievant was seen in the REC Center.

18. It is not a violation of Marshall University policy for employees to use the REC Center. In any event, for reasons not clear from record, Mr. Felder decided to investigate Grievant's leave use.

19. Marshall University Board of Governors Policy No. HR-5, entitled *Four-Part Progressive Discipline Counseling*, governs discipline of classified employees. It provides, in pertinent part, "The goal of four-part progressive counseling is to restore the employee's work performance to an acceptable level." *Id.* at 2.1. "The principles of four-part progressive counseling are (1) to ensure that such counseling is provided fairly and consistently among employees and across departmental lines; (2) to provide clear communication about the problem; and (3) to set forth a plan for improvement to the employee providing the employee a reasonable opportunity to improve." *Id.* at 2.3.

20. Policy No. HR-5 further provides that "the employee's supervisor is responsible for intiating four-part progressive counseling for instances of inadequate work performance for which four-part progressive counseling is appropriate. The employee's immediate supervisor is responsible for creating and maintaining appropriate documentation and records to support the application of four-part progressive counseling." *Id.* at 2.4.

21. The purpose of Marshall University's disciplinary policy is to ensure that employee discipline is fair and to place the employee on notice regarding problems with performance and to allow the employee an opportunity to make improvements. *See* Grievant's Exhibit No. 12.

22. On January 9, 2019, Grievant was called into a meeting with Mr. Felder.

23. At the beginning of the meeting, Grievant requested that he be permitted to have a representative. Mr. Felder declined Grievant's request and indicated that a representative was not needed.

24. At the January 9, 2019, meeting, Mr. Felder advised Grievant that he was recommending that Grievant be suspended from work for five days.

25. Marshall University Board of Governor's Policy No. HR-10, entitled *Employee Infractions*, provides, in part, that it is an employee infraction in circumstances where there is a "deliberate falsification of employment application or other University records such as time cards, medical records, or any other dishonest acts committed for personal gain or for malicious intent . . ."

26. At the January 9, 2019, meeting, Mr. Felder completed a *Performance Counseling Statement*. In it, Mr. Felder asserted that Grievant violated Marshall University Board of Governor Policy HR-10 and deliberately falsified University records and/or committed a dishonest act for personal gain or malicious intent when he used sick leave on November 26, 2018, and December 18, 2018.

27. Grievant was suspended for five days as a result of the *Performance Counseling Statement*.

28. On Tuesday, January 15, 2019, Grievant sent an email to Mr. Felder asking when his suspension was up so that he could return to work. On the same day, Mr. Felder responded to Grievant's email, in part, as follows:

> Your five (5) day suspension was scheduled January 10, 2019 - January 16, 2019. Your first day to return to work is January 17, 2019. Due to recent

> events and performance issue, the CITE department no longer wishes to participate in your modified duty assignment.

The recent events in the email were the alleged sick leave misuse. The performance issues were not documented.

29. Grievant was suspended and removed from his modified duty assignment because of the use of sick leave on November 26, 2018, and December 18, 2018.

30. Grievant was placed on a preferential recall pursuant to WEST VIRGINIA CODE § 23-5A-31.

31. Grievant sent Mr. Felder a letter indicating that he wants to work and is able to work within his limitations in any available position. Grievant's Exhibit No. 14.

32. Mr. Felder acknowledged that he sent emails to the Director of the REC Center regarding surveillance videos and time sheets. As part of his discovery request, Grievant requested all correspondence related to the events giving rise to this grievance. These correspondences were not produced to the Grievant. Mr. Felder also acknowledged that he was uncertain whether other documents were not produced in response to Grievant's discovery request.

33. The record reflects that not all applicable policies were produced during discovery. Marshall University represented to the administrative law judge that there was no written workers' compensation policy. Thereafter, Marshall University produced a written workers' compensation policy after Mr. Felder made reference to it in his testimony.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the weight of the testimony." *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). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

The record clearly establishes that Respondent failed to meet its burden of proof in this case relating to its grounds for suspending Grievant. Marshall University Board of Governors Policy No. HR-10 "defines infractions which if committed by a classified or nonclassified employee require immediate suspension or dismissal." This includes "deliberate falsification of employment application or other University records such as time cards, medical records, or any other dishonest acts committed for personal gain or for malicious intent." *Id.* at 2.5.6. Respondent failed to meet its burden of proving, by a

preponderance of the evidence, that Grievant violated Marshall University Board of Governors Policy No. HR-10.

Marshall University's Classified Staff Handbook provides that "sick leave may be used by the employee when ill, injured, when in need of medical attention or when death occurs in the immediate family. Sick leave may also be used to care for immediate family members who are ill, injured, or when in need of medical attention." Marshall University has no policy that instructs what employees may not do when utilizing sick leave. In addition, Marshall University has no policy that prohibits an employee's use of its recreation center for medical purposes while on sick leave. Sick leave is an earned employee benefit. It is permissible for an employee to utilize sick leave to care for a family member, such as a child.

The next issue presented to the undersigned is whether it was arbitrary and capricious to remove Grievant from his position where there existed no policy prohibiting the employee from utilizing the recreation center for medical purposes while on sick leave. As this claim does not involve a disciplinary matter, Grievant has the burden of proving this assertion 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).

"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)).

Both parties submitted to the Grievance Board code citations and procedure concerning the workers' compensation aspect of this case. Granted, the undersigned is without authority to proceed under WEST VIRGINIA CODE § 23-5A-3(2). In any event, Respondent's counsel aptly pointed out to the undersigned that the creation of Grievant's temporary transition position was discretionary. Discretionary actions of a public agency are upheld unless they are found to be arbitrary and capricious. *McComas v. Public Service Commission*, Docket No. 2012-0240-PSC (Apr. 24, 2013).

Respondent's argument that nothing about the decision to end the temporary transitional position was arbitrary and capricious because it was not the result of a disciplinary action is misplaced. The record of this case demonstrates that Grievant was not returned to his modified duty assignment due to recent events involving his suspension and performance issues. The totality of the circumstances, including overturning the suspension, support a finding that Respondent failed to reasonably accommodate Grievant insofar as it removed an accommodation based upon an arbitrary and capricious action. Respondent purportedly removed Grievant from his position, in part, due to performance issues. Respondent failed to specify any performance issue in its January 15, 2019, email removing Grievant from his position. This action would further support a finding that Respondent's conduct was arbitrary and capricious.[1]

It is undisputed that Grievant was denied his right to representation at the January 9, 2019, meeting with Mr. Felder. The Grievance Board has for some time considered the right to representation in a variety of settings. In *Koblinsky v. Putnam County Health Department*, Docket No. 2010-1306-CONS (Nov. 8, 2010), the Grievance Board held that:

> The label given the meeting does not matter. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present, if she makes such a request.

[1]The circuit court has ruled that in situations where an employee is seeking to return to work under restrictions that were in place before a more recent workers' compensation claim, the employee should be allowed to return to work under those previous restrictions. The facts of this case are somewhat similar, albeit in a higher education setting. *See Griffon v. West Virginia Division of Transportation, Department of Motor Vehicles*, Civil Action No. 09-AA-177 (March 24, 2010).

Similarly, in *Beaton, et al., v. West Virginia Department of Health and Human Resources*, Docket No. 2013-0496-CONS (Dec. 20, 2013), the undersigned held that the right to representation included a right to representation in investigatory meetings where discipline might result.

Respondent violated Grievant's right to representation. This action further supports a finding that Respondent's conduct, in the totality of all circumstances, was arbitrary and capricious. Marshall University's refusal to permit Grievant to have a representative present at the January 9, 2019, is evidence of its arbitrary and capricious conduct when disciplining and removing Grievant from his position.

Grievant preserved at the evidentiary hearing, and developed in his fact/law proposal, the argument that Respondent spoliated evidence insofar as it failed to produce the evidence in response to the Grievant's discovery requests. An adverse inference is appropriate where, upon weighing four factors, the administrative law judge concludes that spoliation has occurred. The administrative law judge must consider and weigh the following factors: (1) the party's degree of control, ownership, possession or authority over the undisclosed evidence; (2) the amount of prejudice suffered by the grievant as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for the grievance; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in failing to produce the evidence. The party requesting the adverse inference based upon spoliation of evidence has the burden of proof on each element of the four-factor test. *See* Syl. Pt. 2, *Tracy v. Cottrell*, 206 W. Va. 363, 524 S.E.2d 879 (1999); *Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003).

Grievant established, by a preponderance of the evidence the four factors above, and that Respondent spoliated evidence. In particular, a correspondence between Mr. Felder and the REC Center Director concerning Mr. Felder's investigation into Grievant's REC Center use, because Respondent failed to produce the evidence as part of discovery. The undersigned makes a finding that disclosure of such evidence would have been favorable to Grievant concerning discrepancies regarding why Mr. Felder investigated Grievant; the opening and closing times of the REC Center's aquatic area; and the times Grievant was actually in the REC Center.

The record established by a preponderance of the evidence that Respondent failed to produce the actual workers' compensation return-to-work policy it allegedly relied on in this case. The record established that Respondent misrepresented to the Grievance Board that there was no written policy at the beginning of the evidentiary hearing, only to later reference and produce the policy during the proceedings. An adverse inference can be made that Respondent did not follow the policy when removing an accommodation based upon disciplinary grounds. For all the reasons set forth above, the Grievant has proven his grievance by a preponderance of the evidence in light of applicable law.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the weight of the testimony." *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). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. The record clearly establishes that Respondent failed to meet its burden of proof in this case relating to its grounds for suspending Grievant.

3. As Grievant's claim concerning arbitrary and capricious conduct does not involve a disciplinary matter, Grievant has the burden of proving this assertion 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).

4. "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)).

5. The record of this case demonstrates that Grievant was not returned to his modified duty assignment due to recent events involving his suspension and performance issues. The totality of the circumstances, including overturning the suspension, support a finding that Respondent failed to reasonably accommodate Grievant insofar as it removed an accommodation based upon an arbitrary and capricious action.

6. Respondent violated Grievant's right to representation. Marshall University's refusal to permit Grievant to have a representative present at the January 9, 2019, is evidence of its arbitrary and capricious conduct when disciplining and removing Grievant from his position.

7. An adverse inference is appropriate where, upon weighing four factors, the administrative law judge concludes that spoliation has occurred. The administrative law judge must consider and weigh the following factors: (1) the party's degree of control, ownership, possession or authority over the undisclosed evidence; (2) the amount of prejudice suffered by the grievant as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for the grievance; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in failing to produce the evidence. The party requesting the adverse inference based upon spoliation of evidence has the burden of proof on each element of the four-factor test. *See* Syl. Pt. 2, *Tracy v. Cottrell*, 206 W. Va. 363, 524 S.E.2d 879 (1999); *Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003).

8. Grievant established, by a preponderance of the evidence, that Respondent spoliated evidence, namely correspondence between Mr. Felder and the REC Center Director concerning Mr. Felder's investigation into Grievant's REC Center use, because Respondent failed to produce the evidence as part of discovery.

9. The record established that Respondent misrepresented to the Grievance Board that there was no written policy at the beginning of the evidentiary hearing, only to later reference and produce the policy during the proceedings. An adverse inference can be made that Respondent did not follow the policy when removing an accommodation based upon disciplinary grounds.

Accordingly, this grievance is **GRANTED**.

It is hereby **ORDERED** that Grievant be returned to the position he held prior to Marshall University's suspension and removal of Grievant from his position. If that position is not available, Grievant is to be placed in a position that is comparable in wages and benefits and accommodates his medical limitations. It is hereby **ORDERED** that Grievant be awarded back pay, including pay for the wrongfully imposed five-day suspension, benefits and interest, from January 10, 2019, until he is instated into a position. It is hereby **ORDERED** that all documents regarding Grievant's suspension and removal from his position be removed from his personnel files.

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, 2018).

Date: October 9, 2019

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Ronald L. Reece
Administrative Law Judge