THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL TROTTO,
Grievant,

v. **Docket No. 2017-2085-CONS**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Michael Trotto, employed by the Division of Highways, filed a Level One grievance on June 30, 2017, stating, "Grievant was discriminated against due to his filing of worker's compensation claims and his medical disability. Employer has refused to allow Grievant to return to work." For relief, Grievant requested "[t]o be reinstated to his employment position and to be awarded backpay and attorney fees." On December 27, 2017, Grievant filed another grievance asserting that Grievant has requested FMLA due to the decline in his wife's health, and that Respondent failed to process Grievant's FMLA request. Grievant seeks the FMLA request to be processed. A mediation session for the first grievance was conducted on March 9, 2018. Grievant appealed that case to Level Three on or about March 21, 2018. These two grievances were consolidated on July 11, 2018. A Level Three hearing was conducted before the undersigned on October 29, 2018, at the Grievance Board's Westover office. Grievant appeared in person and by his counsel, Erika Klie Kolenich. Respondent appeared by its counsel, Xueyan Palmer, Legal Division. This matter became mature for

consideration upon receipt of the last of the parties' fact/law proposals on December 21, 2018.

Synopsis

Grievant suffered multiple back injuries while he was on the job for the Division of Highways. As a result, Grievant was unable to work and on workers' compensation for a period of time. When Grievant challenged the Division of Highways' refusal to return him to work, his treating physician had not authorized his return to work, nor had Grievant provided his employer with any documentation by his treating physician returning him to work. After Grievant's treating physician authorized his return to work with restrictions, the Division of Highways created a return to work plan. Grievant declined to return to work under the plan because he wanted to remain home to care for his ill wife. Grievant was unable to establish that any actions taken by his employer were arbitrary and capricious or an abuse of discretion. Grievant also failed to establish that he was the victim of discrimination. Accordingly, this grievance is denied.

The following Finding of Facts are based upon the record of this case.

Findings of Fact

1. Grievant is employed by Respondent as a Transportation Worker 2 Equipment Operator in District Four Goshen Road. Grievant has been employed with Respondent approximately 12 years.

2. During 2014-2015, Respondent provided accommodations to Grievant for limitations he suffered due to a work-related injury. The accommodations included a return to work plan that restricted lifting by Grievant to no more than 25 pounds.

3. In January of 2016, Grievant sustained another back injury and was off work for several months. Respondent developed another return to work plan to accommodate the restrictions imposed by Grievant's treating physician. The medical restrictions included "no repetitive climbing/bending/stooping, weight lifting restrictions 25 lbs., no forceful pushing/pulling over 25 lbs." The return to work plan covered the period 6/14/2016 to 12/31/2016. Grievant signed the return to work plan on June 14, 2016. Respondent's Exhibit 5.

4. On or about August 19, 2016, Grievant sustained another work-related back injury that was diagnosed as a thoracic sprain. As a result of this injury, Grievant was not medically cleared to return to work for several months. Respondent once again developed another return to work plan to accommodate the medical restrictions imposed by Grievant's physician. The medical restrictions included "no lifting, pushing or pulling greater than 20 pounds, no shoveling, and no standing and walking more than 1 hour at a time (no more than 4 hours total shift)." The new return to work plan covered the period 12/31/2016 to 1/31/2017. Grievant signed the return to work plan on December 7, 2016. Grievant's Exhibit 1.

5. During the first two weeks of January 2017, Grievant missed work for various non-work-related reasons, including an ear infection and night vision problems. As a result, Grievant was on a leave of absence beginning January 11, 2017. Grievant's treating physician imposed additional work restrictions that included: no lifting, pushing or pulling greater than 20 pounds; no shoveling; no standing more than 1 hour at a time, maximum total of 4 hours per day; and no commercial vehicle operation.

As a result, Respondent was not able to develop a return to work plan for Grievant. Consequently, Grievant was placed back on workers' compensation and received workers' compensation benefits through March of 2017.

6. In April of 2017, Grievant's workers' compensation case was closed for benefits after an independent medical examination was performed, and it was determined that he could return to work without restrictions. Grievant informed Respondent that the IME physician cleared him to return to work without restrictions.

7. Respondent contacted Grievant's treating physician to confirm that he could return to work without restrictions. The treating physician indicated that he would not authorize Grievant's return to work until a functional capacity evaluation was performed. On July 5, 2017, Respondent received a report from Grievant's treating physician, which indicated that he could return to work, but that he could not engage in repetitive climbing, bending or stooping; lifting more than 25 pounds; and no forceful pushing/pulling over 25 pounds. Respondent's Exhibits 2 and 4.

8. Following the filing of the first grievance, a Level One conference was held during which Respondent agreed to assist Grievant to return to work under the restrictions imposed by his treating physician on July 5, 2017. Respondent created a return to work plan that accommodated the work restrictions imposed by Grievant's treating physician. The work plan set a trial return to work date from 10/16/2017 to 11/30/2017. Respondent informed Grievant on October 13, 2017, that he could return to work on Monday, October 16, 2017.

9. On October 16, 2017, Grievant called his supervisor, Ronald Cumpston, and informed him that he would not be able to come back to work because of his wife's health problems.

10. While the first grievance was pending, Grievant filed another action on December 27, 2017. Grievant alleged that he requested a leave of absence from Respondent under the Family and Medical Leave Act (FMLA) due to his wife's declining health. Grievant's wife died on December 11, 2017.

11. Anthony Paletta, Director of District 4 Human Resources, indicated that no FMLA application was filed by Grievant. Mr. Paletta went on to clarify that even if one had been filed, Grievant would not have been granted FMLA leave. Mr. Paletta explained that this was because Grievant had not accumulated the required amount of work hours to qualify for leave under FMLA. Mr. Paletta acknowledged that this information was not conveyed to Grievant. In any event, Grievant did not seek to determine whether or not he was eligle for leave under FMLA.

12. Grievant indicated that during the period that he voluntarily did not return to work, he submitted a personal leave of absence without pay applications to Respondent. Grievant did not return to work until June of 2018. Grievant returned to work under the same restrictions he had when he refused to return to work under the October 16, 2017, return to work plan.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 role of the undersigned in this matter is to review the evidence in the record and assess whether the actions taken by Respondent were arbitrary and capricious or an abuse of discretion. Grievant's initial action involved an allegation that Respondent refused to allow him to return to work after a previous work injury. The record established that Grievant received workers' compensation benefits through March of 2017. When those benefits terminated, an IME report was issued which found that Grievant could return to full duty work on April 4, 2017. Respondent contacted Grievant's treating physician to confirm that the IME report was correct in returning him to work without restrictions. Grievant's treating physician informed Respondent that he would not authorize Grievant to return to work until after a functional capacity evaluation was conducted. The Grievance Board has previously approved of Respondent seeking information from an injured employee's treating physician before allowing the employee

to return to work. *Cassella v. Div. of Highways*, Docket No. 2011-0379-CONS (Dec. 18, 2012). The Division of Personnel's Rule 14.4(h) allows an employer to refuse to allow an employee to return to work at less than full duty. *Griffon v. Div. of Motor Vehicles*, Docket No. 2008-1271-DOT (Aug. 17, 2009). This action by Respondent cannot be viewed by the undersigned as arbitrary and capricious, or an abuse of discretion.

When Grievant filed his grievance on June 30, 2017, seeking his return to work, his treating physician had not authorized his return to work, nor had Grievant provided Respondent with any documentation by his treating physician returning him to work. It was not until July 5, 2017, that Grievant's treating physician authorized him to return to work with restrictions. Under these undisputed facts, it is clear that Grievant's action seeking a return to work was precipitous, because Grievant had not been cleared to return to work by his treating physician. After Grievant's treating physician authorized his return to work with restrictions, Respondent created a return to work plan while the case was pending. The record established that after Grievant's treating physician authorized his return to work with restrictions, Grievant declined to return to work under the plan because he wanted to remain home to take care of his wife. No other reason was given to Respondent as to why Grievant would not return to work under the plan. Respondent caused no injury to Grievant after his case was filed, because it is undisputed that Grievant rejected Respondent's return to work plan. As Grievant suffered no injury-in-fact by Respondent, the undersigned agrees with counsel for Respondent that there is no basis for any relief on his return to work action. "The Grievance Board has held that a grievant must show an injury-in-fact, economic or

otherwise, to have what constitutes a matter cognizable under the grievance statute." *Delp v. Mercer County Bd. of Educ.*, Docket No. 06-27-219 (Jan. 3, 2007).

Grievant's second action requests that the undersigned order Respondent to immediately process his request for lease of absence under FMLA. To be eligible for leave under FMLA an employee must have been employed for at least 12 months by the employer and for at least 1,250 hours of service with such employer during the previous 12 month period. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 122 S.Ct. 1155 (2002). The Grievance Board has recognized that to prevail on a claim for denial of FMLA leave, "the employee must prove that: (1) he was eligible for FMLA protections; (2) his employer was covered by the FMLA; (3) he was entitled to leave under the FMLA; (4) he provided sufficient notice of his intent to take FMLA leave; and (5) his employer denied him FMLA benefits to which he was entitled." *Nestor v. W. Va. Dep t of Health & Human Res.*, Docket No. 2012-0652-DHHR (Aug. 29, 2012). Grievant failed to put on any evidence that he was eligible for leave under FMLA. Respondent did establish that Grievant had not worked the required hours to be eligible for leave pursuant to FMLA. The only relief requested by Grievant was to have his request for leave under FMLA immediately processed so that he could be with his ill wife. Unfortunately, the record established that his wife had already passed.

Finally, Grievant asserts that he was the victim of discrimination. For the purpose 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 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'n., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). Grievant did not establish that he was the victim of discrimination under the applicable statute. The mere allegation that the Respondent refused to allow him to return to work after his treating physician authorized him to return to work with limitations does not meet the elements set out above.[1]

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 grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v.*

[1]The undersigned does not have the authority to award attorney's fees and any incurred expenses related to his wife's medical treatments.

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).

2. The Division of Personnel's Rule 14.4(h) allows an employer to refuse to allow an employee to return to work at less than full duty. *Griffon v. Div. of Motor Vehicles*, Docket No. 2008-1271-DOT (Aug. 17, 2009). It further allows the employer to request additional information from the employee's physician, prior to making a decision as to whether he should be allowed to return to work. Respondent was acting in accordance with this Rule when it refused to allow Grievant to return to work.

3. Grievant failed to establish that he was eligible for leave under FMLA. Grievant did not establish that he was the victim of discrimination under the applicable statute.

Accordingly, this 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 (2008).

Date: January 28, 2019

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Ronald L. Reece
Administrative Law Judge