WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHRISTOPHER CARVER,
Grievant,

v. **Docket No. 2019-1429-MAPS**

DIVISION OF CORRECTIONS AND REHABILATION/ BUREAU OF PRISONS AND JAILS/CENTRAL REGIONAL JAIL AND CORRECTIONAL FACILITY,
Respondent.

D E C I S I O N

Christopher Carver, Grievant, filed this grievance against his employer the Division of Corrections and Rehabilitation/Bureau of Prisons and Jails/Central Regional Jail and Correctional Facility, Respondent. Grievant initiated this proceeding on April 10, 2019, alleging he was improperly denied permission to work "light duty" as an accommodation by his employer. Grievant's statement of grievance reads, "[m]y supervisor requested that I obtain medical paperwork in order to return to work. Once I got the paperwork, I was denied return to work until my medical paperwork was approved. Central Regional Jail has failed to provide accommodations and has been discriminating against me due to my disability." The relief Grievant seeks is to be able to return to work and back pay for the period of November 26, 2018, to May 14, 2019.[1]

A level one conference was initially commenced on April 29, 2019, subsequently the matter was held in abeyance for a period and ultimately the grievance was denied at that level on September 10, 2019. Grievant appealed to level two on September 17,

[1] Originally Grievant was seeking back pay for the period of November 26, 2018 through his resignation on or about December 18, 2019. During the outset of the Level 3 evidentiary hearing, the parties stipulated to the contested period being November 26, 2018 to May 14, 2019, when Grievant returned to work full time.

2019, and a mediation session was held on February 18, 2020. Grievant appealed to level three on February 28, 2020. A level three hearing was held before the undersigned Administrative Law Judge on August 28, 2020, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by legal counsel Ambria Britton of Klie Law Offices. Respondent was represented by its counsel Briana J. Marino, Assistant Attorney General. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on or about September 28, 2020, on receipt of the last of these proposals.

Synopsis

Grievant was employed by Respondent as a Correctional Officer I. Grievant contends that Respondent's action(s) in denying his return to work on light duty was improper. Grievant has the burden of proof in this non-disciplinary matter. Grievant seeks back pay for the period he was off work until his return to full duty.

Respondent invested significant time and effort into evaluating the request for light duty/return to work made by Grievant. Grievant could not work any of the posts manned by correctional officers, was unable to work directly with inmates, and was restricted from performing many of the essential duties of his position as outlined in the classification specifications. Grievant failed to prove that he was discriminated against or that Respondent denied him the right to return to his position of Correctional Officer I in violation of any applicable rule or statute. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed at Central Regional Jail and Correctional Facility ("CRJ") as a Correctional Officer 1. Grievant was hired for this position on or about May 22, 2018 and worked within that classification until his voluntary resignation effective on December 18, 2019.

2. Grievant had a history of medical problems related to seizures and seizure-like spells. He has taken medication for seizures since 2016.

3. On or about November 13, 2018, Grievant experienced a medical emergency (seizure-like spell) while at work at CRJ on the night shift which caused him to be seen in a local emergency room. A physician placed Grievant off work due to that incident until November 16, 2018.

4. On November 26, 2018, Grievant was approached by then Superintendent Ralph Terry, and was verbally instructed to get paperwork regarding the seizures showing that he was able to work.

5. Grievant was placed on medical leave beginning on November 26, 2018.

6. After being placed on medical leave Grievant sought the medical opinion/advise of his neurologist, Dr. Adnan Alghadban. Dr. Alghadban provided a letter, dated November 26, 2018.

7. Grievant provided a work excuse to Respondent's staff at CRJ from Associated Specialist Inc., Dr. Adnan Alghadban, which provided that Grievant was under

his care and requested that Grievant be put on light duty or Control Post until at least January 1, 2019 and his seizures are more controlled. Pursuant to Dr. Alghadban, Grievant was restricted from climbing stairs or interacting with the inmates until January 1, 2019.

8. On November 26, 2018, Respondent's personnel [Mary Ramsey] sent an e-mail, labeled as high importance, to the Division of Administrative Services ("DAS") and Patricia Reeder asking if Grievant's light duty request was approved, as he was scheduled to return to work the next evening.

9. On November 27, 2018, Ms. Ramsey sent a second e-mail to the same parties stating that Grievant was scheduled to work that evening and asking if his light duty was approved or not. Response to Ms. Ramsey included that the request for light duty could not be approved at that time and said that a Functional Capacity Assessment form needed to be provided to Grievant to be completed by his attending physician.

10. Grievant was advised by Human Resources employee(s) at CRJ that additional information would be needed to reportedly evaluate whether Grievant could perform the essential functions of his position, Correctional Officer I, safely in light of the work excuse and restrictions noted on the November 26, 2018, doctor's note. Grievant was provided Division of Personnel (DOP) forms via e-mail for completion by a medical professional and instructed to return them when completed.

11. Grievant had the forms completed and returned them to CRJ for processing. The relevant portions of the completed DOP forms listed in summary, "Period of Incapacity: 11/30/2018 to unknown; May work light duty pending neurology evaluation

pending also EEG study to be done Dec 3, 2018; Light duty from 11/30/2018 to unknown; Completed by Minnie Hamilton NP."

12. Upon evaluation of these forms by the Division of Administrative Services ("DAS") who processed light duty requests by employees, it was determined at that time, light duty could not be accommodated because there were no specific limitations noted by Nurse Practitioner Hamilton. Grievant was asked to have this deficiency addressed by his treating medical professionals and to return the updated forms.

13. During this time, Grievant was utilizing annual leave and/or sick leave to receive wages while off work.

14. The DOP forms were submitted by Grievant on November 30, 2018, for processing by DAS, requesting light duty excluded any specific work limitations. On November 30, 2018, Ms. Ramsey sent an e-mail, labeled as high importance, to DAS Employee Relations, attaching the updated paperwork provided by Grievant and inquiring if his light duty was approved or if more information was needed.

15. On Wednesday December 5, 2018, Ms. Ramsey sent a second e-mail to DAS Employee Relations checking on the status of the light duty request, as Grievant was scheduled to return to work the following Sunday.

16. Grievant's light duty request was not granted at this juncture, Respondent maintains the forms were incomplete. Grievant was again asked to have his medical providers fix the deficiency and resubmit the documentation.

17. On December 12, 2018, Grievant sent an e-mail to Ms. Ramsey asking what he needed to do to get his light duty approved and inquiring when he could set up a

conference call to include Elaine Harris, a union representative, regarding any miscommunication that was occurring. Ms. Ramsey's response directed Grievant to contact Lia Dyer at the main office.

18. On December 13, 2018, Dr. Alghadban completed a second functional capacity assessment for Grievant.

19. On or about December 13, 2018, Grievant submitted a corrected and complete DOP form listing specific restrictions placed upon his ability to work by his treating physician. The limitations listed on that form were: never climbing; never pushing/pulling/lifting/carrying over 50 pounds; no climbing stairs; and no driving. These DOP forms were forwarded to DAS for processing and decision on whether light duty could be accommodated for Grievant in light of the restrictions and his potential seizure disorder.

20. DAS, by and through its Assistant Director April Darnell, determined after a comparison of the DOP Classification Specification for a Correctional Officer I and the restrictions listed on the medical documentation submitted by Grievant, that Grievant's request for light duty could not be accommodated.

21. Ms. Dyer sent Ms. Ramsey an e-mail shortly after receiving Grievant's e-mail stating that Ms. Darnell could not approve the request for light duty at that time. April Darnell was the Assistant Director of the Division of Administrative Services – Human Resources and Payroll at this time.

22. On December 20, 2018, Grievant sent an e-mail to Lia Dyer and Elaine Harris asking why the forms that he sent on December 13, 2018 were denied. On

December 21, 2018, Ms. Darnell sent Grievant an e-mail stating that the reason his light duty was denied was because of his medical condition and the limitations and restrictions listed by his physician. Grievant responded on December 23, 2018 requesting what exactly he needed to do or get in order to return to work as quickly as possible. Ms. Darnell replied on December 28, 2018 suggesting that Grievant work with his physician and reiterated that they were unable to approve his light duty request with the restrictions that Grievant's physician had put into place.

23. In approximately January or February of 2019, Grievant participated in a three-way phone conference with Union Representative Elaine Harris and Assistant Director April Darnell in which it was discussed that his paperwork was denied because of the restriction on being around inmates.

24. On March 1, 2019, Dr. John Brick, Grievant's new neurologist, filled out a functional capacity assessment stating that Grievant could perform less than full duty work from March 1, 2019 to June 1, 2019.

25. Grievant applied for FMLA leave on March 5, 2019. On March 6, 2019, Grievant e-mailed a copy of all the completed forms requested by Respondent to Ms. Ramsey, who then forwarded the e-mail to DAS Employee Relations and April Darnell.

26. On April 1, 2019, Grievant sent another e-mail to Ms. Ramsey, an agent of Respondent.

27. On April 30, 2019, Dr. Brick completed a Physician's/Practitioner's Statement for Grievant stating that Grievant required light duty with no stairs and no driving for a period of incapacity from November 26, 2018 to July 15, 2019.

28. The DOP Classification Specification for a COI states under "Knowledge, Skills, and Abilities" that a COI must be able to: "…safely handle and use mechanical restraints, intermediate weapons and firearms and be certified as required. Ability to operate a motor vehicle. Ability to run, jump, climb stairs and physically restrain violent offenders." Additionally, COIs must be able to work a variety of posts with differing levels of physical activity and be available for outside facility duties, such as accompanying inmates to the hospital, when necessary; performing perimeter checks alone; and other duties.

29. At the time relevant to this matter, regional jails did not offer a light duty post or any other post where a COI would not be required to ascend/descend stairs, push/pull/lift/carry over 50 pounds; not drive; or otherwise respond to emergencies. Respondent's employees invested significant time and effort into evaluating the request for light duty/return to work made by Grievant.

30. Prior to April 2019, Respondent failed to identify a duty assignment performed by a correctional officer that was not in one way or another in violation of the restrictions placed on Grievant's activities.

31. Grievant acknowledges that there were legitimate safety concerns regarding him working in the secure portion of the facility with a seizure disorder/other condition that involved random loss of consciousness by Grievant.

32. Once Grievant exhausted his annual and sick leave accrued, Grievant was granted an unpaid medical leave of absence while he continued treatment for his condition.[2]

33. On or about April 2019, Policy Directive 311.00 was implemented creating a new position to be manned by a correctional officer or other personnel outside of the secure portion of the facility as part of interdiction efforts to eliminate the entrance of contraband into the secure portion of the facility. This new position would be a "scan line" position which involved logging entering/exiting personnel and visitors; conducting searches of parcels, bags, and items entering the secure portion of the facility; and utilizing a metal detector or x-ray machine to examine persons and things.

34. It was determined by Respondent that Grievant's restrictions could be accommodated if assigned to this new position outside of the secure portion of the facility. Accordingly, Grievant was contacted regarding his return to work on light duty effective May 14, 2019.

35. On May 14, 2019, Grievant returned to work on light duty, full time and was assigned to the "scan line" outside of the secure portion of the facility until he was released for full duty by his physician.

[2] Grievant worked at a third-party food service provider for Glenville State College while on unpaid medical leave of absence from Respondent. While Respondent had a policy prohibiting third-party employment without prior permission, Respondent did not take any disciplinary action against Grievant when it was learned he had secured other employment. Grievant testified that the food service provider was able to accommodate his work limitations and he worked full-time for them from approximately January 2019 until his full-time return to duty with Respondent on May 14, 2019.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant's return to work at less than full duty is governed by both the Division of Personnel's ("DOP") administrative rule and applicable provisions of Respondent's policies. Under the DOP's 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). DOP administrative 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).

Discretionary actions of a public agency are consistently upheld unless they are found to be arbitrary and capricious. *McComas v. Public Service Commission*, Docket No. 2012-0240-PSC (Apr. 24, 2013); *See generally, Dillon v. Bd. of Educ*., 177 W.Va. 145, 51S.E.2d 58 (1986); *Christian v. Logan County Bd. of Educ*., Docket No. 94-23-173 (Mar. 31, 1995). 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 is 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).

Grievant argues that Respondent's decision to deny his return to work on light duty was improper. Grievant essentially presents two issues for consideration by the undersigned: (1) Grievant was discriminated against by not being brought back to work promptly after submission of his DOP forms; and (2) Grievant was discriminated against because Respondent failed to offer him sufficient accommodations for his seizure disorder/psychiatric condition to allow him to return work immediately.

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 a discrimination 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 his treatment was not related to the actual job responsibilities. In summary, Grievant argues that each time he submitted medical documentation from his treating providers, Respondent rejected the paperwork but he was never told why or how to address the issue. This is not factually accurate. Testimony presented by both Grievant and Respondent dealt with a menagerie of emails back and forth between Grievant and various employees or agents of Respondent regarding his medical forms, leave utilization, light duty requests, and decisions. Respondent invested significant time and effort into evaluating the request for light duty/return to work made by Grievant. Communication with Grievant was ongoing. Communication between the parties may have been confusing from time to time but Grievant was made aware that Respondent was of the opinion that his work limitations were simply not of the type or kind that could be accommodated by the nature of work performed by a COI. Grievant did not adduce evidence that any other employee's light duty request was processed differently or decision made more quickly or required more or less evidence than in Grievant's case. Respondent contends that Grievant's situation was treated the same as any other employee's when attempting to return to light duty: medical documentation was requested, evaluated, and decision made whether the

restrictions could be accommodated in the demanding environment jails present. Respondent persuasively established that, even if it could accommodate Grievant's physical limitations as outlined by his physicians, that it could not permit Grievant to work in the secure portion of the facility due to safety concerns.

Grievant asserts that he could work in the "control room" which would safely segregate him from inmate interaction was not convincing. Respondent aptly points out the dangers not only to Grievant's bodily safety but to the security and safety of the entire facility should Grievant lose consciousness within the locked confines of the "control room." Grievant has not met his burden of proof to establish Respondent acted in a discriminatory manner towards him on this first theory of grievance.

With regard to Grievant's second theory of discrimination, Grievant again fails to carry his evidentiary burden. Grievant argues that Respondent should have reasonably accommodated his work limitations and returned him to work as a Correctional Officer I and its failure to do so is tantamount to discriminating against him due to disability. Grievant's own testimony fatally undermines his claim of discrimination when he concedes that he cannot realistically and safely work any of the 5 posts within the secure portion of regional jail facility with the stated work restrictions. When Respondent's counsel went through each post's general functions and requirements individually with Grievant, it was clear that Grievant could not perform the essential functions of the positions. Relevant testimony presented at the level three hearing persuasively supports that Grievant could not work any of the posts available in the regional jail prior to April 2019, as each required ascending/descending stairs and other physical activity that would

violate restrictions placed on Grievant's activities. Moreover, Grievant was unable to articulate any reasonable accommodation that would allow him to work any of the post positions in the secure portion of the jail without fundamentally changing the workflow and staffing requirements of his shift. To require such a dramatic change in the fundamental operation of the facility cannot be stated as being a "reasonable" burden for Respondent to bear.[3]

Grievant points out no specific employee that has been treated differently apart from generally averments that others have worked the "control room" on light duty in the past. Again, the testimony from Grievant and others demonstrate that, while light duty is sometimes accommodated in the "control room" post, Grievant's condition and restrictions would not allow him to do so either because he would not be exempt from situations that would straightforwardly violate his physician's restrictions or the dangers Grievant's presence would create.[4]

Respondent's employees invested significant time and effort into evaluating request for light duty/return to work made by Grievant. Grievant's limitations were simply

[3] L3 Testimony underscored that, even if Respondent were to undertake the marked and significant burden of accommodating Grievant's fundamental restrictions, those accommodations would not allow Grievant to work any of the posts without creating a clear and present danger to all other officers and inmates. Grievant's spells of unconsciousness could occur at any time and he would be unable to function for countless minutes during and after those spells makes him especially vulnerable amidst a potentially hostile population.

[4] It is easy to imagine a scenario where Grievant is working in a post that controls all of the secure doors in a facility and, while losing consciousness, pushes a button or lever that unlocks a door permitting inmate(s) to access some portion of the facility or outside where they are not permitted to be in. This could create a situation not only where there is a medical emergency with delays of reaching Grievant because of his being locked in a room alone, but also a chance of escape or danger to staff and others by allowing inmates unfettered access to hallways and other housing units.

not of the type or kind that could be reasonably accommodated by the nature of work performed by a COI.

In this case, based on his physician's orders, Grievant could not work any of the posts manned by correctional officers, was unable to work directly with inmates, and was restricted from performing many of the essential duties of his position as outlined in the classification specifications even with accommodation. Until April 2019 when the "scan line" position was created, there were no light duty posts within the jail that could accommodate Grievant's restrictions. Even working a "control room" post proved risky and problematic as Grievant would still be required to respond to emergency situations that arise which could very well include climbing stairs and pushing/lifting/pulling/pushing over 50 pounds. In terms of a discrimination claim on the basis of not being reasonably accommodated due to a disability, Grievant has failed to meet his burden of proof.

On or about April 1, 2019, Policy Directive 311.00 was implemented creating a new position to be manned by a correctional officer or other personnel. This new position would be a "scan line" position which involved logging entering/exiting personnel and visitors; conducting searches of parcels, bags, and items entering the secure portion of the facility; and utilizing a metal detector or x-ray machine to examine persons and things. The newly created position was available outside the secure portion of the jail. Respondent brought Grievant back to work on light duty working a full-time schedule as a "scan line" employee shortly after the position was established. Grievant failed to prove that he was discriminated against or that Respondent denied him the right to return to his position of Correctional Officer I in violation of any applicable rule or statute.

The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. Because the subject of 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 Board, 156 C.S.R. 1 § 3 (2018).

2. 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); W. Va. Code St. R. § 143-1-14.4(h)(4).

3. Discretionary actions of a public agency are consistently upheld unless they are found to be arbitrary and capricious. *McComas v. Public Service Commission*, Docket No. 2012-0240-PSC (Apr. 24, 2013); *See generally, Dillon v. Bd. of Educ*., 177 W.Va.

145, 51S.E.2d 58 (1986); *Christian v. Logan County Bd. of Educ*., Docket No. 94-23-173 (Mar. 31, 1995).

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 is 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).

5. Grievant did not prove that Respondent's decision to deny him light duty was arbitrary and capricious.

6. 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).

7. In order to establish a discrimination 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).

8. Grievant did not establish that he was subjected to discrimination as that term is defined in W. VA.CODE § 6C-2-2(d).

9. Grievant did not establish by a preponderance of the evidence that Respondent denied him the right to return to his position of Correctional Officer I in violation of any applicable rule or 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 (2018).

Date: November 6, 2020

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Landon R. Brown
Administrative Law Judge