THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DANIEL FROST,
Grievant,

v. **Docket No. 2019-0319-BSC**

BLUEFIELD STATE COLLEGE,
Respondent.

DECISION

Grievant, Daniel Frost, was employed by Respondent, Bluefield State College. On August 29, 2018, Grievant filed this grievance against Respondent stating, "I have been unduly terminated while on medical leave. It is my contention this is retaliation due to my remarks concerning President & HR Director at BOG Meetings." For relief, Grievant sought, "Official reprimand of President & HR Director. Compensation for the stress it has caused."

Respondent failed to hold a level one proceeding, instead dismissing the grievance by an undated *Level One Dismissal Order* mailed September 7, 2018. Grievant appealed to level two on September 21, 2018. Following mediation, Grievant appealed to level three of the grievance process on March 21, 2019. Grievant represented himself throughout the lower level proceedings but then retained counsel who filed a notice of appearance on September 12, 2019.

On September 16, 2019, Respondent, by counsel, filed *Respondent's Motion to Dismiss* asserting Grievant failed to state a claim upon which relief can be granted and that the relief sought is wholly unavailable through the grievance procedure. On September 19, 2019, Grievant, by counsel, filed *Grievant's Response to Respondent's Motion to Dismiss* moving that the motion to dismiss be rejected as untimely, asserting

that Grievant had clarified during mediation that he wished to be reinstated, and moving that the formal amendment of the relief sought be permitted. Due to the late filing of the motion to dismiss, time did not permit a formal ruling on the motion. By email dated September, 19, 2019, Grievance Board staff informed the parties that the motion to dismiss had been preliminarily denied and the hearing on the merits would go forward as scheduled, although the parties would be permitted to present additional evidence and argument regarding the motion to dismiss at the hearing. The level three hearing was held on September 24, 2019, before the undersigned at the offices of the Raleigh County Commission on Aging in Beckley, West Virginia. A second day of hearing was conducted on October 25, 2019, at the Grievance Board offices in Charleston, West Virginia. Grievant was represented by counsel, Derrick W. Lefler. Respondent was represented by counsel, Kelly C. Morgan and Brent D. Benjamin, Bailey & Wyant, PLLC. This matter became mature for decision on December 11, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent in a classified position and protests his termination from employment while on medical leave alleging such was retaliation because Respondent would not permit him to take indefinite catastrophic leave. Grievant's employment was terminated based on the medical verification provided by his own doctor stating that he was permanently incapacitated from performing his job duties. Respondent's decision to terminate Grievant's employment under these circumstances was reasonable. The granting of indefinite discretionary catastrophic leave is not a reasonable accommodation. Grievant made a *prima facie* case of

retaliation but Respondent provided credible evidence of legitimate nondiscriminatory reasons for its actions and Grievant failed to prove those reasons were pretextual. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent in a classified position as a Counselor II and had been employed by Respondent in various positions for twenty-two years.

2. Grievant also had served on Respondent's Board of Governors multiple times and had been most recently elected to the Board in 2017 as an employee representative. Grievant's service on the Board ended before the natural expiration of his term when he was terminated from employment.

3. Grievant and Respondent, particularly President Marsha Krotseng and Human Resources Director Jonette Aughenbaugh, have a long-standing contentious relationship. Grievant has filed numerous grievances against Respondent and one grievance decision specifically found that Respondent had retaliated against Grievant, although neither President Krotseng nor Director Aughenbaugh were in any way involved in the retaliation. Grievant also had at least one grievance pending at the time of his termination. As an employee, Grievant had made multiple accusations of wrongdoing against President Krotseng and Director Aughenbaugh and he continued those accusations in his position on the Board of Governors. As a member of the Board, Grievant vocally called for both President Krotseng and Director Aughenbaugh's

removal. Grievant also made accusations of wrongdoing against members of the Board of Governors and, at the time of his termination, was in an ongoing dispute with the Chairman of the Board regarding Grievant's allegations that the Chairman was suppressing information regarding Grievant's complaints by refusing to place the same in the meeting minutes.

4. The record does not contain documentation regarding Grievant's initial periods of leave but it appears Grievant went out on medical leave on or about February 14, 2017, and had spinal fusion surgery on February 28, 2017. Grievant's medical leave was then extended in March 2018 and again in May 2018.

5. By letter dated July 24, 2018, Human Resource Representative Senior Kim Daniels sent Grievant a *Bluefield State College Medical Return to Work Form* to be completed by Grievant's physician. Ms. Daniels stated that Grievant's approved leave was to end on July 26, 2018, and his anticipated return to work was July 27, 2018.

6. On July 27, 2018, Grievant's surgeon, Eric Marvin, DO, faxed the completed *Bluefield State College Medical Return to Work Form* stating that Grievant could return to normal duties without restriction on July 30, 2018.

7. On July 30, 2018, Director Aughenbaugh emailed President Krotseng, copying Grievant, his supervisor, and a payroll employee, stating that the human resources office had received the form from Grievant's physician indicating he was released to return to work that day.

8. In response, although Director Aughenbaugh was simply relaying the information provided by Grievant's own physician, Grievant stated that Director Aughenbaugh "was advised on NUMEROUS occasions" that he would be "out of

service until at least August 14, 2018, . . . yet she still sends out misinformation." Grievant stated that his primary care physician had not been working the week before and could not fill out paperwork until "today." He concludes, "this is another example of the kind of presumptuousness that emanates from her. (Ms. Aughenbaugh) It seems to me something MUST be done about this type of superciliousness."

9. On the same date, the human resources office did receive a second faxed *Bluefield State College Medical Return to Work Form* from another physician, Sameh Hanna, MD.

10. The *Bluefield State College Medical Return to Work Form* provides three numbered checkbox options from which physicians are to select one: that the employee is released to work with no restrictions, that the employee is totally incapacitated, or that the employee is released to work with restrictions. The form includes the word "or" in all caps and bold font between each option.

11. Despite this, Dr. Hanna completed multiple sections on the form. He checked the box that states, "Employee is totally incapacitated at this time" with the date range "4-23-18" to "Lifetime." Although Dr. Hanna did not check the box for "return to work with restrictions", he completed the information on restrictions by checking the box for "Permanent" and indicating Grievant was restricted from lifting more than five pounds and was limited in sitting and standing "not more than 10 min."

12. Although Dr. Hanna's completion of Respondent's form is somewhat confusing, Dr. Hanna also included as an attachment his completed *Physician's Certification*, which answers "Yes" to the question, "Does the applicant have a medically determinable physical or mental impairment that prevents the applicant from engaging

in any substantial gainful activity?" The form further clarifies: "Substantial gainful activity means a level of work performed for pay or profit that involves doing significant physical or mental activities or a combination of both. If the applicant is able to engage in any substantial gainful activity in any field of work, you must answer 'No'."

13. Reading the two documents together clarifies that Dr. Hanna provided the information regarding Grievant's limitations not to indicate that Grievant could return to work but to explain why Grievant could not return to work.

14. At some point during his leave, Grievant applied for and received short-term disability benefits, which had expired prior to Grievant's termination.

15. Prior to the expiration of his short-term disability benefits, Grievant also applied for long-term disability benefits and social security disability benefits.

16. Upon receipt of Dr. Hanna's documentation, as they had never before received documentation from a physician indicating an employee's lifetime incapacitation, President Krotseng and Director Aughenbaugh sought the advice of both Respondent's legal counsel and the Higher Education Policy Commission.

17. Bruce Cottrill, Interim Senior Director of Human Resources for the Higher Education Policy Commission, met with Respondent's representatives and counsel on two occasions and gave the opinion that indefinite leave, when Grievant's physician had certified that Grievant was permanently incapacitated, was not a reasonable accommodation.

18. On August 2, 2018, Grievant applied for catastrophic leave using the *Bluefield State College Catastrophic Leave Request Form*. As the reason for his

request Grievant stated, “waiting on long term disability” and that the expected end date of the leave was “unknown.”

19. Respondent’s Board of Governors Policy No. 35, Catastrophic Leave, allows for employees to receive donated leave from other employees once the employee’s own leave has been exhausted. The policy states, “Any employee who has a catastrophic illness or injury may be eligible for catastrophic leave. An employee who has exhausted all annual leave accruals may apply to receive paid leave donations through the catastrophic leave program.” In addition, the leave “may not exceed twelve continuous calendar months of any one catastrophic illness or injury” and one of the requirements is for the employee’s treating physician to verify the expected duration of the incapacity.”

20. By letter dated August 9, 2018, Respondent terminated Grievant’s employment based on Dr. Hanna’s medical verification stating, “Due to your permanent inability to perform the functions of your job, you are being separated from Bluefield State College employment effective immediately.”

21. Grievant’s applications for long-term disability and for social security disability benefits have been denied and are under appeal.

Discussion

As a preliminary matter, the undersigned must address the motion to dismiss filed by Respondent in this matter. Despite dismissing the grievance at level one, Respondent did not file its motion to dismiss before the Grievance Board until a mere six business days before the hearing in this matter. Grievant asserted that the motion to dismiss should be denied for untimeliness. Although the preliminary ruling denying the

motion to dismiss was based on the merits of the motion to dismiss, the motion to dismiss should ultimately be dismissed as untimely. "An application to an administrative law judge for an order must be by motion, in writing, unless made during a hearing, and must be filed and served on all parties promptly, as soon as the facts or grounds on which the motion is based become known to the moving party." W.VA. CODE ST. R. § 156-1-6.6 (2018). Respondent was aware of the grounds for the motion at level one and, in fact, dismissed the grievance for the same. The filing of the motion to the Grievance Board so close to the level three hearing was clearly untimely.

"The grievant bears the burden of proving the grievant's case by a preponderance of the evidence, except in disciplinary matters, where the burden is on the employer to prove that the action taken was justified. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W.VA. CODE ST. R. § 156-1-3.1 (2018). "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 employer has not met its burden. *Id*.

Although the procedural rule regarding the burden of proof specifically uses the word "disciplinary," the Grievance Board has consistently determined that the non-disciplinary separation of an employee for inability to perform their job duties is a dismissal for cause such that the employer should bear the burden of proof. *Cook v. Dept. of Health & Human Res*., Docket No. 99-HHR-298 (Nov. 30, 1999). *Dalton v. Dept. of Health & Human Res.,* Docket No. 2013-1547-DHHR (Oct. 10, 2013).

Grievant asserts Respondent erred in terminating Grievant's employment when there was a "clear conflict" between the medical documentation Grievant's physicians had provided. Grievant also asserts Respondent retaliated against him when it terminated his employment rather than allowing him to remain employed to receive catastrophic leave, for which he would be paid using donated leave from other employees while waiting to be awarded permanent disability benefits. Respondent asserts it reasonably relied on the latest documentation from Grievant's medical provider certifying he was permanently incapacitated for life in terminating his employment for Grievant's inability to perform the essential functions of his job and that its decision was not retaliatory.

It is disingenuous for Grievant to argue now that Respondent should have considered Dr. Marvin's form when Grievant had accused Director Aughenbaugh, in writing and very rudely, of misconduct for considering Dr. Marvin's form in the first place. Grievant unequivocally denounced Dr. Marvin's opinion that he could return to work in Grievant's July 30, 2018 email. In direct response to Dr. Marvin's certification, Grievant caused to be sent to Respondent Dr. Hanna's certification that stated Grievant could not work and that his inability to work would be permanent. There was nothing improper or unreasonable in Respondent's decision to consider only the most recent medical documentation.

Given the certification by Dr. Hanna that Grievant was permanently unable to perform his job duties, Respondent's decision to terminate Grievant's employment was clearly reasonable. At no time prior to his termination did Grievant indicate that Dr. Hanna's certification was disputed. In fact, the last information Grievant provided to

Respondent prior to his termination was his application for catastrophic leave in which he states himself that his return to work would be "unknown" and that his reason for seeking leave was "waiting on long term disability."

The catastrophic leave policy is clearly discretionary. Nothing in the policy guarantees the granting of such leave. In addition, although it is not made completely clear, the policy certainly indicates in its language that it is contemplated only for temporary leave and does specifically state that the leave may be for no more than a year. Grievant had already been on leave for at least five months and, by his own medical evidence, was permanently disabled from performing his job duties. Grievant's own stated reason for seeking the catastrophic leave was only to wait to receive long-term disability benefits with no indication of ever returning to work. Respondent had further sought counsel regarding the situation and had received the opinion from the Higher Education Policy Commission that indefinite leave was not a reasonable accommodation. As such, Respondent's refusal to address Grievant's request for catastrophic leave prior to his termination was not unreasonable. Grievant provided no contrary evidence that he was in any way entitled to be granted indefinite catastrophic leave.

Grievant asserts that Respondent's decision to terminate his employment rather than grant him indefinite catastrophic leave was retaliation. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of

an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.VA. CODE § 6C-2-2(o).

"In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

"An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va.

627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

Grievant has made a *prima facie* case of retaliation. Grievant has clearly engaged in protected activity both in the filing of grievances and in his vocal complaints about administration in his role on the Board of Governors. Grievant was terminated while one of his grievances was still pending and Grievant had continued his objections to the approval of Board meeting minutes only a month and a half prior to his termination. President Krotseng was a party to some of the grievances, was present at the Board meetings, and was the subject of some of Grievant's complaints during the Board meetings, so was certainly aware of Grievant's protected activities.

However, Respondent has rebutted the presumption of retaliation by presenting credible evidence of legitimate nondiscriminatory reasons for its actions. As discussed above, Respondent's actions were not improper. Respondent carefully sought both a legal opinion from counsel and had protracted discussions with Director Cottrill of the Higher Education Policy Commission to ensure that their actions were proper. The decision to terminate Grievant was based on his own medical evidence that he was permanently disabled from performing the essential duties of his job and the opinion of the Higher Education Policy Commission that indefinite leave was not a reasonable accommodation. Grievant has not proven by a preponderance of the evidence that the

reasons offered by Respondent for their decision to terminate his employment were merely a pretext to retaliate against him. While it is certainly true Grievant's working relationship with President Krotseng and Director Aughenbaugh was quite contentious, the termination of Grievant's employment was simply because he could no longer perform his job duties and he was not entitled to receive indefinite discretionary catastrophic leave.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. "An application to an administrative law judge for an order must be by motion, in writing, unless made during a hearing, and must be filed and served on all parties promptly, as soon as the facts or grounds on which the motion is based become known to the moving party." W.VA. CODE ST. R. § 156-1-6.6 (2018).

2. Respondent's motion to dismiss is denied as untimely.

3. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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 employer has not met its burden. *Id*.

4. Although the procedural rule regarding the burden of proof specifically uses the word "disciplinary," the Grievance Board has consistently determined that the non-disciplinary separation of an employee for inability to perform their job duties is a

dismissal for cause such that the employer should bear the burden of proof. *Cook v. Dept. of Health & Human Res*., Docket No. 99-HHR-298 (Nov. 30, 1999). *Dalton v. Dept. of Health & Human Res.,* Docket No. 2013-1547-DHHR (Oct. 10, 2013).

5. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.VA. CODE § 6C-2-2(o).

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6. "An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

7. Grievant made a *prima facie* case of retaliation but Respondent rebutted the presumption of retaliation by providing credible evidence of legitimate nondiscriminatory reasons for its actions. Grievant failed to prove by a preponderance of the evidence that the reasons offered by Respondent for their decision to terminate his employment were merely a pretext to retaliate against him.

8. Respondent proved that termination of Grievant's employment was justified when Grievant's own medical provider certified Grievant was permanently incapacitated for life and, therefore, unable to perform the essential functions of his job.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: January 27, 2020

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Billie Thacker Catlett
Chief Administrative Law Judge