

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**ROBIN PERDUE,  
Grievant,**

**v.**

**Docket No. 2019-0674-DOT**

**DIVISION OF MOTOR VEHICLES,  
Respondent.**

**DECISION**

Grievant, Robin Perdue, is employed by Respondent, Division of Motor Vehicles. The above-styled grievance was filed directly to level three on December 10, 2018 stating, "Grievant suspended, sent home by supervisor" and requesting as relief "[t]o be made whole in every way including back pay with interest and benefits restored." On December 21, 2018, Respondent, by counsel, filed *Respondent's Motion to Dismiss, or in the Alternative, Motion to Transfer to Level One*. Following a telephone conference in which it was revealed that Grievant had not been suspended but had been denied return to work due to her medical restrictions, the Grievance Board denied the motion to dismiss and transferred the grievance to level one of the grievance process by order entered March 11, 2019. On March 15, 2019, Grievant amended her grievance statement to allege she was "improperly denied return to work due to medical restrictions."

Following the March 28, 2019 level one conference, a level one decision was rendered on April 3, 2019, denying the grievance. Grievant appealed to level two on April 9, 2019. Following mediation, Grievant appealed to level three of the grievance process on June 19, 2019. The grievance was originally scheduled for level three hearing on November 7, 2019, but was continued at the request of Grievant. Thereafter, the hearing was continued twice more: once as a result of the pandemic and once at the request of

Grievant. A level three hearing was held on November 19, 2020, before the undersigned at the Grievance Board's Charleston, West Virginia office via video conference. Grievant was represented by Gary DeLuke, Field Organizer, UE Local 170 and Damon Snead. Respondent was represented by counsel, Cassandra L. Means, Assistant Attorney General. Proposed Findings of Fact and Conclusions of Law ("PFFCL") were to be submitted by December 21, 2020, but Grievant requested and was granted several extensions in which to file. The final deadline to submit was January 22, 2021. Both parties mailed their PFFCL but the Grievance Board did not receive the same. The Grievance Board did not receive the parties' PFFCL until Grievance Board staff requested a second copy by email on February 16, 2021, upon which this matter became mature.

### **Synopsis**

Grievant is employed by Respondent, Division of Motor Vehicles, as an Administrative Services Assistant 1. Grievant suffered from a medical condition that restricted her ability to work. Respondent initially accommodated Grievant's medical restrictions through providing transitional employment for a year but were unable to continue to accommodate Grievant's restrictions after Grievant developed additional restrictions. Grievant failed to prove Respondent discriminated against her as she is not similarly situated to the employees with whom she compares herself. Grievant failed to prove Respondent improperly denied her return to work due to her medical restrictions. 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 is employed by Respondent, Division of Motor Vehicles, as an Administrative Services Assistant 1 and had been so employed since 2014.
2. Grievant worked within the Vehicle Services section, which is comprised of three units: Online Renewals, Sendback, and NMVTS.
3. Grievant was originally hired as the only employee for the Online Renewal unit. The duties of the position as listed in the original vacancy posting are as follows:

Under limited supervision, the incumbent will provide the administrative oversight over the agency's program to process on-line transactions submitted by customers renewing vehicle registrations and other types of transactions. This employee will interact with internal Division of Motor Vehicle sections, as well as several external agencies to ensure that vehicle renewal transactions are conducted in a prompt and uniform manner . . . During periods of higher volume, this employee will be responsible for coordinating with the vehicle services management with additional workload allocation. Incumbent will have problem solving skills to troubleshoot customer issues with the submission of credit card, insurance and or personal property tax information to resolve individual transaction problems or to recommend modification or work-a-round to data linkage and verification issues to ensure transactions are completes as efficiently and effectively as possible. . . The incumbent will be required to be able to react and respond on a variety of roadblocks that may occur in the on-line service process. Applicant must be familiar with or be able to quickly obtain the skill necessary to inquire and enter vehicle information in the agency mainframe databases, and become familiar with standard operating procedures of credit card companies for retailers and other data transmission networks within DMV and other outside entities such as the State Treasurer and State Portal Manager. Will collect and maintain statistics and error/problem logs for senior management review for future refinements of the on-line system. Document routine

processes of the on-line transactions for use in procedural guides and training materials. Train and mentor support staff personnel as added to the work group as transaction volumes increase. Additional duties as required.

4. Grievant's position changed over time as the program became established and the demand for online renewals increased. At some unspecified time, Grievant assumed supervisory or quasi-supervisory duties. These duties were removed in or before September 2017. Grievant filed a grievance alleging functional demotion regarding the removal of these duties, which was later denied in *Perdue v. Div. of Motor Vehicles*, Docket No. 2018-0421-DOT (Jan. 30, 2019).

5. At the time relevant to this grievance, Grievant was responsible for processing online renewals, which numbered approximately six hundred per day. This required Grievant to type information for each renewal into Respondent's mainframe computer system and mail the return documents to customers. Mailing required Grievant to manually fold the documents and "stuff" the envelopes. Grievant also engaged in "problem solving" and answering emails and phone requests.

6. Grievant suffers from carpal tunnel syndrome of her right wrist, which began in 2016, progressively worsened, and eventually required surgery.

7. In December 2017, Grievant's condition worsened to the point she could not perform the data entry required of her position. Grievant's supervisor at the time, Michael Maggard, assigned other employees to help with the data entry, stuffing envelopes, and mailing, and allowed Grievant to do more problem solving and emails.

8. On January 4, 2018, Grievant's physician issued a *Return to Work* document stating Grievant needed modified duties for six weeks. Grievant's work restrictions for her right upper extremity were as follows: wear a splint while working;

perform repetitive motions only occasionally; take frequent breaks from data entry; and lift/carry no weight of a pound or more.

9. Respondent has a policy governing work at less than full duty due to medical restrictions: *West Virginia Department of Transportation Division of Highways/Division of Motor Vehicles Return to Work/Accommodation Policy*. In pertinent part that policy states in section 4.5, “When an employee has not reached maximum medical improvement, has physical or mental limitations, but has been deemed by a medical practitioner as able to return to temporary modified duty, Highways will assess the current functional capacity of the employee for the purpose of assigning the employee to Transitional Employment. . . .” “Transitional Employment” is defined in section 3.8 as “[t]emporary assignment of an employee to job duties with essential functions the employee can perform until such time as he/she is able to return to his/her regular duties, or return to the pre-injury/illness job with temporary suspension of some of the essential functions. Provided, however, that such transitional employment must also be productive work that advances the mission of Highways and the unit involved.”

10. Although Grievant’s restrictions should have been addressed in compliance with the procedures of the policy, it appears Grievant’s supervisor at the time simply allowed Grievant to unofficially adjust her duties to accommodate her restrictions.

11. In late January/early February 2018, due to a backlog of work in the section and personnel issues, Respondent’s administration made changes to its supervisory structure and placed the Vehicle Services section under the management of Linda Ellis. This placed Grievant and nine other employees under the supervision of Ms. Ellis.

12. On February 15, 2018, Grievant's physician issued a *Return to Work* document stating Grievant could return to work on that date with modified duties for an unspecified time. Grievant's work restrictions were as follows: wear a splint while working; only occasionally walk, twist/bend, squat/kneel, climb, or perform repetitive motions; no lift/carry weight of a pound or more, work above shoulder, push/pull, or work with vibratory tools. It further stated Grievant could not stuff envelopes but could perform "occasional light typing."

13. On February 20, 2018, an office representative from Grievant's physician's office completed an untitled document reiterating the restrictions listed in the February 15, 2018 *Return to Work* and stating in all capital letters, "SHE IS NOT TO PERFORM ANY PROLONG DATA ENTRY OR REPETITIVE MOTIONS USING THE RIGHT WRIST."

14. Ms. Ellis was initially unaware of Grievant's medical restrictions when she began supervising Grievant. When Ms. Ellis received the February 15, 2018 *Return to Work* document, in accordance with Respondent's policy, she met with Grievant, reviewed Grievant's job duties, and completed Respondent's form RW-4, *West Virginia Division of Motor Vehicles Notice of Available Employment*. This placed Grievant into a "temporary transitional work assignment" within her existing job classification.

15. Specifically, due to Grievant's inability to perform prolonged data entry, which was required for her duties in the Online Renewals unit, Ms. Ellis realigned the duties of several employees within the section to accommodate Grievant. Ms. Ellis assigned another employee responsibility for the online renewals and assigned two other employees to perform the data entry for the Sendback unit. Grievant was made

responsible to scan, file, and type and mail letters for the Sendback unit, which also required her to pull staples from the documents.

16. Grievant protested the temporary transitional work assignment to Human Resources Manager Monica Price on February 28, 2018. Ms. Price informed Grievant by email that, as Grievant was not able to perform her normal duties and had refused to acknowledge her temporary transitional work assignment, Grievant would not be permitted to return to work.

17. Grievant accepted the temporary transitional work assignment by her signature on March 1, 2018.

18. On March 26, 2018, Grievant's surgeon issued a *Return to Work* document stating Grievant could return to work on that date with modified duties for four weeks. The work restrictions were the same as the February 15, 2018 *Return to Work* except it removed the prohibition of stuffing envelopes and added that Grievant "may need to take frequent breaks from data entry."

19. On April 3, 2018, Ms. Ellis again met with Grievant and prepared form RW-4 continuing Grievant's temporary transitional work assignment, which Grievant signed "under duress."

20. On April 23, 2018, Grievant filed a workers' compensation claim alleging her carpal tunnel syndrome was caused by intensive ongoing data entry and stuffing of envelopes, claiming a date of injury of January 3, 2018.

21. *Return to Work* documents with no change of restrictions were issued by Grievant's physician on April 19, 2018, May 21, 2018, and June 21, 2018.

22. Additional form RW-4s were completed on April 20, 2018, June 1, 2018, and July 10, 2018 continuing Grievant's assignment as before and with Grievant signing "under duress."

23. On July 23, 2018, Grievant's physician issued a *Return to Work* document continuing the previous restrictions except lifting the restrictions on lifting weight from between 1 and 10 pounds, walking, twisting/bending, and squatting/kneeling. He stated Grievant "[n]eeds light typing duties and frequent breaks from typing." He added a restriction that Grievant could not climb.

24. A form RW-4 was completed on August 1, 2018 continuing Grievant's assignment as before and with Grievant signing "under duress."

25. On September 10, 2018, Grievant's physician issued a *Return to Work* document continuing the previous restrictions except removing the requirement to wear a brace and adding that Grievant could lift 1 to 10 pound weight occasionally.

26. A form RW-4 was completed on October 11, 2018 continuing Grievant's assignment as before and with Grievant signing "under duress."

27. During this time, Grievant could perform light typing while taking a five to ten minute rest when typing began to hurt her wrist.

28. At some unspecified time, Grievant complained that pulling staples hurt her wrist and Respondent provided a different type of staple puller.

29. Although Grievant had continued to sign the form RW-4s "under duress" Grievant did not discuss any specific concerns that her new duties were exacerbating her condition or request any specific modification or change in duties other than regarding the staple pulling.



30. On December 5, 2018, Grievant's physician issued a *Return to Work* document continuing the previous restrictions and adding "no staple pulling, no filing, no pushing or pulling on files as it increases the symptoms of injury."

31. On the same date, Grievant's physician also completed the Division of Personnel's State of West Virginia Physician's/Practitioner's Statement stating the same and that Grievant would be partially incapacitated from December 10, 2018 to January 17, 2019.

32. On December 7, 2018, an office representative from Grievant's surgeon's office completed an untitled document reiterating the previous restrictions except stating that Grievant could do "occasional repetitive motion but must take frequent breaks."

33. Grievant's physician's definition of "occasional" is "up to 1/3 of the day."

34. On the same date, Ms. Ellis determined there was not enough work available that Grievant could perform given her extensive restrictions as all positions within the Vehicle Services section require extensive data entry, filing, and and/or mailing.

35. After consultation with Respondent's ADA Coordinator, Raymond Patrick, Ms. Ellis directed Grievant to apply for medical leave.

36. Grievant's surgeon completed a State of West Virginia Physician's/Practitioner's Statement on January 18, 2019, stating Grievant would be incapacitated from January 18, 2019 through March 4, 2019.

37. Grievant was placed on medical leave, which required the use of sick leave and annual leave.

38. Grievant returned to work without restrictions on March 5, 2019.

## **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. 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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant argues that Respondent’s refusal to allow her to return to work at less than full duty was discriminatory, that there were other duties she could perform that she could have been assigned, and that Respondent failed to provide her with a technology aid that could have assisted her in performing her duties. Respondent asserts it appropriately accommodated Grievant’s restrictions until the restrictions became impossible to accommodate and that the employees to which Grievant compares herself for purposes of discrimination are not similarly-situated.

Return to work at less than full duty is governed by the Administrative Rule of the West Virginia Division of Personnel as follows:

The appointing authority may permit an employee to work or return to work . . . at less than full duty for a period of no more than thirty (30) days, provided that the terms of the return shall be in writing. An employee may request to continue to work at less than full duty beyond the period permitted by the appointing authority. . . .

W. VA. CODE ST. R. § 143-1-14.4.h.1. An agency “may deny a request to return or continue to work at less than full duty or with restrictions under conditions including, but not limited to, the following:”

14.4.h.3.A. the employee cannot perform the essential duties of his or her job with or without accommodation;

14.4.h.3.B. the nature of the employee's job is such that it may aggravate the employee's medical condition;

14.4.h.3.C. a significant risk of substantial harm to the health or safety of the employee or others cannot be eliminated or reduced by reasonable accommodation; or,

14.4.h.3.D. the approval of the request would seriously impair the conduct of the agency's business.

W. VA. CODE ST. R. § 143-1-14.4.h.3. Respondent is also governed by its policy as stated in the above findings of fact.

Grievant essentially argues that Respondent should have modified her original position to allow her to remain in that position. It is Grievant's burden to prove that Respondent's action in removing her were improper. Although Grievant testified that there were sufficient "administrative" duties she could perform, Grievant did not provide enough evidence of the nature of those duties, their necessity to the agency, or the amount of time those duties would consume. Grievant's duties had been in flux for some time prior to her medical incapacity and Grievant's prior grievance challenging those changes in her duties failed. At the time Grievant's medical restrictions began, Grievant's primary duties were data entry and mailing, which included stuffing envelopes for hundreds of requests. These were duties Grievant could clearly no longer perform based on the restrictions from her doctor.

Although Grievant did not ask for such an accommodation at the time, Grievant now argues that she could have performed data entry through the use of a voice-to-text

program. Grievant presented the testimony of other state employees from other agencies regarding the availability of such accommodation. Grievant failed to prove that such a program would have enabled her to perform data entry in her position. The computer system Grievant was required to use is a mainframe system, not a Windows-based system, that requires extensive use function keys. Grievant presented no evidence of the compatibility of such a program with Respondent's computer system or with the work she was required to do. Grievant's argument that she was discriminated against because other employees were permitted to remain in their positions through the use of a voice-to-text program also fails. "Discrimination' means 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). The employees to which Grievant compares herself are employed by other state agencies in other classifications and are, therefore, not similarly-situated to Grievant.

As Grievant was unable to perform the essential functions of her position, Respondent was required to assess Grievant's functional capacity to provide her with applicable transitional employment. Respondent's policy defines transitional employment as "[t]emporary assignment of an employee to job duties with essential functions the employee can perform until such time as he/she is able to return to his/her regular duties, or return to the pre-injury/illness job with temporary suspension of some of the essential functions. Provided, however, that such transitional employment must also be productive work that advances the mission of Highways and the unit involved."

Respondent assigned Grievant to her transitional employment in compliance with its policy. Grievant signed the agreement to accept this transitional employment “under duress” but this appears to be based on her disagreement that she could not perform the essential functions of her position rather than on an assertion she could not perform the duties of the transitional employment. Grievant did not grieve her assignment to transitional employment, nor, with the expectation of her concerns regarding staple-pulling, communicate to Respondent that the transitional duties were exacerbating her symptoms. Regardless, the instant grievance is not about whether the transitional employment was originally proper but is rather about whether Respondent improperly removed Grievant from transitional employment.

Respondent had worked with Grievant’s extensive restrictions for a year. The last statement of restrictions from Grievant’s physician acted to remove most of the limited duties she had been able to perform in her transitional employment. Grievant asserts Respondent should have allowed Grievant to answer the phone, citing a phone log showing that many calls were abandoned during this time period. Ms. Ellis testified that this log represented all calls to Respondent, not just for the Vehicle Service section with which Grievant was familiar, and that answering calls still required extensive data entry during the calls. Again, Grievant failed to present evidence that she would have been qualified to provide phone customer service or counter Ms. Ellis’ testimony that this also required extensive data entry which Grievant was prohibited from performing due to her medical restrictions.

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 her grievance by a preponderance of the evidence. 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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. Return to work at less than full duty is governed by the Administrative Rule of the West Virginia Division of Personnel as follows:

The appointing authority may permit an employee to work or return to work . . . at less than full duty for a period of no more than thirty (30) days, provided that the terms of the return shall be in writing. An employee may request to continue to work at less than full duty beyond the period permitted by the appointing authority. . . .

W. VA. CODE ST. R. § 143-1-14.4.h.1.

3. An agency “may deny a request to return or continue to work at less than full duty or with restrictions under conditions including, but not limited to, the following:”

14.4.h.3.A. the employee cannot perform the essential duties of his or her job with or without accommodation;

14.4.h.3.B. the nature of the employee's job is such that it may aggravate the employee's medical condition;

14.4.h.3.C. a significant risk of substantial harm to the health or safety of the employee or others cannot be eliminated or reduced by reasonable accommodation; or,

14.4.h.3.D. the approval of the request would seriously impair the conduct of the agency's business.

W. VA. CODE ST. R. § 143-1-14.4.h.3.

4. “‘Discrimination’ means 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).

5. Grievant failed to prove Respondent discriminated against her as she is not similarly situated to the employees with whom she compares herself.

6. Grievant failed to prove Respondent improperly denied her return to work due to her medical restrictions.

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: February 26, 2021**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**