THE WEST VIRGNIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

TRACY LYNN HAAS BURGR,
Grievant,

v. **Docket No. 2019-0713-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

This is a consolidated action filed by Tracy Burgr against her employer, William R. Sharpe, Jr. Hospital. The first Statement of Grievance was "Denial of a reasonable accommodation" and the requested relief was "To be made whole in every way including granting of reasonable accommodation." The second Statement of Grievance was "Dismissal without good cause" and the requested relief was "To be made whole in every way including back pay and interest & benefits restored." A level three evidentiary hearing was held before the undersigned on January 29, 2020, September 3, 2020 and September 9, 2020. A final Zoom conference was conducted on August 9, 2021, to discuss the status of the matter. Grievant appeared in person and by various representatives of UE Local 170, West Virginia Public Workers Union. Michael Hanson, UE Local 170, appeared for Grievant at the final conference and submitted proposals on behalf of the Grievant. Respondent appeared by Steven R. Compton, Deputy Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on November 15, 2021.

Synopsis

Grievant was employed as a Health Service Worker with the Department of Health and Human Resources at Sharpe Hospital. Grievant was dismissed from her employment because she could not perform an essential function of the job. The record supported a finding that Respondent attempted to make reasonable accommodations; however, no positions were available that could be performed by Grievant. Respondent established by a preponderance of the evidence that Grievant was dismissed from employment for good cause. This grievance is denied.

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

Findings of Fact

1. Grievant was employed as a Health Service Worker with the Department of Health and Human Resources at Sharpe Hospital.

2. On or about September 8, 2017, Grievant submitted an Application for Federal Family and Medical Leave (FMLA). By letter dated September 19, 2017, Grievant was granted intermittent FMLA until August 25, 2018.

3. By letter dated October 18, 2017, Grievant was sent paperwork to be used to determine whether Grievant was eligible for consideration under the Americans with Disabilities Act (ADA). Respondent received a letter from Grievant's physician dated November 1, 2017 stating that, due to her medical condition, Grievant is unable to work more than 8 hours in one day or more than 40 hours in one week.

4. By letter dated December 11, 2017, Grievant was notified that her exclusion from working mandatory overtime would be designated as FMLA counted against her FMLA entitlement.

5. Respondent received another letter from Grievant's physician dated June 1, 2018. Grievant's physician stated that Grievant was still unable to work more than 8 hours a day and more than 40 hours a week.

6. Respondent sent Grievant's physician a letter dated June 8, 2018, asking for additional information to ascertain if Respondent could accommodate Grievant in a way which would allow her to perform the essential functions of her job.

9. Grievant was notified by letter dated June 13, 2018, that she had exhausted her allotted 480 hours of FMLA as of June 10, 2018.

10. By letter dated June 25, 2018, Grievant was informed that her request for ADA accommodation could not be granted because it was determined that being able to work overtime was an essential function of her position.

11. Grievant was asked to fill out an application so that a job search to find a position which she could perform could be started.

12. Carlotta Gee. Respondent's EEO Civil Rights Officer, spoke with Grievant on June 25, 2018, and informed her that she was trying to assist Grievant in finding a new position in which she could perform the essential functions of the job. Ms. Gee informed Grievant that mandatory overtime is an essential function of a Health Service Worker.

13. Ms. Gee informed Grievant that termination of employment would be the only option if Respondent and Grievant were unable to secure a position.

14. Grievant was notified by letter dated August 28, 2018, that there were no other available positions within DHHR. Grievant was permitted to continue to work in a restricted capacity for 60 days during the search for another job.

15. Despite Respondent's attempts to find the Grievant another position, there were no positions available which Grievant could perform. Due to the nature of work for the positions at Sharpe Hospital, staffing concerns and the patients it serves, mandatory overtime is required. Mandatory overtime is specifically designated and approved as an essential function of the job on every position at Sharpe Hospital.

16. Grievant was unable to secure another position during that time so she was notified that Respondent had fulfilled its obligation under the ADA. Grievant was placed on an unpaid personal leave of absence on October 30, 2018 through December 31, 2018. Grievant was advised that she would be dismissed from employment at the end of the personal leave of absence if she was unable to secure other state employment.

17. By letter dated December 10, 2018, Grievant was advised that she would be dismissed from employment effective January 1, 2019.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the

witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Division of Personnel Rule 12.2a states that "An appointing authority may dismiss any employee for cause." Where an employee cannot perform the essential duties of her position as reasonably required by the employer, there exists good cause for dismissal. *Adkins v Division of Labor*, Docket No. 04-DOL-071 (Jan. 25, 2005). In the instant case, it was demonstrated by a preponderance of the evidence that Respondent worked with Grievant for over one year to determine whether a reasonable accommodation was available to enable her to perform the essential functions of her job. Despite the length of time and efforts, Grievant could not be cleared by her physician to be able to work mandatory overtime. The record established that there were no positions available which Grievant could be accommodated. Grievant asserted that she could perform the job duties of two positions, Office Assistant II and Office Assistant II Unit Clerk. However, the Functional Job Description of both positions state that overtime is an essential function of the job which made her ineligible.

Grievant also asserted that Sharpe Hospital discriminated against her when they accommodated other employees who were restricted from working mandatory overtime. Grievant named Amy Dillon, Christa Burrows and Deborah Warner as employees who

were accommodated and were restricted from working mandatory overtime. The undersigned notes that the "Grievance Board does not have jurisdiction to determine whether the ADA has been violated, based upon the West Virginia Supreme Court of Appeals holding in *Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995) . . ." *Ruckle v. Dep't of Health and Human Res.*, Docket No. 04-HHR-367 (Dec. 22, 2005).

The Grievance Board's authority to provide relief to employees for discrimination as that term is defined in our statute, includes jurisdiction to remedy discrimination that would also violate the ADA. The undersigned does have subject matter jurisdiction over handicap-based discrimination claims. *Smith v. W. Va. Bureau of Employment Programs*, Docket No. 04-BEP-099 (Dec. 18, 1996). *Vest*, supra.

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).

The record of this case established that none of the employees whom Grievant seeks to compare herself to for the purpose of her discrimination claim were restricted from working overtime. In addition, the accommodations made to these employees had nothing to do with the ability to work overtime. Grievant is not similarly situated to any of the above employees given that they were not restricted from working overtime and the difference in treatment was directly related to the actual job requirements. Amy Dillon provided testimony in this case. Ms. Dillon acknowledged that her restriction did not involve overtime and that she was able to work overtime. Ms. Dillon was accommodated because she could not conduct direct patient care while using oxygen. Sharpe Hospital placed Ms. Dillon in an Office Assistant II position that did not require direct patient care. Ms. Dillon confirmed that she was required to perform mandatory overtime.

The record of this unfortunate case establishes that, due to her medical condition, Grievant could not perform mandatory overtime as required by her Health Service Worker position. It is reasonabe that the Health Service Worker position would require mandatory overtime as an essential function, especially at Sharpe Hospital. The record established that Grievant could not perform the essential functions of the Health Service Worker position and that there were no other positions available that did not require mandatory overtime.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees

Grievance Board, 156 C.S.R. 1 § 156-1-3 (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).

2. Division of Personnel Rule 12.2a states that "An appointing authority may dismiss any employee for cause." Where an employee cannot perform the essential duties of her position as reasonably required by the employer, there exists good cause for dismissal. *Adkins v Division of Labor*, Docket No. 04-DOL-071 (Jan. 25, 2005).

3. 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).

4. 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,
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> (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).

5. Grievant failed to establish that she was the victim of discrimination.

6. Respondent proved by a preponderance of the evidence that good cause existed for the termination of Grievant's employment.

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: January 2022

Ronald L. Reece
Administrative Law Judge