THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BETH ANN METZ,
Grievant,

v. **Docket No. 2021-2146-MAPS**

DIVISION OF CORRECTIONS AND REHABILITATION/ BUREAU OF PRISONS AND JAILS/OHIO COUNTY CORRECTIONAL CENTER AND JAIL
Respondent.

DECISION

Grievant, Beth Ann Metz, is employed by Respondent, Division of Corrections and Rehabilitation, at the Ohio County Correctional Center. On January 26, 2021, Grievant filed this grievance against Respondent stating:

> I was refused COVID sick leave pay for work dates missed after December 31, 2020. I find that the policy is discriminatory towards personnel that did not get sick early enough in the still ongoing pandemic. I did everything that I could to avoid getting sick, while our facility was on a quarantined lockdown, due to having over 75% of the inmate population testing positive, and it still wasn't enough.

As relief, Grievant requests, "I would like my 72 hours of sick leave returned to me and that time changed to COVID sick leave."

The parties waived level one. A level two mediation occurred on April 27, 2021. On May 7, 2021, Grievant appealed to level three. A level three hearing was held on November 9, 2021. Grievant appeared and was represented by coworker Allen Utt. Respondent was represented by Philip Sword, Assistant Attorney General. This matter became mature for decision on January 3, 2022. Only Respondent submitted Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by the Division of Corrections and Rehabilitation. Under the COVID leave policy, employees who missed work with COVID between April 1, 2020 and December 31, 2020 received COVID leave. When Grievant got COVID in January 2021, COVID leave was no longer available, so she used sick leave. Grievant contends this lack of coverage after December 31, 2020, was discriminatory. Grievant requests her sick leave be returned and changed to COVID leave. Grievant was not similarly situated to those who received COVID leave because it was expired when she got sick. Thus, Grievant failed to prove discrimination. 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 has been employed at all relevant times as an Office Assistant II by Respondent, the Division of Corrections and Rehabilitation (DCR), at the Ohio County Correctional Center.

2. In October 2020, DCR issued Policy Directive 129.17 to clarify that its employees were eligible for paid COVID-19 leave from April 1, 2020 through December 31, 2020, under the Federal Families First Coronavirus Response Act (FFCRA). (Respondent's Exhibit 1)

3. DCR employees who could not work between April 1, 2020 and December 31, 2020, for reasons related to COVID-19, were given paid COVID leave and did not use their sick leave.

4. On January 11, 2021, Grievant tested positive for COVID-19.

5. On January 12, 2021, DCR Commissioner Betsy Jividen sent a memo to all staff stating that COVID-19 leave benefits under the FFCRA and DCR Policy 129.17 were no longer available as of January 1, 2021, but that standard sick leave and annual leave could still be used. (Respondent's Exhibit 2)

6. Grievant quarantined for nine days beginning on January 11, 2021.

7. Grievant used 72 hours of sick leave and did not receive any COVID leave. (Respondent's Exhibit 3)

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 does not dispute that the FFCRA and DCR Policy Directive 129.17 only provided paid COVID leave from April 1, 2020 through December 31, 2020. She does not compare herself to anyone who was off with COVID outside of this coverage period. Grievant argues that this policy was discriminatory because she had the misfortune of getting COVID in January 2021, after COVID leave had expired. Grievant requests that her sick leave be returned and changed to COVID leave.

"'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). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp*., Docket No. 2008-1594-DOT (Dec. 15, 2008).

Respondent's COVID leave policy treated employees who were out with COVID between April 1, 2020 through December 31, 2020 differently from Grievant by providing them with COVID leave. However, Grievant was not similarly situated to these employees. While those employees who received COVID leave were out with COVID during the coverage period provided under the policy, Grievant was out with COVID after coverage expired in January 2021. Thus, Grievant failed to prove discrimination. This grievance is therefore DENIED.

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. "'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).

3. Grievant did not prove discrimination by a preponderance of the evidence.

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 24, 2022

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Joshua S. Fraenkel
Administrative Law Judge