THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

NELLIE A. PAYNE-LESHER,
Grievant,

v. **Docket No. 2020-0745-MAPS**

DIVISION OF CORRECTION AND REHABILITATION/
BUREAU OF PRISONS AND JAILS/MOUNT OLIVE
CORRECTIONAL COMPLEX AND JAIL,
Respondent.

DECISION

Nellie Payne-Lesher, Grievant, is employed by Respondent, Division of Corrections and Rehabilitation, ("DCR"), and assigned to the Mount Olive Correctional Complex and Jail ("Mt. Olive"). Ms. Payne-Lesher filed a level one grievance form dated December 30, 2019, alleging that she was required to remain off work for a period of time due to her medical provider's advice that she needed to be stationed near a restroom and not work beyond an eight-hour day. She complains the Respondent refused to make these accommodations causing her to exhaust all leave and remain off work without pay for an extended time.[1] As relief, Grievant seeks; "All unpaid time lost including any holiday pay, any and all paid leave used during this time returned to my banked sick and annual leave. Any sick and annual leave I would have accrued during this forced time off, and the FMLA time I was forced to use, returned."

A level one hearing was conducted on January 20, 2020, and a recommended decision denying the grievance was forwarded to DCR Commissioner, Betsy Jividen on

[1] This is a summary of Grievant's allegations. She attached a long and detailed statement to her grievance form as well as several supporting documents, all of which is hereby incorporated into the record by reference herein.

February 19, 2020. Commissioner Jividen accepted and adopted the decision the next day. Grievant appealed to level two on March 2, 2020. A mediation was conducted on June 10, 2020. Grievant thereafter perfected a timely appeal to level three.

After continuance requests were granted for good cause shown, a level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on November 30, 2021. Grievant personally appeared and was represented by Elizabeth K. Campbell, Esquire, Harrah Law Firm PLLC. Respondent appeared in the person of Mt. Olive Superintendent, Donnie Ames, and was represented by Mark S. Weiler, Assistant Attorney General. This matter became mature for decision on January 18, 2022, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant had a very serious medical condition which resulted in her requesting certain accommodations to her regular work schedule. Those accommodations were to be placed where she could use the restroom as needed and to work no more than eight hours per day. Respondent had legitimate concerns regarding the second accommodation because there are emergency situations where Mt. Olive is "locked down" and all employees must stay until the matter is resolved. The accommodation was originally denied. For reasons discussed herein, the accommodation was later allowed. It is established that if the matter had been appropriately discussed with Grievant the accommodation could have been made all along. Grievant's circumstances did not change in any way between the time the accommodation was denied and the time it was

granted. There was only a problem with communication. Respondent's denial of the accommodation was arbitrary and capricious.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. During all times relevant to this action Grievant was employed by Respondent and assigned to Mt. Olive in the Corrections Facility Coordinator 1 classification.[2]

2. Grievant is a non-uniform employee which means that the predominant duties of her position are not in security.[3] Correctional Officers ("CO") are in security and are referred to as uniform employees.

3. As a Corrections Facility Coordinator 1, Grievant helps provide oversight of operations at Mt. Olive. Specifically, she processes and keeps records of all packages coming into Mt. Olive. She searched all packages for contraband and saw that all items provided were properly issued to inmates.

4. Mt. Olive is a maximum-security prison housing the state's most dangerous prison population. Security posts must be occupied 24 hours each day.

5. The prison continues to struggle with keeping all security posts covered on a daily basis due to a shortage of COs generally, as well as COs on sick and annual leave, military leave and workers compensation.

[2] Grievant has since assumed a position in the Human Resource Associate classification and spends the majority of her time in the recruitment and hiring of staff.
[3] Obviously, safety and security are the first priority of Mt. Olive and all employees must be mindful of that at all times. However, non-uniform employees are not regularly charged with the care and supervision of inmates.

6. Non-uniform staff, including Grievant, typically work eight-hour shifts Monday through Friday. During the relevant time, to ensure mandatory coverage of security posts and minimize CO overtime, most non-uniform staff, including Grievant, were required to work one twelve-hour shift each week at a security post.[4]

7. Mt. Olive must occasionally be locked down pursuant to procedures to address some emergencies or security threats. During lock downs no employees may enter or leave the prison which results in employees having to stay on duty longer than their usual shift hours. Additionally, non-uniform employees may be required to work a security post in emergencies. (Respondent Exhibit 7)

8. On or about October 10, 2019, Grievant sought medical treatment for a serious gastrointestinal issue from medical professionals at New River Health in Fayetteville, West Virginia.

9. As a result of her examination, Grievant's primary medical provider furnished a note indicating Grievant would have certain needs and restriction to accommodate her medical condition, which at that time was not yet diagnosed. Specifically, the medical provider wrote:

> I saw Nellie Lesher in the office today. I am requesting as her treating provider that she only be allowed to work no more than 8 hours per day.
> I am requesting that she be placed where she can quickly be relieved of duty if needed for use of the restroom as needed.

(Grievant Exhibit 1) In a second note provided the same day the medical provided wrote that Grievant had been referred to a specialist for diagnosis and treatment so she could

[4] All Mt. Olive employees must attend the Corrections Academy and be trained in Defensive Tactics.

not say when Grievant would be able to return to regular work duties, but she would provide monthly updates if needed. (Grievant Exhibit 2)

10. Grievant gave this note to her immediate supervisor during her next day at work.

11. The request for accommodation went through proper channels and was given to Superintendent Ames. Superintendent Ames told his subordinates that he could not grant the 8-hour limit at that time. He instructed them to tell Grievant that she needed to have the 8-hour restriction removed or agree that she would stay beyond eight hours if needed.

12. Grievant worked for a week after submitting her medical provider's letter to her supervisor. Her medical provider would not remove the 8-hour restriction from her recommendation. No one told Grievant at that time, she could have the accommodation if she agreed to stay beyond eight hours if circumstances required.[5]

13. Grievant was told that her accommodation had been denied due to the eight-hour restriction. Superintendent Ames did not want to put Grievant in a situation where the restriction was violated if an emergency arose. He could not guarantee Grievant would be relieved of duty after eight hours, nor could he let her leave during the middle of an emergency. No one had asked Grievant if she would agree to stay beyond eight hours, if necessary, regardless of the eight-hour restriction.

14. On October 21, 2019, Grievant was told that she could no longer report to work and would be placed on unpaid medical leave, because she did not have any accumulated sick leave.

[5] Testimony of Superintendent Ames.

15. By letter dated October 22, 2019, Human Resources Generalist Mary Cain sent Grievant a set of documents including the following:

- Application for FMLA and/or Medical Leave of Absence ("MLOA"),
- Application for Leave of Absence Without Pay,
- Certification for Health Care Provider for Employees Serious Condition,
- Notice of Eligibility,
- Rights and Responsibilities,
- Application to Receive Donated Leave.

The letter included, *inter alia,* the following instructions:

> You and your Physician/Practitioner are required to complete the documentation if it is your intention to request a leave of absence with or without pay. The completed documentation must be made on the prescribed attached forms and must be received within 15 calendar days following the receipt of this letter, no later than Wednesday, November 6, 2019. (Emphasis in original). (Respondent Exhibit 1)

` 16. Grievant provided a completed Application for FMLA and/or MLOA to her employer dated November 5, 2019. In this section entitled, "Period of Incapacity" Grievant's health provider wrote the following:

> Pt. was not incapacitated. She only needed 8 hr. shifts and to be allowed to use the restroom, when necessary, she has appt. w/ specialist 11/6/19.

Grievant's health care provider also noted:

> Pt. able to perform full duties, just needs 8 hr shift and allowed to go to the restroom when needed.

18. Grievant also submitted a form for Leave Donation. However, it was determined that Grievant was not qualified to receive leave donations, so the form was not processed. (Grievant Exhibit 6)

19. Grievant was placed on unpaid medical leave. The Division of Administrative Services determined that she did not qualify for FMLA but did not inform Grievant about that decision.

20. By email dated November 13, 2019, HR Generalist Mary Cain inquired whether Grievant received any medical documentation from the specialist concerning a release to return to work or an extension. Grievant responded that the specialist had prescribed medication but gave her no further documentation. (Responded Exhibit 5)

21. Grievants primary care provider provided a note dated November 14, 2019, stating that she had seen Grievant in her office on November 5, 2019. She indicated that Grievant's condition had not changed, and the diagnosis had not been determined yet. She reiterated that the Grievant had seen a gastroenterologist, but no diagnosis was noted on that doctor's report. (Respondent Exhibit 13)

22. Grievant asked for written reasons for her denial of an accommodation but was never provided such documentation. She then contacted the Governor's Office. Thereafter she received a telephone call from Kathy Sizemore indicating that she could file an EEO complaint.

23. By email dated December 5, 2019, HR Generalist Mary Cain told Grievant the following:

> "Please see attached Designation Notice requesting additional information to determine if accommodations can be met. I've attached a copy of your job description for you to provide to your health care provider as well. In order to determine if the requested work restrictions can be met we need clarification of the following.
>
> Clarification is needed to the requested work restriction of only working 8 hours per shift. We need a specific duration of how long restrictions should be for. Your current schedule requires

one 12 hour shift. Accommodations were made for you to use the restroom when needed. [6]

24. The attached Designation Notice is related solely to FMLA and the State Parental Leave Act. The form specifically states: "Additional information is need to determine if your FMLA leave can be approved." Nothing on the attached document indicates that it is to be used to determine if accommodations may be made.

25 No policy, procedure, rule, or guidance was presented into evidence concerning how Respondent makes decisions related to accommodations, nor to indicate that a specific diagnosis or a specific duration of the condition was required for accommodations to be made.

26. By email dated December 11, 2019, Grievant provided another note from her primary health care provider. It stated that she had seen Grievant on that day and her condition had not changed. Neither she nor the specialist could provide a diagnosis at that time. The health pro carevider reiterated the need for Grievant to receive the accommodations previously requested. (Respondent Exhibit 14)

27. On December 30, 2019, Grievant filed a Level 1 grievance form alleging refusal to accommodate, as well as discrimination and harassment.

28. Superintendent Ames received a call from the DCR Central Office requesting that Mt. Olive try to accommodate the 12-hour security post Grievant was required to perform once per week.[7]

29. Superintendent Ames met with Grievant in January 2020. As a result of that meeting, he accommodated the 12-hour security shift by allowing Grievant to work an 8-

[6] (Respondent Exhibit 2)
[7] Testimony of Superintendent Ames.

hour security shift on one day and a work 4-hour on a security shift another day each week. Grievant also assured Superintendent Ames that she understood that in necessary circumstances she would have to work overtime or stay at the facility during a lock down.[8]

30. Grievant and Superintendent Ames had not discussed her situation personally before that time. Superintendent Ames noted there had been a miscommunication with regard to the doctor's notes, and that if he had spoken to the Grievant regarding his concerns with the 8- hour work-day restriction, this all could have been avoided.[9]

31. Grievant was allowed to return to work at Mt. Olive on January 21, 2020, with the accommodations agreed to by Superintendent Ames. No new notes were submitted by her primary health care provider. Nothing had changed regarding Grievant's medical condition or documentation. The only thing that changed was that Grievant told Superintendent Ames that she was willing to stay on duty more than eight hours if she was needed.[10]

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE R §156-1-3. (2018) *Burden of Proof.* "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 and*

[8] *Id.*
[9] *Id.*
[10] *Id.*

Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant argues that her due process rights were violated when her employment was temporarily terminated without notice or an opportunity to be heard. However, Grievant's employment was not suspended or terminated. Rather, she was placed on sick leave because Respondent believed that she could not perform essential duties of her job. Grievant was allowed to utilize any accumulated sick leave during this time but unfortunately, her sick leave was exhausted. Her loss of pay was not due to her employment being suspended or terminated. Thus, there was no due process violation in this specific instance.

Grievant also argues that Respondent failed to give her a reasonable accommodation for her temporary disability which would have made it possible for her to perform all essential duties of her job and allowed her to continue working. She argues that the failure by Respondent to offer a reasonable accommodation violated WEST VIRGINIA CODE § 5-11-9, the West Virginia Human Rights Act ("WVHRA"). This is similar to a federal claim for accommodation under that Americans with Disabilities Act ("ADA").

Respondent argues that it properly denied Grievant from returning to work under an eight-hour workday because occasionally working over eight hours including one twelve-hour shift are essential duties to Grievant's job. In support of this position Respondent relies on the Division of Personnel ("DOP") Administrative Rule which provides:

> The appointing authority, after receiving approval of the Director, may deny the request to return or continue to work at less than full duty under conditions including, but not limited to, the following: the employee cannot perform the essential

> duties of his or her job with or without accommodation; the nature of the employee's job is such that it may aggravate the employee's medical condition; 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, 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 required to follow the provisions of the WVHRA and the ADA. Although the Grievance Board has no authority to determine liability under the either Act, consideration of those Acts is still relevant in the grievance process to determine whether a Respondent's actions were proper and not arbitrary and capricious. *See Martin v. W. Va. Dep't of Health & Human Res./Jackie Withrow Hosp*., Docket No. 2011-1590-DHHR (May 18, 2012), aff'd, Kanawha County Circuit Court, Civil Action No. 12-AA-79 (December 7, 2012); *Ruckle v. W. Va. Dep't of Health & Human Res./Office of Maternal and Child Health,* Docket No. 04-HHR-367 (December 22, 2005); *Vest v. Bd. of Educ*., 193 W. Va. 222, 455 S.E.2d 781 (1995).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

When Grievant originally brought her health provider's requests for accommodations to Mt. Olive, she followed appropriate procedures and gave the note to her supervisor. The request eventually reached Superintendent Ames. The request to

work where she could quickly access the restroom was immediately granted. However, the Superintendent was concerned with the eight-hour restriction because there were situations, such as lock downs, where Grievant would be required to stay beyond eight-hours to ensure the safety and security of the facility.[11] He was also concerned because Grievant was required to work a twelve-hour shift one day a week. He did not want to be in the position of violating an accommodation by requiring Grievant to stay beyond eight hours in critical situations due to security requirements. Superintendent Ames told his subordinates that he could not grant the eight-hour restriction. He instructed them to tell Grievant that she needed to have the 8-hour restriction removed or agree that she would stay beyond eight hours if needed for security purposes.

No one told Grievant that she could agree to work beyond eight hours in emergencies and her health care provider would not remove the restrictions. When it was reported to Superintendent Ames that Grievant's health care provider would not remove the eight-hour restriction he denied the accommodation and Grievant was placed on unpaid medical leave.

The West Virginia Supreme Court has held, "To state a claim for breach of the duty of reasonable accommodation under the West Virginia Human Rights Act, W.Va. Code, 5-11-9 (1992), a plaintiff must allege the following elements: (1) The plaintiff is a qualified person with a disability; (2) the employer was aware of the plaintiff's disability; (3) the plaintiff required an accommodation in order to perform the essential functions of a job; (4) a reasonable accommodation existed that met the plaintiff's needs; (5) the

[11] He was also somewhat concerned because Grievant was required to work a twelve-hour shift one day a week.

employer knew or should have known of the plaintiff's need and of the accommodation; and (6) the employer failed to provide the accommodation." Syllabus Point 2, *Skaggs v. Elk Run Coal Co.,* 198 W. Va. 51, 479 S.E.2d 561 (1996). Additionally, the DOP Administrative Rule provides that the agency may deny the request to return or continue to work at less than full duty under conditions including, but not limited to, the following:

- the employee cannot perform the essential duties of his or her job with or without accommodation;
- the nature of the employee's job is such that it may aggravate the employee's medical condition; 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,
- 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. It is important to note that Grievant was not requesting "to return or continue to work at less than full duty." Her health care provider made it clear in her responses to Respondent's inquiries that Grievant was "able to perform full duties, [she] just needs an eight-hour shift and allowed to go to the restroom when needed."[12]

No one denies that Grievant was suffering from an undiagnosed medical condition which required her to seek the accommodation of working eight-hour shifts. The issue is whether that accommodation could be granted without causing security risks in emergency situations. Based upon the information Superintendent Ames received, he initially did not believe that it could. However, once he met with Grievant to discuss the accommodation, she assured Superintendent Ames that she understood that in necessary circumstances she might have to work overtime or stay at the facility during a lock down. Once that issue

[12] *See* FOF 15 and 16, *supra.*

was addressed, Superintendent Ames was able to easily address the once-a-week requirement that Grievant serve a twelve-hour shift on a security by allowing her to serve the twelve-hour security assignment over two days. At this point, Superintendent Ames realized there had been a miscommunication with Grievant and her willingness to stay beyond eight hours if needed. He testified that if he had originally spoken to the Grievant regarding his concerns with the 8-hour work-day restriction, "this all could have been avoided"[13] and she could have received the accommodation from the start.

Grievant proved by a preponderance of the evidence that she could perform all the essential duties of her job with the accommodations requested. She also proved by a preponderance of the evidence that the accommodation could have been granted when requested without causing any security or safety risks at the Mt. Olive. Grievant is not responsible for the miscommunication which caused her to be placed on unpaid medical leave. Finally, Grievant proved that Respondent's failure to make the accommodation when requested was arbitrary and capricious because it did not rely on factors which should have been considered in making that decision. Accordingly, the Grievance is **GRANTED.**

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE R §156-1-3. (2018) *Burden of Proof.* "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 and*

[13] Testimony of Superintendent Ames.

Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. The appointing authority, after receiving approval of the Director, may deny the request to return or continue to work at less than full duty under conditions including, but not limited to, the following: the employee cannot perform the essential duties of his or her job with or without accommodation; the nature of the employee's job is such that it may aggravate the employee's medical condition; 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, 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.

3. Respondent is required to follow the provisions of the WVHRA and the ADA. Although the Grievance Board has no authority to determine liability under the either Act, consideration of those Acts is still relevant in the grievance process to determine whether a Respondent's actions were proper and not arbitrary and capricious. *See Martin v. W. Va. Dep't of Health & Human Res./Jackie Withrow Hosp*., Docket No. 2011-1590-DHHR (May 18, 2012), aff'd, Kanawha County Circuit Court, Civil Action No. 12-AA-79 (December 7, 2012); *Ruckle v. W. Va. Dep't of Health & Human Res./Office of Maternal and Child Health,* Docket No. 04-HHR-367 (December 22, 2005); *Vest v. Bd. of Educ*., 193 W. Va. 222, 455 S.E.2d 781 (1995).

4. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

5. The West Virginia Supreme Court has held "To state a claim for breach of the duty of reasonable accommodation under the West Virginia Human Rights Act, W.Va. Code, 5-11-9 (1992), a plaintiff must allege the following elements: (1) The plaintiff is a qualified person with a disability; (2) the employer was aware of the plaintiff's disability; (3) the plaintiff required an accommodation in order to perform the essential functions of a job; (4) a reasonable accommodation existed that met the plaintiff's needs; (5) the employer knew or should have known of the plaintiff's need and of the accommodation; and (6) the employer failed to provide the accommodation." Syllabus Point 2, *Skaggs v. Elk Run Coal Co.,* 198 W. Va. 51, 479 S.E.2d 561 (1996).

6. Grievant proved by a preponderance of the evidence that she could perform all the essential duties of her job with the accommodations requested and that the accommodation could have been granted when requested without causing any security or safety risks at Mt. Olive.

7. Grievant proved that Respondent's failure to make the accommodation when requested was arbitrary and capricious because it did not rely on factors which should have been considered in making that decision.

Accordingly, the Grievance is **GRANTED.**

Respondent is ORDERED to pay Grievant her regular wage for every day she was placed on unpaid leave between the time she requested her accommodation and the time it was approved plus statutory interest and benefits.

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: March 1, 2022

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE