

CONNIE BENNETT

v. Docket No. 95-HHR-206

DEPARTMENT OF HEALTH AND HUMAN RESOURCES

DECISION

Grievant, Connie Bennett, employed by the Department of Health and Human Resources (DHHR) as a Licensed Practical Nurse at the William R. Sharpe Jr., Hospital, filed a complaint directly to level four on May 24, 1995, following the termination of her employment, effective May 1, 1995. An evidentiary hearing was held on September 25, 1995, and the matter became mature for decision with DHHR's submission of proposed findings of fact and conclusions of law on December 14, 1995. [\(See footnote 1\)](#)

The facts of this matter are undisputed.

1. Grievant had been employed at Sharpe Hospital for approximately ten and one-half years, classified as a Licensed Practical Nurse II, when she was injured while controlling a combative patient in November 1992. 2. After recuperating three or four days Grievant continued to work with the injuries until March 25, 1993.

3. Grievant was granted temporary total disability benefits from Workers' Compensation on March 26, 1993.

4. On May 16, 1993, Grievant began a medical leave without pay.

5. Effective November 16, 1993, the medical leave of absence expired and Grievant began a personal leave without pay for medical reasons.

6. Grievant's temporary total disability benefits expired on December 6, 1994. An award of ten percent permanent partial disability was effective the same date.

7. By letter dated April 13, 1995, Hospital Administrator Michael Todt and Assistant Administrator L.H. Garrison notified Grievant that the leave of absence could not be continued indefinitely, and, unless a physician should release her to return to work, her employment

would be terminated effective May 1, 1995.

8. A physician's statement dated May 1, 1995, confirmed that Grievant remains unable to return to work, and will be permanently restricted from resuming work as an LPN, due to the injury of November 19, 1992.

Grievant states that she wishes to return to work either as an LPN, in a light-duty capacity, or in another position. She stated that in June or July she applied for, but did not receive, a position of telephone operator at the Hospital. Grievant opined that she was capable of fulfilling the duties of telephone operator and noted that it offered the same wages and benefits as her prior assignment.

DHHR argues that the termination of Grievant's employment was proper because she can no longer perform the essential functions of the position. Further, there are no permanent light-duty LPN assignments, and no accommodation can be made to guarantee that Grievant will not suffer further injury as an LPN. It asserts that the position of telephone operator requires different skills and is not comparable to that of LPN. In any event, Ann Jennings, Director of Human Resources Management, stated that the position had been filled by the reallocation of another employee.

W.Va. Code §23-5A-3(b) addresses this situation in pertinent part:

It shall be a discriminatory practice . . . for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position. If the former position is not available, the employee shall be reinstated to another comparable position which is available and which the employee is capable of performing. A comparable position for the purposes of this section shall mean a position which is comparable as to wages, working conditions, and, to the extent reasonably practicable, duties to the position held at the time of the injury. . . . In the event that neither the former position nor a comparable position is available, the employee shall have a right to preferential recall to any job which the injured employee is capable of performing which becomes open after the injured employee notifies the employer that he or she desired reinstatement. Said right of preferential recall shall be in effect for one year from the day the injured employee notifies the employer that he or she desires reinstatement. . . .

Grievant's assertion that the position of telephone operator offers the same salary as LPN is undisputed. Arguably, working conditions would be comparable since both positions are within the hospital. DHHR relies upon the third criteria, that the duties of telephone operator are not similar to those of LPN, to deny Grievant the position; however, that interpretation is too restrictive. The provision requires comparable duties only "to the extent reasonably practical." Because this statute is protective of employees who have been injured and wish to return to work, the fact that the duties of telephone operator significantly differ from those of LPN cannot be used to deny Grievant the position if she wishes to accept it.

Even if Grievant were not entitled to the operator position under the first provision of paragraph (b), she has stated a valid claim under the second provision which grants an injured employee preferential recall to any job she is capable of performing after she notifies the employer that she desires reinstatement. Grievant stated that she applied for the position of telephone operator in June or July. This testimony indicates that a vacancy existed and Grievant's application put DHHR on notice that she wished to be reinstated. DHHR does not claim that Grievant is incapable of performing the duties of telephone operator. Therefore, she is entitled to the position. [\(See footnote 2\)](#)

In addition to the foregoing findings of fact and discussion it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. Because this is a non-disciplinary matter, Grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Grievant has proven that under the provisions of W.Va. Code §23-5A-3(b) she is entitled to the position of telephone operator.

Accordingly, the grievance is GRANTED and DHHR Ordered to instate Grievant into the position of telephone operator effective the date of its posting with all backpay and benefits to which she is entitled.

February 27, 1996

Footnote: 1 *Notwithstanding a specific request by the undersigned, proposed findings of fact and conclusions of law were not submitted on Grievant's behalf.*

Footnote: 2 *Although Grievant's representative mentioned the Americans with Disabilities at hearing, no specific claims were made under the provisions of that Act. Further, the Grievance Board has no jurisdiction over ADA claims. Keatley v. Mingo County Bd. of Educ., Docket No. 95-29-257 (Sept. 25, 1995).*