JAKE WALLACE,

Grievant,

v.

DOCKET NO. 95-DOH-174

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Jake Wallace, filed this grievance on September 15, 1994, alleging:

> Today, September 14, I learned that a co-worker was given light duty work due to an on-the-job injury when I was denied light duty in spite of a release for light duty provided by my doctor. This is discrimination and favoritism.

Grievant seeks compensation for the back pay plus interest for the time period he was available for, but denied, light duty. Following adverse decisions at the lower levels, Grievant appealed to level four on May 2, 1995. Following several continuances for good cause, this case was set for hearing on September 30, 1996; however, Grievant's representative did not appear for the hearing. A level four hearing was held for the limited purpose of allowing Grievant to submit an additional piece of evidence, and subsequently, the parties agreed to submit this case on the record developed at thelower levels. This case became mature for decision on September 30, 1996, and the parties declined to file written submissions.

The material facts are not in dispute and are set forth in the following findings.

Findings of Fact

1. Grievant is employed by the Division of Highways in District One in Elkview, West Virginia,

as a Transportation Worker II.

2. Grievant was on medical leave in 1994 due to an on-the-job injury, from January 12, 1994 through January 17, 1994; January 21, 1994 through September 30, 1994; and from November 2, 1994 through December 31, 1994. The period from January 21 through September 30, 1994, is the period subject to the allegations in Grievant's statement of grievance.

3. Grievant's normal duties as a Transportation Worker II include flagging, cutting brush, putting in pipe, and shoveling.

4. Following his injury in January 1994, Grievant returned to work on January 18, 1994, with a release slip from his doctor, John Foundas, dated January 14, 1994, which stated:

> Jake Wallace has been under my care since 1/11/94. May return to work 1/18/94.

LIII, Adm. Ex. 1.

5. When he returned to work, James Huffman told him to grab some shovels and shovel some chemicals from the salt bin. Grievant told Mr. Huffman that he was not able to do that job because of the leg spasms which resulted from his on-the-job injury. Wallace, LIII Tr., p. 20. 6. Mr. Calvert Mitchell, supervisor of the Elkview garage, told Grievant to work in the garage, where he fixed chains and cleaned the garage area. Wallace, LIII Tr., pp. 11, 20.

7. Two days later, Mr. Mitchell informed Grievant that the other men were complaining that he was working "light duty", and that he had checked on the Department's policy, and found there was no "light duty" policy. Mr. Mitchell then instructed Grievant to go home until he was released to return to his normal duties. Wallace, LIII Tr., p. 11, 20.

8. Mr. Carl Thompson, District One Engineer, confirmed that Mr. Calvert had contacted him regarding Mr. Wallace and he, Mr. Thompson, informed Mr. Calvert that the Department had no "light duty" provision and that Mr. Wallace could not work light duty. Thompson, LIII Tr., p. 21.

9. Mr. Paul Hoffman, Equipment Operator at the Elkview garage, was off work on two occasions due to illness or injury, and returned to work with a light duty slip from his doctor. When he returned to work on both occasions, Mr. Hoffman performed the same duties he normally performed as an Equipment Operator. Hoffman, LIII Tr., p. 6.

10. Mr. James Richard, Craftsman II at the Elkview garage, was off work due to illness and

received a light duty slip to return to work from his doctor. When Mr. Richard returned to work, he performed the same duties he had performed before his illness. Richard, LIII Tr., p. 10.

Discussion

Grievant alleges Respondent has engaged in acts of discrimination and favoritism against him in allowing Mr. Hoffman and Mr. Richard to return to work with light duty slips, but denying him the same opportunity. Respondent denies the charges, averring that no discrimination or favoritism was shown because (1) Grievant's return to work slip from Dr. Foundas did not specify light duty; and (2) the other two gentlemen were able to perform their normal duties, while Grievant was not. At the level four hearing on September 30, 1996, before the case was submitted on the record, Grievant offered into evidence a doctor's slip from Dr. Foundas dated April 24, 1995, which states:

> Back on Jan. 14 1994 I gave Jack Wallace a slip to return to work on light duty.

Respondent did not object to Grievant offering this evidence and it was submitted into evidence as LIV, Jt. Ex. 1.

W. Va. Code § 29-6A-2(d) defines "discrimination" as:

> . . . any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

W. Va. Code § 29-6A-2(h) defines "favoritism" as:

> . . . unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

When alleging discrimination or favoritism, Grievant is required to establish by a preponderance of the evidence

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) have not, in a significant particular; and

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Once Grievant establishes a prima facie case of discrimination or favoritism, the employer can then offer a legitimate reason to substantiate its actions; thereafter, Grievant must show that the offered reasons are pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant alleges that he is similarly situated to the other two employees, Mr. Hoffman and Mr. Richard, in that they all possessed "light duty" slips to return to work from their respective doctors. However, despite Grievant's presentation of LIV, Jt. Ex. 1, there is no evidence that Grievant presented Respondent with a "light duty" slip when he returned to work on January 18, 1994. Thus, Grievant has failed to prove by a preponderance of the evidence that he is similarly situated to Mr. Hoffman and Mr. Richard.

In any event, Respondent did not allow Mr. Hoffman and Mr. Richard to return to work performing light duty, despite the fact that they had "light duty" slips. Mr. Hoffman and Mr. Richard returned to work and proceeded to perform to full capacity, the same job duties they performed before they were off work due to illness or injury. Grievant, on the other hand, presented Respondent with a return to work slip that did not limit him to light duty, yet he informed Respondent that he could not perform the normal functions of his job. Respondent does not have a "light duty" policy, and Mr. Mitchell correctly sent Grievant home upon learning that he could not employ Grievant on "light duty." West Virginia Division of Personnel Administrative Rule 15.09 (1993), provides, in pertinent part:

> Injury on the Job: In the event an employee is injured in the course of and resulting from covered employment, the employee may elect to receive either temporary total disability benefits from the Workers' Compensation Fund or sick leave benefits but not both. . . [I]t is discriminatory practice for an employer to fail to reinstate an employee who has sustained a compensable injury to that employee's former position of employment, upon demand for reinstatement, provided that the position is available and the employee is not disabled from performing the essential duties of the position. If the former position is not available, the employee shall be reinstated to another comparable available position with duties the employee is capable of performing. A comparable position means a position which is comparable in wages, working conditions, and, to the extent reasonably practicable, duties to the position held at the time of injury. A written statement from a medical professional that the medical professional approves the injured employee's return to regular employment is prima facie evidence that the worker is able to perform such essential duties.

Grievant returned to work on January 18, 1994 with a return to work slip from a medical

professional approving his return to work, without limitation, which was prima facie evidence that Grievant was able to perform the essential duties of his job. However, Grievant informed Respondent that he could not perform the essential duties of his job, and Respondent sent him home. Grievant does not allege that he should have been given a comparable job or that the job in the garage was a comparable job to his normal position as Transportation Worker II.

Thus, Grievant has failed to prove by a preponderance of the evidence that Respondent violated any state law, rule or policy when it refused to let him perform light duty work at the Elkview garage.

Conclusions of Law

1. In a non-disciplinary grievance, it is incumbent upon the Grievant to prove his case by a preponderance of the evidence.

2. W. Va. Code § 29-6A-2(d) defines "discrimination" as:

> . . . any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

3. W. Va. Code § 29-6A-2(h) defines "favoritism" as:

> . . . unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

4. Grievant has failed to prove Respondent engaged in any act of discrimination or favoritism against him when it refused to allow him to return to work in a light duty capacity following an on-the-job injury.

5. Grievant has failed to either allelge or prove, by a preponderance of the evidence, that Respondent violated any state, rule, law or policy when it refused to allow him to return to work in a light duty capacity.

Accordingly, this grievance is **DENIED.**

Any party or the West Virginia Division of Personnel may appeal this decision to the “circuit court of the county in which the grievance occurred,” and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State

Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: November 19, 1996