THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARILYN MARTIN,
Grievant,

v. **Docket No. 2011-1590-DHHR**

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES/
JACKIE WITHROW HOSPITAL,
Respondent.

DECISION

Grievant, Marilyn Martin, filed a grievance against Respondent on May 5, 2011. The statement of grievance reads, "On April 27, 2011, Grievant informed that she will be terminated in 90 days for inability to work mandatory overtime." For relief, Grievant seeks: "To be made whole, including withdrawal of termination notice." Grievant elected to proceed directly to a level three hearing as authorized by W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on February 22, 2012, before Administrative Law Judge Jennifer Lea Stollings-Parr at the Grievance Board's office in Charleston, West Virginia. Grievant was represented by Gordon Simmons, UE Local 170 West Virginia Public Workers Union. Respondent was represented by Harry C. Bruner, Jr., Assistant Attorney General. This matter became mature for decision upon the final receipt of the parties' proposed findings of fact and conclusions of law on March 23, 2012.

Synopsis

Respondent terminated Grievant due to her inability to work mandatory overtime. Respondent asserts that essential kitchen operations in the dietary department became dysfunctional due to Food Service Workers (FSWs) receiving accommodations exempting them from mandatory overtime.

Beginning in 2008, Grievant provided Respondent with Physician's Statement forms stating that she has a medical condition which restricted her from working more than 8 hours per day and 40 hours per week. Grievant still performed the FSW duties and responsibilities during the 40 hour workweek. Respondent and Grievant entered into an Accommodation Agreement in August 2008 exempting Grievant from mandatory overtime. Grievant received this accommodation for approximately 4 years.

Respondent contends that it followed West Virginia Division of Personnel (DOP) Administrative Rule 14.4(h) when it decided not to continue the Accommodation Agreement and ultimately terminate Grievant. As Grievant was not returning to work following sick leave or a leave of absence, Respondent incorrectly applied the WV DOP Administrative Rule. Additionally, Respondent failed to demonstrate that Grievant cannot perform the essential duties of her job.

Grievant is able to perform her duties and responsibilities as a Food Service Worker for a 40 hour workweek. She has provided Physician's Statements restricting her from working overtime due to a medical condition. Respondent failed to demonstrate the termination was for good cause.

Accordingly, this grievance is GRANTED.

Findings of Fact

1. Grievant, Marilyn Martin, has worked as a Food Service Worker (FSW) in the Dietary Department for Respondent since November 16, 2006.

2. The Division of Personnel's FSW classification specification does not state that mandatory overtime is a requirement for the position.[1]

3. Respondent amended its own job description[2] for FSWs to list more detailed duties and responsibilities. Mandatory overtime is listed in bold capital font as an essential function of the FSW position.

4. Respondent's amended FSW job description[3] listed the following 19 responsibilities and duties under the bold font statement that mandatory overtime is an essential function of this position:

> 1. Assists cook in preparation of food.
> 2. Prepare items for tray line service for residents utilizing proper utensils and scoops as required according to the menu.
> 3. Assuring the policies and procedures are followed while washing dishes, pans and equipment used in the preparation of food.
> 4. Use proper amount of bleach in three compartment sink and buckets, keeping all towels submerged in the bleach water.
> 5. Cleans the dining room thoroughly including microwaves, tables, filling the napkin dispensers and salt and pepper shakers and also taking out the garbage.
> 6. Assure the resident's likes and dislikes are being honored.
> 7. Starts up dish machine and checks temperatures, document temperatures and levels per procedure.

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[1]Grievant's Exhibit No. 1, Division of Personnel's Food Service Worker classification specification effective 8/16/92.

[2]Respondent's Exhibit No. 2, Respondent's Food Service Worker classification specification established April 8, 2011.

[3]*Id.*

8. Shuts down dish machine and cleans dish machine work area including deliming dish tank and top of dish tank and including mopping floor.
9. Wipe down food carts thoroughly using sanitation policy and procedure.
10. Performs emergency clean-up jobs as needed.
11. Collects trash from dishwashing area, kitchen, and tray line room and disposing properly, clean trash cans and replace the trash can liners.
12. Observes safety and sanitarian precautions for broken or stained dishware.
13. Observes all established standards to ensure safety of self and others during all tasks.
14. Observes departmental health and sanitation procedures at all times.
15. Reports any need for equipment repair to dietary manager.
16. Uses time efficiently to complete work as scheduled.
17. Performs other duties as assigned.
18. Reports to work as scheduled and follows the mandate policies.
19. Practices safety rules and demonstrates knowledge of facility fire plan and disaster plan.

5. Grievant signed an acknowledgment of Respondent's specific FSW job description on April 15, 2011.

6. Prior to Respondent's amended FSW job description, Respondent verbally told employees that mandatory overtime was an essential function of the position.[4]

7. Starting around 2008, Grievant submitted Physician's Statements restricting her work to no more than 8 hours per day and 40 hours per week.[5] The restriction was due to Grievant's inability to stand longer than the hours indicated on the Physician's

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[4]Level three hearing testimony of Aimee Bragg, Assistant Administrator for Respondent.

[5]*See* Grievant's Exhibit No. 3, Physician's Statement; Level three hearing testimony of Angela Booker, Chief Executive Officer for Respondent; and, Level three hearing testimony of Grievant.

Statements.

8. Title I of the Americans with Disabilities Act of 1990 (ADA) prohibits employers from discriminating against individuals with disabilities in all employment practices and all employment related activities. Disability is defined as a physical or mental impairment that substantially limits one or more major life activities. The U.S. Equal Employment Opportunity Commission (EEO) considers the following as major life activities: walking, seeing, speaking, hearing, breathing, learning, performing manual tasks, caring for oneself, working, sitting, **standing**, lifting, reaching, thinking, concentrating, interacting with others, and sleeping. Reasonable accommodation is defined by the ADA as any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. (*Emphasis added.*)

9. In an Accommodation Agreement[6] dated August 7, 2008, Respondent and Grievant agreed that Grievant would be exempted from mandatory overtime.

10. The Accommodation Agreement stated, in part:

> In order to accommodate you[r] impairment which limits your capacity to work more than 8 hours per day, our agency will provide the following modification to your job duties.
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> - Extra full duty work shifts (i.e. 8 hours) will be limited to one shift per pay period on your day off, if needed, not to exceed 16 hours in a month.
> - It is your responsibility to ensure that your work is completed within the allotted 8 hours as restricted by your physician. You will also be

[6]Respondent's Exhibit No. 3, Memo of Understanding regarding Accommodation Agreement dated August 7, 2008.

responsible for monitoring your restricted hours.

- Additionally you may be required to complete Mandatory Training as needed during your scheduled 8 hours or on your off days to prevent working over the restricted 8 hour day.
- You will be exempt from mandatory holdovers during this accommodation agreement.
- This accommodation will be re-evaluated no less than monthly or upon your next scheduled doctor's visit not to exceed quarterly. You will be required to submit the most current medical documentation on the State of West Virginia Physician's Practitioner's form (L-3) following your physician visit before your next scheduled shift. You are required to submit to the HR Director, your scheduled physician's appointments during this accommodation agreement for this particular impairment (edema of the legs).[7]
- Continuation of this accommodation will depend on the demands of your impairment and the agency's capacity to provide them.

11. Grievant received this accommodation from 2008 until her dismissal in 2011.

12. Grievant submitted a Physician's Statement[8] dated May 8, 2009, stating that "This patient has significant edema in her lower extremities. She is unable to work more than 8 hours a day/40 hrs per week." The form was marked that the disability will permanently prevent the employee from performing his/her duties.[9]

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[7]The burden of proof in this matter rests upon Respondent, and as such, Respondent put forth its case first. Neither party elected to give opening statements. Respondent called its witnesses first. Grievant's medical condition was not included on the grievance form. Respondent disclosed Grievant's personal health information (phi) through its witness testimonies and Respondent's Exhibit No. 3, the Accommodation Agreement. Respondent first disclosed that Grievant suffers from the medical condition edema. According to the Mayo Clinic website, "edema occurs when tiny blood vessels in your body (capillaries) leak fluid and the fluid builds up in surrounding tissues, leading to swelling." *Mayoclinic.com*. Grievant later disclosed through her own testimony and Grievant's Exhibit No. 3, Grievant's Physician's Statement, that she has edema in her lower extremities.

[8]Grievant's Exhibit No. 3, Physician's Statement.

[9]Although testimony by Grievant and Respondent's witnesses revealed that Grievant turned in multiple Physician's Statements, not all of the forms were introduced into evidence. The exact number of Physician's Statements submitted is unclear.

13. On April 18, 2011, Grievant submitted a Physician's Statement indicating she was unable to work more than 8 hours per day and 40 hours per week. The restriction, according to Grievant's doctor, was in effect until May 18, 2011.[10]

14. Ms. Booker, CEO for Respondent, Ms. Bragg, Assistant Administrator for Respondent, and Regina Saunders, Grievant's immediate Supervisor, met with Grievant on April 26, 2011.[11] At the meeting, Grievant was advised that mandatory overtime was an essential function of the FSW position.

15. At the April 26, 2011 meeting, Grievant was given the following three options:

> 1) She could complete an application listing her abilities so she could be considered for other job positions that didn't require mandatory overtime within the West Virginia Division of Health and Human Resources;
> 2) She could take a 90 day personal leave of absence without pay to attempt to improve her health and to be able to perform the mandatory overtime function of the FSW job; or,
> 3) She would be dismissed for failure to meet the essential functions of the position.

16. Not all medical conditions are curable.

17. Grievant did not take a medical leave of absence from work.

18. Grievant completed an application. She qualified for the positions of Office Assistant I, Telephone Operator and Data Entry Operator I. None of those positions were available with Respondent.

19. Grievant performed the functions and duties of her FSW position for 8 hours

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[10] *See* Grievant's Exhibit No. 2, Letter summarizing meeting between Grievant and Respondent.

[11] *Id.*

per day and 40 hours per week. Grievant's inability to perform overtime was due to a documented medical condition. Grievant submitted Physician's Statements restricting her from working overtime.

20. As of the date of the level three hearing, Grievant was never declared eligible to receive disability benefits from the United States Social Security Administration (SSA).

21. The SSA's definition of disability requires an individual be unable to perform "substantial gainful activity" because of a medical condition. Substantial gainful activity has been interpreted as full-time competitive work, 8 hours per day, 40 hours per week.

22. The Federal Fair Labor Standards Act of 1938 considers 40 hours as the standard workweek.

23. On May 10, 2011, CEO Booker met with Grievant and informed her that Respondent did not have any available positions for an Office Assistant I, Telephone Operator or Data Entry Operator I. At that meeting, Grievant was presented with the options of taking a personal leave of absence "to improve her health status or to attempt to find another position, either within state employment or elsewhere."

24. Grievant informed CEO Booker that she could not afford to take unpaid leave.

25. Grievant's employment was terminated by letter[12] dated May 10, 2011.

26. The dismissal letter stated in part:

> Your dismissal is the result of your inability to complete the essential functions of the position of Food Service Worker. On May 10, 2011, I met with you and explained to you that you qualify for the positions of Office Assistant I, Telephone Operator, Data Entry Operator I. None of these

[12]Respondent's Exhibit No. 1, Grievant's dismissal letter dated May 10, 2011.

> positions are currently available at Jackie Withrow Hospital. During this same conversation in the presence of your supervisor, the HR director, and I informed you that you were eligible to take a personal leave of absence in order to attempt to find a position, either within State employment or elsewhere. We also informed you that if you chose to take a personal leave of absence, your insurance and health benefits would continue. You declined to accept any such leave of absence.
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> A predetermination conference was held between you, Regina Saunders, Dietary Director, Aimee Bragg, HR Director, and myself on May 10, 2011 concerning this matter. During the conference you were given the opportunity to respond to these issues and explain your behavior. Your response was, "I mean, I don't know what to say, I really don't, it is really devastating to me, no notice or nothing. This is my only means of income and I can't afford to take off, and it is not right**. I feel like I'm being punished because I have a medical issue and this is not my fault.**" I have considered your response and have decided that your dismissal is appropriate and I will proceed with that personnel action. (*Emphasis added*.)

27. Grievant's termination was not a result of her Employee Performance Appraisals but due to her inability to work mandatory overtime.[13]

28. At the time of the level three hearing, the Dietary Department for Respondent had 15 people employed in the division. With a full quota, the division would have at least 20 employees.[14]

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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

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[13]Level three hearing testimony of Angela Booker, CEO for Respondent.

[14]Level three hearing testimony of Regina Saunders, Dietary Manager and Grievant's immediate supervisor.

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." *Petry v. Kanawha County Bd. of Educ.*, Docket No.96-20-380 (Mar. 18, 1997). "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 Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Respondent terminated Grievant due to her inability to work mandatory overtime. Respondent asserts that essential kitchen operations in the dietary department became dysfunctional due to Food Service Workers (FSWs) receiving accommodations exempting them from mandatory overtime. Respondent asserts that essential kitchen functions, such as cleanliness, proper food preparation, and timely service of food at the required temperature, per Health Department Health and Safety Regulations, were compromised thereby increasing the risk for substantial harm to patient health and safety. Respondent believes the kitchen functionality has deteriorated due to lack of sufficient staff. Respondent also asserts that staff morale is low amongst FSWs because they are "burned-out" from the mandatory overtime.[15]

At the time Grievant was hired in November 2006 she did not need an accommodation. Grievant experiences swelling in her legs and lower extremities due to the medical condition edema. Beginning in 2008, Grievant provided Respondent with

[15]Level three hearing testimony of CEO Booker and Ms. Bragg.

Physician's Statement forms stating that she has edema and that she is restricted from working more than 8 hours per day and 40 hours per week. Grievant still performs the FSW duties and responsibilities during the 40 hour workweek. Respondent and Grievant entered into an Accommodation Agreement in August 2008 exempting Grievant from mandatory overtime. Grievant received this accommodation for approximately 4 years.

Respondent contends that it followed West Virginia Division of Personnel Administrative Rule 14.4(h)[16] when it decided not to continue the accommodation agreement and ultimately terminate Grievant. 143 C.S.R. 1 § 14.4 states:

> (h) Return At Less Than Full Duty -
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> 1. The appointing authority may permit an employee to return to work from sick leave at less than full duty for a period of no more than thirty days, provided that the terms of the return shall be in writing. An employee may request to continue to work at less than full duty beyond the period permitted by the appointing authority. The request must be submitted to the appointing authority at least five days before the end of the period. The appointing authority shall consider the request in the same manner as the original request.
> 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:
> (a) the employee cannot perform the essential duties of his or her job with or without accommodation;

Respondent asserts that it "cannot be faulted for applying the WV DOP Administrative Rule 14.4(h) Return at Less than Full Duty."[17] Yes, Respondent can. Respondent is faulted for applying a rule pertaining to employees returning from sick leave

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[16]Respondent's Exhibit No. 3.

[17]Conclusion of Law #6, Respondent's Proposed Findings of Fact and Conclusions of Law.

to Grievant, who has not been on sick leave or taken a leave of absence. Grievant is performing FSW duties and responsibilities for a 40 hour workweek. Respondent has failed to demonstrate that Grievant violated WV DOP Administrative Rule 14.4(h). In fact, Rule 14.4(h) does not apply to this situation, at all. Further, Respondent has failed to demonstrate that Grievant cannot perform the essential duties of her job. Respondent's amended April 2011 FSW classification specification states that mandatory overtime is an essential function of this position then goes on to list 19 other responsibilities and duties. Respondent failed to demonstrate that Grievant has failed to perform any one of the 19 responsibilities and duties listed in the April 2011 classification specification. The only reason Grievant does not perform the mandatory overtime is her documented medical condition. Grievant has provided Respondent with numerous Physician's Statements regarding her medical restriction.

Because Grievant was a tenured employee in the state's classified service, the employer must also demonstrate that misconduct which forms the basis for the dismissal was of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*,

[149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

An employer must allow an employee with a disability to work a modified schedule as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees. Americans with Disabilities Act of 1990 (ADA). 42 U.S.C. § 12101 *et seq*. A modified work schedule is a reasonable accommodation. 42 U.S.C. § 12111 (9) (B) (1994); *See Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166, 172 (1st Cir. 1998). Respondent granted Grievant the reasonable accommodation of working no more than 8 hours per day and 40 hours per week, as directed by her physician, for approximately four years. Then, Respondent gave Grievant the options to take a leave of absence "to improve her health,"[18] seek other employment, or else be terminated. Grievant completed an application to qualify for other positions, and testified that she was willing to accept another position; however, no positions were available with Respondent at that time.

Respondent's assertion that Grievant can improve her health to the point of not needing a reasonable accommodation is utterly offensive. Grievant testified at the level three hearing that her medical condition was "beyond her control." As for the accommodation of not working more than 8 hours per day and 40 hours per week, Grievant

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[18]At the level three hearing, Respondent's counsel asked Grievant on cross examination if she had "availed" herself of any programs to deal with her medical condition edema. Grievant responded by testifying that she goes to her doctors appointments. Respondent asserted that the Public Employees Insurance Agency (PEIA) offers programs to help with "diet and salt intake," then asked Grievant if she has called PEIA to ask about these alleged programs. Grievant again responded by testifying that she seeks treatment from her physicians. Visibly upset, she further stated in response to Respondent's inquiry about diet and salt intake, "That's an insult to me as far as my weight."

testified that she did not ask her doctor for this restriction. The undersigned is not persuaded that people can always improve their health simply by taking a leave of absence from work. Some medical conditions simply cannot be cured, regardless of how much treatment and desire is directed towards the ailment. Grievant testified that her doctor informed her that there is no cure for her medical condition edema, which substantially limits her major life activity of standing for longer than 8 hours per day and 40 hours per week.

Respondent asserts that reasonable accommodations are granted for temporary disabilities and are not intended for long term or permanent disabilities.[19] Respondent asserts that an accommodation "has to diminish over time." Respondent avers, "The issue with [Grievant's accommodation] is, the accommodation became more like a permanent accommodation." CEO Booker testified that she personally told Grievant multiple times that Grievant "needed to get off the accommodation." CEO Booker testified that Physician's Statements for accommodations should illustrate that the employee is improving; however, for approximately four years, Grievant's restriction from her physician did not change.[20]

Respondent's assertion that work accommodations for medical conditions should only be granted on a temporary basis, is absurd. Not all medical conditions or disabilities are temporary. Respondent failed to provide any statutes, policies, and/or case law to support its assertion. *In Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166, 172 (1st Cir.

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[19]Level three hearing testimony of Angela Booker, CEO for Respondent.

[20]*Id.*

1998), the court held that "The duty to provide reasonable accommodation is a continuing one, however, and not exhausted by one effort."

Grievant is able to perform her job as a FSW for a 40 hour workweek. She has provided Physician's Statements restricting her from working overtime due to a medical condition. Respondent has not proven misconduct substantiating dismissal. Moreover, Respondent has failed to demonstrate that Grievant's termination was for good cause.

Conclusions of Law

1. 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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

2. "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." *Petry v. Kanawha County Bd. of Educ.*, Docket No.96-20-380 (Mar. 18, 1997). "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 Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

3. Respondent failed to demonstrate that Grievant violated WV DOP Administrative Rule 14.4(h).

4. Respondent failed to demonstrate that Grievant cannot perform the essential duties of her job.

5. Because Grievant was a tenured employee in the state's classified service, the employer must also demonstrate that misconduct which forms the basis for the dismissal was of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989).

6. "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

7. An employer must allow an employee with a disability to work a modified schedule as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees. Americans with Disabilities Act of 1990 (ADA). 42 U.S.C. § 12101 *et seq*. A modified work schedule is a reasonable accommodation. 42 U.S.C. § 12111 (9) (B) (1994); *See Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166, 172 (1st Cir. 1998).

8. Respondent failed to provide any statutes, policies, and/or case law to

support its assertion that work accommodations for medical conditions should only be granted on a temporary basis.

9. In *Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166, 172 (1st Cir. 1998), the court held that "The duty to provide reasonable accommodation is a continuing one, however, and not exhausted by one effort."

10. Respondent did not prove misconduct substantiating dismissal.

11. Respondent failed to demonstrate that Grievant's termination was for good cause.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant and to pay her all back pay and benefits to which she is entitled from the date her employment was terminated to the date her employment is reinstated. Documentation of the termination shall be removed from Grievant's personnel file.

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 (2008).

DATE: May 18, 2012

William B. McGinley[21]
Administrative Law Judge

[21] ALJ Jennifer Stollings-Parr conducted the hearing and drafted the foregoing decision for this grievance. However, she left employment with the West Virginia Public Employees Grievance Board prior to the decision's publication. This matter was reassigned to ALJ McGinley for final approval and signature.