JIMMIE L. FITZWATER,

Grievant,

v. DOCKET NO. 93-BEP-180

WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS and WEST VIRGINIA DEPARTMENT OF ADMINISTRATION/DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

This Level IV grievance was filed on May 21, 1993 by Jimmie L. Fitzwater ("Grievant"), upon his return to employment with the State of West Virginia, Bureau of Employment Programs (BEP). The Division of Personnel (DOP) was joined as an indispensable party at Level III. A hearing was held before this Board on December 14, 1993. The parties submitted Proposed Findings of Fact and Conclusions of Law on or about January 19, 1994, at which time this case become mature for decision. (See footnote 1)

Background

Grievant was employed by the State for thirty years, beginning in 1962. Of those thirty years, twenty-two were with the State Police and eight were with the Department of Highways and the Division of Employment Security. Grievant decided to run forpublic office in January, 1992. He informed the Bureau of Employment Programs that he wished to resign as of January 9, 1992. Grievant testified that he was told that it would be easier for Personnel if he resigned as of January 16, 1992, the end of the pay period. He agreed and requested annual leave for the period January 9, 1992 through January 16, 1992.

Grievant's last day on the payroll was January 16, 1992. On that day he received his regular amount of compensation, which included 4.53 days of annual leave. He also received a check on January 31, 1992 in the gross amount of $2,634 as a lump sum payment for his remaining 22.71 days of accrued annual leave.

Grievant was unsuccessful in his bid for public office, and desired to return to service with the State. He was initially unsuccessful in his attempts to regain employment as a Local Veterans Employment Representative with the Job Service. He ultimately was reinstated to employment with the West Virginia Bureau of Employment Programs in the position of an Employment Programs Interviewer.

Grievant was aware that if an employee returned to employment with the State within twelve (12) months from the date of separation from employment, the employee would not lose any accrued sick leave. However, if an employee returned more than twelve (12) months from the date of separation from employment, the employee would only be entitled to retain a maximum of thirty (30) days of accumulated sick leave. Grievant had accumulated approximately 250 days of sick leave. Therefore, he had to be reinstated by January16, 1993, twelve calendar months from his effective date of separation in order to retain his 250 days of sick leave. The Bureau of Employment Programs was also aware of this time limitation and began processing Grievant's reinstatement paperwork at least a week in advance of January 16, 1993, the intended date of reemployment.

January 16, 1993 fell on a Saturday. The following Monday, January 18, 1993, was Martin Luther King's Birthday, a legal holiday. Therefore, Grievant actually returned to work on Tuesday, January 19, 1993. The DOP denied him reinstatement of all but thirty (30) days sick leave on the ground that he did not return to work within twelve (12) calendar months of the date of separation from employment.

Parties' Arguments

Grievant contends that January 16, 1992, his last day on the payroll, should be considered his effective date of separation from employment. Grievant also contends that it was the intent of the Bureau to reinstate him as of January 16, 1993, within twelve months of his date of separation. In addition, as January 16, 1993 fell on a Saturday, and the following Monday, January 18, 1993, was a legal holiday, Grievant was not able to actually return to work until January 19, 1993. Therefore, the intervening weekend and holiday should act to toll the computation period, thus allowing him to retain his 250-plus days of accumulated sick leave.

The Division of Personnel has two positions: First, that Grievant's last day actually worked, January 9, 1992, is the datewhich should be used as his effective date of separation from employment. In the alternative, even if his effective date of separation from employment was January

16, 1992, Grievant did not actually return to work until January 19, 1993. Consequently, the DOP concludes that Grievant did not return to work within twelve (12) calendar months of his effective date of separation, thereby entitling him only to the thirty (30) maximum allowable days of sick leave.

Discussion

The parties submitted two regulations regarding sick leave as authority for their respective positions.

The West Virginia Bureau of Employment Programs Policy and Procedures Manual, § 6700.50, relied on by Grievant, provides in pertinent part:

> SICK LEAVE
>
> . . . However, any accumulated sick leave shall be reinstated if the employee returns to work within a period of twelve months of the date of separation. If the employee returns after one (1) year, sick leave lost up to a maximum of 30 days shall be recredited. . . .

The West Virginia Division of Personnel Administrative Regulation 16.04(e)(2), relied on by DOP, provides, in pertinent part:

> 2. All Other Separations - All accumulated sick leave shall be cancelled as of the effective date of separation of employment or last day worked during the notice period. If the employee returns to work within twelve (12) calendar months all lost sick leave shall be restored. However, if the employee returns to work after more than twelve (12) calendar months from the effective date of separation of employment, no more than thirty (30) days of lost sick leave shall be restored. If anemployee is recalled from a layoff all lost sick leave shall be restored.

The only difference between the two regulations is that the DOP regulation states that all sick leave shall be cancelled as of the effective date of separation of employment or last day worked during the notice period, while the Bureau regulation only refers to the effective date of separation of employment.

Mr. Joe Smith, Assistant Director of Employee Relations, DOP, testified that it was within DOP's discretion which date to use for purposes of Section 16.04(e): effective date of separation or last day worked. It has been DOP's practice to use whichever date would be earlier, but there is nothing which

precludes the agency from using the later date. Mr. Smith offered a Civil Service System service credit policy, reflected in minutes of its June 23, 1981 Commission Meeting, to support DOP's practice, which states as follows:

POLICIES OF THE COMMISSION

> The Director of Personnel presented to the Commission the issue of whether or not employees are entitled to a salary adjustment following a separation from employment and who are being carried on the payroll for the payment of annual leave. The Commission ruled that individuals ceased to be employees at the end of their notice period, or last day worked during the notice period, and would not be entitled to a salary adjustment. The Commission further ruled that service credit will no longer be given for time covering payment of annual leave and separations should be posted as of the last day of work. Additionally, payment for holidays which occur after the effective date of separation will no longer be made. This ruling is to become effective July 1, 1981.

The Civil Service System service credit policy is inapplicable to the instant case. That policy clearly states that employees whohave given notice of termination of employment are not entitled to accrue any additional annual leave, sick leave, or receive any salary adjustments that may occur during the notice period, and are therefore not considered "employees" for that purpose. The memorandum does not abrogate benefits an employee has already accrued and clearly are entitled to as of the effective date of separation.

Section 16.04(e)(2) of the DOP regulation provides that:

> "if the employee returns to work within twelve (12) calendar months all lost sick leave shall be restored. However, if the employee returns to work after more than twelve (12) calendar months from the effective date of separation of employment, no more than thirty (30) days of lost sick leave shall be restored. (Emphasis added).

Therefore, Section 16.04(e)(2) clearly provides that the relevant date for determining eligibility of accrued sick leave is the effective date of separation of employment, not the last day worked.

"Effective Date" is defined in Section 3 of the Administrative Rules and Regulations as "the established date the action takes place." (See footnote 2) Mr. Fitzwater's effective date of separation was January 16, 1992, the day the action of termination became effective for purposes of calculating all remaining salary and benefits, and the day he last was on the State's payroll.

At the time of Grievant's interviews with the Bureau of Employment Programs, it was understood and appreciated that hewould need to be returned to employment in a timely manner so that his accumulated sick leave credit could be recredited to his account.

Mr. Burdette, who was the Assistant Director for Unemployment Compensation at the time Grievant was seeking reemployment, testified that he relied on the Bureau's regulation in determining when Grievant would have to be reinstated in order to keep his accumulated sick leave. Mr. Burdette testified that January 16, 1993 was the date on which Grievant was to be put back on the payroll. The Bureau of Employment Programs instituted the paperwork with the Division of Personnel in a timely manner in order that Grievant would be placed on the payroll by or on January 16, 1993, one year from his effective date of separation from employment. Grievant's WV-11 form, which was submitted into evidence at Level III by the DOP, indicates that the paperwork was being processed at least as early as January 13, 1993, and was approved by the Department of Administration on January 15, 1993. However, the WV-11 indicates that the effective date of the position is January 19, 1993.

It was clearly the intention of Grievant and the Bureau of Employment Programs that he be reinstated by January 16, 1993, in order to preserve his accrued sick leave. January 16, 1993 was a Saturday. The following Monday, January 18, 1993, the earliest date he could have actually returned to work, was a legal holiday, Martin Luther King's Birthday. Grievant returned to work the next day, January 19, 1993. There is no evidence in the record thatGrievant would not have returned to work on January 16, 1993 if it had been at all possible.

The introduction to Section 16 of the Administrative Rules and Regulations, Attendance and Leave, states that, "in compliance with Chapter 21, Article 5C; Chapter 2, Article 2; and Chapter 29, Article 6, Section 10, of the Code of West Virginia, as amended, the following regulations shall apply to classified employees." Therefore, the undersigned looks to those statutes for guidance. Chapter 2, Article 2 of the West Virginia Code includes § 2-2-1, the listing of all observed state and federal holidays, including Martin Luther King's Birthday. That chapter also includes § 2-2-3, the State's counting statute, which provides:

> "The time or period prescribed or allowed within which an act is to be done shall be computed by excluding the first day and including the last; or if the last be a Saturday, Sunday or legal holiday, it shall also be excluded, . . ."

Therefore, as January 16, 1993 was the last day of the time within the act was to be done, i.e., reinstatement of Grievant, and that day fell on a Saturday, it is to be excluded, as would be the Sunday and legal holiday following that day, according to the statute. Therefore, January 19, 1993 became the last day upon which the act was to be done, and as Grievant's WV-11 indicates, his reinstatement was effective on January 19, 1993.

The following findings of fact are derived from the record developed by the parties.

Findings of Fact

1. Grievant was employed by the State of West Virginia for thirty years, beginning in 1962.
2. Grievant resigned from State service effective January 16, 1992, in order to run for public office.
3. Grievant was unsuccessful in his bid for public office and desired reemployment with the State.
4. Grievant was reemployed by the Bureau of Employment Programs.
5. Mr. John Burdette, then Assistant Director of Unemployment Compensation for the Bureau of Employment Programs, was aware that Grievant had to be reinstated by January 16, 1993, twelve calendar months from his effective date of separation, in order to retain his accumulated sick leave, which amounted to approximately 250 days.
6. The Bureau of Employment Programs began the necessary paperwork to reemploy Grievant in advance of January 16, 1993.
7. January 16, 1993 fell on a Saturday. The following Monday, January 18, 1993, was Martin Luther King's Birthday, a legal holiday.
8. Grievant actually returned to work on Tuesday, January 19, 1993.

Conclusions of Law

1. W. Va. Code, Section 2-2-3, provides:

> "The time or period prescribed or allowed within which an act is to be done shall be computed by excluding the first day and including the last; or if the last bea Saturday, Sunday or legal holiday, it shall also be excluded, . . ."

2. The last day of the twelve calendar month period in which Grievant had to be reinstated to retain his accumulated sick leave was January 16, 1993.

3. As January 16, 1993 fell on a Saturday, and the following Monday was a legal holiday, those days are to be excluded, according to W. Va. Code § 2-2-3, and January 19, 1993 was the next day on which the act of reinstatement could be done.

4. Grievant returned to work on January 19, 1993.

Therefore, this grievance is **GRANTED**.

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.

MARY JO ALLEN

Administrative Law Judge

Date: May 6, 1994

Footnote: 1 This case was assigned for administrative reasons to the undersigned from another Administrative Law Judge.

Footnote: 2 The undersigned relies on DOP's Administrative Rules and Regulations, effective May 16, 1991, as that edition was in effect at the time this grievance arose. The current edition became effective in August, 1993.