DAVID F. GRAF, M.D.

v. DOCKET NO. 93-BOT-156

WEST VIRGINIA BOARD OF TRUSTEES/

WEST VIRGINIA UNIVERSITY

DECISION

This matter now comes before the West Virginia Education and State Employees Grievance Board on remand by the West Virginia Supreme Court of Appeals in the matter of David F. Graf, M.D. v. West Virginia University and West Virginia University Medical Corporation, 429 S.E. 2d 496 (W.Va. 1992). Prior to review by the Court, the Grievance Board determined that Respondent WVU violated Board of Regents Policy Bulletin No. 36 when it prohibited Grievant, a faculty member of the WVU Medical School, from "moonlighting." The Board ordered WVU to cease the prohibition on outside employment in conformity with Policy Bulletin No. 36 and to compensate Grievant for wages lost pursuant to the improper restriction. The Circuit Court ofMonongalia County upheld the Grievance Board's decision on the issue of Grievant's right to moonlight but reversed the damage award, finding that the Board lacked the power to award such damages. The Supreme Court affirmed the Grievance Board and the Circuit Court on the moonlighting issue but reversed the lower court's holding regarding the award of damages. (See footnote 1) Because the Grievance Board decision did not specify the amount of damages to be awarded Grievant for the years that his outside work was restricted, the case was remanded "so that the hearing examiner may determine the amount of damages to be assessed."

(See footnote 2) Hearing was held on July 19 and 20, 1993, and briefs were filed by December 27, 1993. (See footnote 3)

At hearing Grievant presented his Internal Revenue Service Forms 1099 from Uniontown Hospital Association and Emergency Physicians of Greene County, Inc., establishing his actual earnings from these two sources for the years 1979 through 1984. Grievant also offered the testimony of Clifford B. Hawley, Ph.D., Economics, who calculated the lost earnings as follows:On the basis of income tax

documents provided to me, I examined Dr. Graf's moonlighting earnings from July, 1979 to June 3, 1984. Earnings in each year were converted to 1984 dollars using the Consumer Price Index (CPI) and their sum then averaged over the almost five years of work experience observed before the moonlighting prohibition. This produces an annualized base earnings loss of $59,657. Earnings losses after 1984 grow each year with the growth of the CPI- Physician Services. This results in earnings losses for Dr. Graf of $618,666 through May 3, 1992. These losses with interest to July 19, 1993 total $1,001,619.

Dr. Hawley presented this information in the following chart format:

Respondent asserts that the damages should be calculated based upon average annual earnings of $56,235.43. This figure is ascertained by averaging the actual income Grievant earned from the outside activities during the four full years he was allowed to moonlight, i.e., 1980-1983. Respondent then multiplies this base salary by the number of years Grievant was not allowed to work, i.e., seven years and eleven months. This calculation produces actual lost earnings in the amount of $449,880.00 Interest must becalculated, Respondent argues, at the legal rate of ten percent (10%) for each year the salary was not received and that each year of accumulated interest would be the same amount. Respondent illustrated the calculation of interest as follows:

Principal Total 449,880
Interest Total 228,971
TOTAL 678,851

Thus, Respondent concludes that Grievant is entitled to $449,880.00 lost wages and $228,971.00 interest for a total of $678,851.00.

After due consideration of the parties' proposals the following findings are made. First, Grievant's calculation of a base salary is accepted. Dr. Hawley's formulation considers the entire period of time Grievant engaged in the moonlighting and the conversion of the earnings to "1984 dollars" provides an accurate value with which to begin calculations for the time period of 1984-1992. Respondent's calculation is based only on four years of earnings andfails to take into account changes in dollar

value throughout the period of time in question. Therefore, it must be determined that Grievant's calculation of a base salary is more accurate than that offered by Respondent.

Second, the time period for which Grievant is entitled to receive the damages is not in dispute. Grievant was prohibited from moonlighting beginning June 1984 and the restriction continued through May 1992, when amended Policy Bulletin No. 36 became effective. (See footnote 4)

The third factor to be considered is the calculation of Grievant's anticipated earnings for the period of 1984-1992. Grievant asserts that the principle of "make whole" relief requires a commensurate increase in wages. Dr. Hawley incorporates this increase into his calculations through the use of the Consumer Price Index for Physician Services. This Index provides specific increases in the cost of Physician Services based upon national statistics.

Respondent argues that the damage award should reflect no increase in Grievant's salary over the years because his earnings from 1979 through 1984 remained relatively stable and did not reflect the increases indicated by the CPI. (See footnote 5) Respondent further argues that Grievant failed to offer what would have been the best evidence that his salary would have increased, statements from the hospitals regarding the salaries paid to part-time, emergency room physicians.

Respondent's argument that information from Grievant's prior employers would have been the best evidence is not without merit; however, Respondent also had the opportunity to present that evidence and failed to do so. Although Grievant's 1979-1984 income vacillated somewhat it is impossible to determine that there had been no such increases during that period of time absent any information regarding his hourly compensation. Therefore, the earnings enhancement created by the CPI will be incorporated into the calculation of damages.

The fourth and final factor to be considered is whether compound or simple interest shall be applied to the principle. Grievant argues that because this income was earned from secondary employment, it would likely have all,or substantially all, have been invested, thus, compound interest is necessary to restore him to the status he would have otherwise obtained. Respondent asserts that the Grievance Board is not statutorily authorized to award interest on judgments and that the level four grievance decision is not a judgment or decree which entitles Grievant to an award of prejudgment interest. Respondent cites W.Va. Code, §56-6-31 in support of its position that courts of law are authorized to award interest on a judgment or decree, which are granted by courts of record. W.Va. Code §§18-29- 1, et seq. neither establishes the Grievance Board as a court nor empowers it

to grant judgments or decrees within the meaning of Code §56-6-31.

Respondent asserts that even though the Supreme Court noted that the Grievance Board's examiners may determine what is "fair and equitable" it is the specific statute which provides who may order interest and in what circumstances. In the event that interest is awarded, Respondent argues that while the issue of compound versus simple interest is not addressed by statute, it is the common law rule that interest upon interest is not allowed.

W.Va. Code §56-6-31 states:

Except where it is otherwise provided by law, every judgment or decree for the payment of money entered by any court of this State shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not: Provided, that if the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of such special or liquidated damages shall bear interest from the date the right to bring the sameshall have accrued, as determined by the court. Special damages includes lost wages and income, medical expenses, damages to tangible personal property, and similar out-of-pocket expenditures, as determined by the court. The rate of interest shall be ten dollars upon one hundred dollars per annum, and proportionately for a greater or lesser sum, or for a longer or shorter time, notwithstanding any other provisions of law.

Due to the lack of any reference to compound interest in the statute, the common law standard of simple interest must be applied.

(See footnote 6) Although Grievant argues that an award of simple interest cannot make him whole under these circumstances, it would be improper to award compound interest based upon speculation as to what percentage of the income would have been invested and what, if any, profit was realized from that investment.

Based upon the foregoing findings the undersigned calculates Grievant's damages as follows:

Principal Total 618,666.00

Interest Total* 383,259.43

TOTAL 1,001,925.43

*Interest calculated through June 30, 1994.

Accordingly, Respondent is Ordered to compensate Grievant consistent with the holdings of this Decision.

DATED JUNE 22, 1994 SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Respondent filed a Petition for Rehearing in this matter; the Court denied the request by Order dated March 4, 1993.

Footnote: 2

The Court noted that West Virginia University was the only named defendant during the grievance procedure and would be solely liable for the damages. WVU Medical Corporation is therefore exempt from this ruling.

Footnote: 3

Respondent argues that as an agency of the State of West Virginia it is immune from the collection of damages. Because this matter was remanded with only specific instructions to determine the amount of lost wage damages, consideration of this issue would be improper.

Footnote: 4

At hearing Respondent raised an issue regarding whether Grievant was entitled to damages for a three month period of time in 1991-92 in which he was on medical leave. This period of time is not reflected in Respondent's brief or response brief and is, therefore, deemed abandoned.

Footnote: 5

It is noted that in its Petition for Rehearing Respondent submitted a chart titled "Potential Graf Damages & Potential Impacts of Monetary Awards Required to Be Satisfied By WVU School of Medicine." In this document Respondent began with a base salary which it adjusted utilizing the CPI for Medical Care. It also applied an interest factor comparable to that used by Grievant. Respondent's conclusion at that time was that Grievant would be entitled to damages of $955,443.00. Respondent argued at the remand hearing that it should not be held accountable for this calculation because it was compiled by a an attorney no longer on staff and the successors disagreed with this assertion. Grievant argued that Respondent should not be permitted to retract the concession. Because this chart utilized a base salary of $63,122.00, it is mentioned herein only to note that Respondent has previously utilized the same principles as Grievant in calculating the lost wages.

Footnote: 6

"Statutes in derogation of the common law are allowed effect only to the extent clearly indicated by the terms used.

Nothing can be added otherwise than by necessary implication arising from such terms." Syllabus Point 7, Teter and Teter v. Old Colony Company, 441 S.E. 2d 728 (W.Va. 1994).

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