PATRICIA NEAL, .

Grievant, .

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v. . Docket Number: 94-06-238

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CABELL COUNTY BOARD OF EDUCATION, .

Respondent. .

DECISION

Patricia Neal (hereinafter Grievant) filed this grievance on March 23, 1994, pursuant to the provisions of West Virginia Code §18-29-1 et seq., protesting a decision of the Cabell County Board of Education's Sick Leave Bank Review Committee which denied her sick leave benefits under an interpretation of its administrative regulations. (See footnote 1) This grievance was denied at the lower levels of the grievance procedure and Grievant appealed to level four on June 9, 1994. At level four, the parties agreed to submit the matter for consideration based upon the record already developed. Oralargument was presented to the Undersigned, in lieu of testimony, on August 19, 1994. Grievant's attorney was given until September 9, 1994 to file a written brief and Respondent was given until September 21, 1994 to respond. Grievant's counsel did not choose to file a brief and, as a direct result, Respondent's brief was not received until November 4, 1994. The case was deemed mature on that date.

The following findings of fact have been properly deduced from the evidentiary record submitted in the case:

Findings of Fact

1. Grievant was employed by the Cabell County Board of Education (hereinafter Board) as a Secretary on or about August 1974. She worked for approximately sixteen years until she retired as a result of becoming disabled. Her last day of work for the Board was on or about October 7, 1991.

2. Grievant began experiencing severe back pain during the summer school semester of 1991. (See footnote 2) Shortly thereafter, Grievant consulted a physician, Dr. Panos Ignatiadis, for treatment. Dr. Ignatiadis diagnosed Grievant as having a ruptured disc in her back.

3. Based on this diagnosis, Grievant had surgery on her back (a procedure called a partial hemilaminectomy) on October 15, 1991. Following the surgery, Dr. Ignatiadis examined her on November 18, 1991 and found that she was still suffering from some back pain. Dr. Ignatiadis concluded that her condition was disabling due to atrophy and nerve damage and advised her that she should not continue working.

4. W. Va. Code §18A-4-10 permits county boards of education to establish personal leave banks for their employees. The employees may join the leave banks by donating leave days and then drawing upon the leave days held by the bank when needed. This statutory provision also provides that the county boards of education shall adopt rules governing the establishment and operation of the leave banks they create.

5. The Board has created a sick leave bank for use by its employees. Further, it has established a Sick Leave Bank Review Committee (hereinafter SLBRC) and administrative regulations governing the operation of the bank. The stated purpose of the bank, as derived from the regulations, is as follows:

> The purpose of the Sick Leave Bank, hereinafter called SLB, is to provide protection for regular employees of the Cabell County Board of Education who encounter serve medical hardship (catastrophic illness or serious accident) and who have exhausted all sick leave and vacation days.

Membership in the bank is limited to those regular employees who have joined during an open enrollment period and who agree to donate two sick leave days to the bank. The total number of sick leave days donated by the employees constitute the number of days available in the bank for withdrawal.

6. The regulations also set forth the following conditions of eligibility for sick leave benefits:

II. ELIGIBILITY FOR BENEFITS

A. SLB benefits are available only when the SLB member personally has a severe medical hardship (catastrophic illness or serious accident).

B. Benefits can be received only after all accumulated sick leave and vacation days have been exhausted.

C. Any SLB member receiving Workers' Compensation is not eligible to receive benefits from the SLB.

D. A SLB member who is on leave of absence, suspended, or terminated from the Cabell County Board of Education is not eligible for SLB benefits.

E. The form "Request for Sick Leave Benefits" and a physician's statement are required before the SLB Review Committee will consider the request for benefits. The physician's statement shall include a history of the illness, date the illness began, a diagnosis and prognosis, and any other related information.

F. Approval by the SLB Review Committee is required prior to the receiving of benefits.

G. Normal pregnancies, childbirth, childcare, or child adoption shall not be considered as eligible reasons for SLB benefits.

Under Section IV, it is further stated that "Once a member is eligible for retirement benefits, including disability retirement, from the Teachers Retirement Board, all SLB benefits will stop."

7. Grievant applied for membership in the sick leave bank on September 18, 1991, and her application was accepted. Grievant donated two sick leave days to the bank.

8. Grievant had exhausted all of her sick and personal leave days sometime on or about October 16, 1991. Therefore, she applied for thirty days of sick leave benefits from the bank on October 14, 1991. Her request was denied on November 7, 1991, because the SLBRC determined that her medical condition did not constitute a catastrophic illness.

9. At the time Grievant exhausted all of her leave, the Board placed her on a leave of absence. Grievant was notified thatshe had exhausted all of her leave by letter dated November 12, 1991.

10. It is the Board's practice to place all employees who have exhausted both their sick and annual leave on a leave of absence.

11. It is the SLBRC's interpretation of the eligibility language in Section II.A, "severe medical hardship (catastrophic illness or serious accident)," that only those employees who have or are suffering from "life-threatening situations and life threatening illnesses" may receive sick leave bank benefits. Testimony of Chair of Review Committee, level two transcript, p. 69.

12. Grievant applied for disability benefits from the Social Security Administration in February 1992. The Office of Disability and Internal Operations considered that Grievant became disabled on August 2, 1991. She was awarded a regular monthly benefit starting in September 1992. She was also granted a lump sum award compensating her for the period of eight months prior to September 1992.

13. Grievant applied for disability retirement benefits from the State of West Virginia's Consolidated Public Retirement Board in March 1992. She received notice on October 28, 1992, that her request had been granted. She began receiving benefits under this program in November 1992.

Discussion

Grievant contends that she was improperly denied sick leave benefits from the sick leave bank under two theories. First, she contends that the Board has impermissibly narrowed the eligibility requirements so that an employee cannot receive benefits as a result of a simple accident or illness. (See footnote 3) Second, Grievant maintains that, assuming arguendo, Section II.A of the regulations is valid, the Review Board erroneously determined that her medical condition did not amount to a "severe medical hardship."

The Board contends that Grievant was appropriately denied benefits under the SLBRC's assessment of the facts and based upon its interpretation of its own administrative regulations. In addition, it avers that Grievant was not eligible to receive sick leave bank benefits because she was on a leave of absence at the time of her request. Further, it argues that she was not eligible for sick leave bank benefits from the date she became "eligible" for "retirement benefits, including disability retirement from the Teachers Retirement Board." The Board asserts that Grievant became "eligible" for these other benefits at the time she physically became disabled, which the Board contends was before she madeapplication to the bank. Grievant denies that she was placed on a leave of absence.

W. Va. Code §18A-4-10 authorizes county boards of education to establish leave banks for the benefit of their professional and service employees. These employees have the option of joining said

banks and drawing upon the leave days "deposited" in them whenever they are ill or injured. If a board of education chooses to create a leave bank, it is obligated to adopt rules and regulations governing the operation of its bank consistent with the mandates of Code §18A-4-10.

> It is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In the exercise of that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.

Rowe v. Dept. of Corrections, 292 S.E.2d 650, 653 (W. Va. 1982). The Board, in this case, has created a leave bank and adopted administrative regulations governing employee membership, eligibility for benefits, the establishment of the SLBRC and the operation of the sick leave bank. Grievant's claim that the Board has improperly and impermissibly narrowed the eligibility of an employee to receive benefits from the bank will be addressed first.

Grievant contends that the "severe medical hardship" limitation on leave benefits is not consistent with the language of Code §18A-4-10 which states that leave may be obtained from the bank for "accident or illness." She avers that the regulation is too strict and denies her rights afforded under Code §18A-4-10. Therefore, she contends that this regulation is invalid. This argument must fail.

In Detch v. Board of Education of the County of Greenbrier, 117 S.E.2d 138 (W. Va. 1960), our Supreme Court pronounced the standard by which administrative regulations may be declared invalid; the Court stated as follows:

> . . . Moreover, an administrative rule or regulation must be clearly illegal, or plainly and palpably inconsistent with law, or clearly in conflict with a statute relative to the same subject matter, such as the statute it seeks to implement, in order for a court to declare it void on such ground.
>
> It is only where an administrative rule or regulation is completely without a rational basis, or where it is wholly, clearly, or palpably arbitrary, that a court will say that it is invalid for such reason. Moreover, one who claims rights under an administrative rule may not assert the invalidity of the rule under which the rights he claims arise.

Id., p. 142 citing, 73 C.J.S. Public Administrative Bodies and Procedure §104. The Board's limitation on eligibility for leave benefits under its regulation is not clearly, plainly or palpably inconsistent with the language of Code §18A-4-10 nor is it without a rational basis or arbitrary, given the discretion

granted to the Board by the Legislature to create a leave bank for all of its regularly employed personnel. Code §18A-4-10 cannot be interpreted to require that sick leave banks are to be established for use by any and all employees who experience an accident or illness of any severity. No leave bank could be created which would contain adequate resources to carry out such an objective given the limitation that is placed on the number of days that may be deposited in said bank. Further, as noted in Detch, Grievant maynot assert that the leave bank regulations are invalid and then maintain that she has a right to receive benefits under said regulations. Detch, id.

While it is not determined that the "severe medical hardship (catastrophic illness or serious accident)" limitation invalidates the sick leave bank regulations, the SLBRC's interpretation of this language is inconsistent with both the language of the rule and the spirit of Code §18A-4-10. As stated earlier, the SLBRC has interpreted the language of this eligibility provision to limit benefits to only those employees who have suffered a "life-threatening accident or illness." The Board is correct in asserting that the SLBRC's interpretations of its own regulations is entitled to deference unless shown to be clearly wrong. See, W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681 (W. Va. 1993). However, it is determined that this interpretation is not consistent with the actual language of section II.A of these regulations, and therefore, is erroneous.

Not all catastrophic illnesses or serious accidents create life-threatening situations. The Review Board, by adopting this unwritten standard, has more severely limited employees' eligibility for benefits under the regulations that the applicable language of the regulation suggests. An employee may be involved in an automobile accident which renders him/her unable to work for an extended period of time. This employee could be found to have suffered a serious accident by virtue of the nature of his/her injuries; however, the employee may or may not be in a life ordeath situation; the same can be true of many "catastrophic illnesses." An employee may suffer from a stroke or heart attack, but still not be in a life-threatening condition after the initial treatment is rendered. Limiting an employees' eligibility to benefit from membership in a leave bank due to a severe medical hardship, solely on the basis that the employees' condition is life-threatening, is not consistent with the actual language of the regulation. Therefore, the creation of said limitation is not a valid exercise of the Board's discretionary authority granted under Code §18A-4-10.

After a thorough review of the facts, it is concluded that Grievant's medical condition in October 1991, made her eligible for sick leave bank benefits pursuant to the language of Section II.A.

However, the inquiry does not stop here as the Board further alleges that Grievant was not eligible for benefits for two additional reasons. The next issue will be Grievant's alleged leave of absence.

Despite the fact that Grievant was not denied leave benefits because she was placed on a leave of absence by the Board, it still contends that she was ineligible because she became an inactive employee on October 3, 1991. However, the only evidence which establishes the date when Grievant had exhausted all of her sick leave was the Board's own exhibit, Grievant's application submitted to the SLBRC. This application stated that Grievant's sick leave was to expire on October 10, 1991. Grievant submitted this application to the Review Board on October 14, 1991, and it wasreturned to her with no indication that this date was incorrect. No evidence contradicting this date was offered by any witness; therefore, there is no competent evidence upon which the Undersigned can rely which would establish that it was more likely than not Grievant applied for sick leave benefits while on a leave of absence. Accordingly, she could not have been denied such benefits pursuant to section II.D of the administrative regulations.

Finally, the Board contends that this grievance should be denied because Grievant was ineligible for sick leave benefits at the time she applied because she was also eligible for retirement and disability benefits when she made application to the SLBRC. The question presented here is how should the language of section IV.D be interpreted. Again, this was not the stated reason why Grievant was denied the benefits she now seeks.

As pointed out in the Findings of Fact, Grievant applied for retirement and disability benefits after it became apparent that she was no longer going to be able to work. The Board asserts that under section IV.D, she was not eligible for sick leave bank benefits because she was eligible for disability retirement benefits from the Teachers' Retirement Board. The Chair of the SLBRC testified that Grievant's request for benefits would not have been approved had she been receiving social security disability benefits at the time she submitted her application. Tr. level two, p. 93. He also provided the following testimony:

> Q: Now if, in fact, Ms. Neal was, as she has earlier indicated here, disabled beginning as of the earliestdate of August the 2, 1991, would that have also impacted on your decision as to awarding benefits if that information had been known to you?
>
> A: She still would not have received benefits if that information had been set forth.

Q: Why not?

A: She would not have qualified.

Tr. level two, p. 72. The foregoing was the only testimony remotely related to an interpretation of section IV.D.

First of all, section IV.D states that "Once a member is eligible for retirement benefits, including disability retirement, from the Teachers Retirement Board, all SLB benefits will stop." The clear and unambiguous language of the regulation makes no reference to disability benefits from the Social Security Administration. Therefore, this section may not be interpreted by the SLBRC to stand for the proposition that sick leave bank members are ineligible for benefits if they are eligible for disability benefits from any source other than the State Teachers Retirement Board. An administrative body may not interpret its own administrative regulation, which is clear on its face, inconsistent with the language contained therein. The Board's argument in this regard must fail.

Second, W. Va. Code §18-7A-25, which establishes eligibility for teachers retirement benefits, states, in pertinent part, (See footnote 4)

> A member shall be eligible for annuity for disability if he satisfies the conditions in both (a) and (b) as follows:
>
> (a) His service as a teacher in West Virginia must total at least ten years, and service as a teacher must have been terminated because of disability, which disability must have caused absence from service for at least six months before his application for disability annuity is approved. (See footnote 5)
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> (b) An examination by a physician or physicians selected by the retirement board must show that the member is at the time mentally or physically incapacitated for service as a teacher, that for such service the disability is total and is likely to be permanent, and that he should be retired in consequence thereof. (Emphasis added).

Members of the State Teachers Retirement Board are eligible to receive monthly benefits after they

have been off work due to disability for six months. Then, at that point, the employee actually receives the disability benefits, which may include a sum meant to compensate him/her for four months prior to the initial award. Code §18-7A-26.

In order for the Board to show that Grievant was "eligible" for disability benefits under the Teachers Retirement Board, it has to have established that her "disability must have caused absence from service for at least six months," and that an examination by a physician established the date on which she became "mentally or physically incapacitated for service . . . [as a secretary], that for such service the disability is total and is likely to be permanent, and that [s]he should be retired in consequence thereof." The date of eligibility is the date when Grievant wasdetermined by a physician to be physically unable to perform her services and that her disability was likely to be permanent.

Grievant had been suffering from back pain which required her to periodically use sick leave prior to her first visit to Dr. Ignatiadis on September 16, 1991. Thereafter, she had surgery on October 15 and follow-up visits on November 18, 1991 and March 5, 1992. Dr. Ignatiadis stated in a letter to the Consolidated Public Retirement Board that Grievant was to be considered temporarily totally disabled from the date of her surgery to March 19, 1992. March 19 was the first date he opined that Grievant was permanently and totally disabled. Based upon these facts, it must be determined that Grievant's eligibility date for disability retirement was March 19, 1992. At no time prior to that date had Dr. Ignatiadis opined that Grievant was physically unable to perform her services and that "the disability [was] total and likely to be permanent." Based upon this finding, it is concluded that Section IV.D of the SLBRC's regulations cannot be interpreted to deny Grievant benefits from the sick leave bank. The question now becomes one of relief.

Grievant requests that she be awarded a sum equal to her previous daily rate of pay multiplied by 133 which is the maximum number of days a member of the sick leave bank is eligible to withdraw. Under the sick leave bank regulations, a member is only eligible to receive benefits in increments of thirty days for the first request and twenty days thereafter, with a maximum award of 133 days. Had Grievant's request for the first thirty days ofbenefits been granted, there is no evidence to indicate that her future requests would have been denied. Therefore, it is determined that Grievant is entitled to a monetary award based upon the sick leave bank benefits she would have received for the time period between October 16, 1991, and the date she was determined to be disabled, March 19, 1992. Therefore, this grievance is granted.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. The Board's limitation on eligibility for leave benefits under its regulation, that the benefits be limited to members with severe medical hardships, is not clearly, plainly or palpably inconsistent with the language of Code §18A-4-10; neither is it irrational or arbitrary given the discretion granted to the Board by the Legislature to create a leave bank for all of its regularly employed personnel.

2. A grievant may not assert that a policy, regulation or practice is invalid, and then assert that he/she maintains a right to benefits under said law. See, Detch.

3. The Sick Leave Bank Review Committee's interpretation of its own regulation, Section II.A, is clearly erroneous and conflicts with the written language of said regulation. Therefore, this limitation of benefits to members of the leave bank is an abuse of discretion under W. Va. Code §18A-4-10.

4. The Board has not proven by a preponderance of the evidence that Grievant should have been denied benefits under Section II.D of the sick bank regulations.

5. The Board has not proven by a preponderance of the evidence that Grievant should have been denied benefits under Section IV.D of the sick bank regulations.

Therefore, this grievance is hereby **GRANTED**. Grievant is to be compensated by being paid the sum of her daily rate of pay on the last day she worked multiplied by the number of working days between October 16, 1991 and March 19, 1992.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. 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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ALBERT C. DUNN, JR.

Administrative Law Judge

December 22, 1994

Footnote: 1Grievant initiated litigation of this matter in Cabell County Circuit Court. However, the Honorable Dan O'Hanlon dismissed the action for Grievant's failure to have exhausted administrative remedies. The Board of Education waived any timeliness defense and allowed Grievant to initiate the instant action as a result of Judge O'Hanlon's ruling.

Footnote: 2This back pain was either directly or indirectly related to an auto accident Grievant experienced in 1987.

Footnote: 3Code §18A-4-10 states, in pertinent part,

> *. . . Provided, however, That such rules may limit the maximum number of days used by an employee, shall require that leave bank days be used only by an active employee with less than five days accumulated personnel leave who is absent from work due to accident or illness of such employee . . . (Emphasis added).*

> *Footnote: 4It is inferred that Grievant was a member of the State Teachers Retirement Board which is governed by the West Virginia Consolidated Public Retirement Board.*

> *Footnote: 5Service personnel employed by the various county boards of education are also allowed to become members of the State Teachers Retirement System pursuant to Code §18-7A-13.*