JOSEPH CLARK,

Grievant,

v. DOCKET NO. 94-DOH-056

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

This grievance was filed by Joseph Clark on March 31, 1993, protesting the loss of accumulated annual leave pursuant to West Virginia Division of Personnel, Administrative Rules and Regulations, § 16.03(a), 143 CSR 1, et seq., which establishes the number of hours of annual leave an employee can carry forward from one year to another. Hearings were held at Levels II and III and decisions rendered denying the grievance. Mr. Clark appealed to Level IV and the parties agreed to submit the grievance on the record developed below. Proposed findings of fact and conclusions of law were filed on or about June 28, 1994.

The facts are essentially undisputed. Mr. Clark began working for the Division of Highways in Grant County on March 16, 1969. He was injured on the job on June 29, 1992 and was unable to return to work for the remainder of the year. As an employee with overfifteen years of service, Mr. Clark was permitted, pursuant to Division of Personnel Regulation § 16.03, to carry forward 320 hours of annual leave from one year to the next. However, he had accumulated annual leave in excess of 320 hours at the time he received his work-related injury. Because he was off work from June 29, 1992 through the end of the 1992 calendar year, he was unable to use this excess leave. As a result, in January 1993, Mr. Clark's annual leave was reduced to the maximum 320 allowable carry-forward hours.

There is some dispute as to how many hours of accumulated annual leave Mr. Clark had at the end of calendar year 1992. At Level II, it was held that he had a total of 432 hours, resulting in a loss

of 112 hours. However, at Level III a computer printout was offered into evidence which reflects the total accumulated annual leave as 527.74 hours, resulting in a reduction of 207.74 hours. Respondent represents in its proposed findings of fact and conclusions of law that the computer record is wrong, and that the hours presented at Level II are correct. The actual number of annual leave hours lost is immaterial because, for the reasons stated below, Mr. Clark is only entitled to carry forward 320 hours of annual leave.

Mr. Clark contends that Division of Personnel Regulation § 16.03 discriminates against individuals who are "temporarily disabled" and off work, because they do not have the opportunity to use their annual leave as they see fit before it is reduced. Discrimination is defined as "any difference in the treatment ofemployees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29A-6A-2(d). This Board addressed this precise issue in Vance v. W. Va. Dept. of Trans., Docket No. 91-DOH-403 (Mar. 30, 1992), and found the respondent in that case did not act in a discriminatory manner in not permitting the grievant, also off work due to a work-related injury, to carry forward more than 320 hours of annual leave. Further, this Board upheld Division of Personnel Regulation § 16.03, finding that the grievant had not established any authority "which suggests that the regulation in question is unreasonable or enlarges, amends or repeals substantive rights created by statute".

Mr. Clark attempts to distinguish Vance, arguing that the newly enacted Equal Opportunity for Individuals With Disabilities Act, 42 U.S.C. § 12101, et. seq. (also known as the Americans with Disabilities Act or "ADA"), provides the authority which causes the Division of Personnel regulation to be discriminatory and justifies its amendment. That Section provides that

> No covered entity shall discriminate against a qualified individual with a disability because of disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment.

42 U.S.C. § 12112(a).

Mr. Clark's reliance on the ADA to support his position is misplaced. Case law under the ADA is scant due to its recent enactment and courts often look to its predecessor, the Rehabilitation Act of

1973, 29 U.S.C. § 701, et. seq. (the "Act")for guidance in its application. It is well-established that the Act was never intended to extend to persons suffering from temporary conditions or injuries. Paegle v. Dept. of Interior, 813 F. Supp. 61 (D.D.C. 1993). The Court in Paegle held that an employee with a temporary back injury was not "handicapped" within the meaning of the statutory prohibition against discrimination on the basis of handicap. The plaintiff in that case was able to work on limited duty and eventually was able to return to full duty; Mr. Clark has been declared permanently disabled due to his injury and has not returned to work. Nevertheless, he is still not covered under the ADA or the Act because he is not otherwise qualified for employment. A "qualified individual with a disability" is one

> who, with or without, reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others.

29 C.F.R. § 1613.702(f).

Mr. Clark is permanently disabled; he cannot perform the essential functions of his position with or without reasonable accommodation. Therefore, he is not within the protected class for employment purposes under either the ADA or the Act. Further, at the time Mr. Clark's annual leave was reduced, in January 1993, it was still supposed that he was only temporarily disabled and would eventually return to work. He was not declared permanently disabled until the end of calendar year 1993.

Mr. Clark presented testimony that some employees of Respondent were, in emergency situations, able to work and be paid for annual leave at the same time. This evidence was introduced toshow that Respondent made exceptions to Rule § 16.03 in certain situations. However, there was no documentation to verify this testimony, and, in any event, even if Respondent did make exceptions in emergency situations, that is not the case here; Mr. Clark is not similarly situated to workers who are called in for emergency duty. He has presented no evidence that he has been treated any differently than any other employee similarly situated. Indeed, Vance demonstrates that other employees similarly situated have been treated exactly the same as Mr. Clark.

In addition to the foregoing findings of fact, the following conclusions of law are made.

Conclusions of Law

1. Grievant has not proven by a preponderance of the evidence that Respondent acted in a

discriminatory manner, in violation of W. Va. Code § 29-6A-2(d), in not permitting him to carry forward more than 320 hours of annual leave.

2. Procedures and rules properly promulgated by an administrative agency with authority to enforce a law will be upheld so long as they are reasonable and do not enlarge, amend or repeal substantive rights created by statute. Syllabus Pt. 4, State ex rel. Callaghan v. W. Va. Civil Serv., 273 S.E.2d 72 (W. Va. 1980).

3. Grievant is not a "qualified individual with a disability" falling within the protection of either the Equal Opportunities for Individuals With Disabilities Act or the Rehabilitation Act of 1973.

4. Grievant has failed to establish any justification for amending West Virginia Division of Personnel Administrative Regulation § 16.03(a).

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 ALLEN

Administrative Law Judge

Dated: July 14, 1994