DAVID J. COLE and

ROBERT W. KNIGHT,

Grievants,

v. Docket Nos. 99-CORR-187/183

DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

Grievants David J. Cole and Robert W. Knight, employed by the Division of Corrections (Respondent) as Correctional Officers at the Northern Regional Jail & Correctional Facility, individually filed level one grievances on April 7, 1999, in which they alleged they were denied certain benefits while on Workers Compensation. They request adjustment of their seniority for vacation and annual increment purposes, reimbursement of lost wages, and additional annual leave they would have accrued. Grievants' immediate supervisor lacked authority to grant the requested relief at level one. The grievances were denied at levels two and three, and both were advanced to level four on May 10, 1999. Hearings were scheduled in the Grievance Board's Wheeling office on June 7, 1999; however, Grievant Knight was unable to attend. At his request, and absent objection from Respondent or Grievant Cole, these matters are hereby consolidated for decision at level four. In these proceedings Grievant Cole was represented by Ed Littell, Grievant Knight represented himself, and Respondent was represented by Charles Houdyshell, Jr., Assistant Attorney General. The grievance became mature for decision on June 30, 1999, the deadline for submission of objections to the consolidation.

The facts of this matter are undisputed and are set forth as the following formal findings of fact.

Findings of Fact

1. Grievant Cole has been awarded Total Temporary Disability Workers Compensation benefits for approximately seventy (70) months over the past twelve years. His most recent disability period ended when he returned to work on March 1, 1999.

2. Grievant Knight received Workers Compensation benefits from September 30, 1987, until February 25, 1989.

3. Neither Grievant filed a grievance until they learned of the level four decision issued in the matter of McCauley v. Div. of Corrections, Docket No. 97-CORR-354 (Mar. 5, 1999).

Background and Argument

Some background information may be helpful in understanding the present grievance. W. Va. Code §23-4-1 provides in part:

. . . employees may collect sick leave benefits until receiving temporary total disability benefits. The division of personnel shall promulgate rules pursuant to chapter twenty-nine-a [§29A-1-1 et seq.] of this code relating to the use of sick leave benefits by employees receiving personal injuries in the course of and resulting from covered employment and such injury results in lost time from work, and such employee for whatever reason uses or obtains sick leave benefits and subsequently receives temporary total disability benefits for the same time period, such employee may be restored sick leave time taken by him or her as a result of the compensable injury by paying his or her employer the temporary total disability benefits received in an amount equal to the temporary total disability benefits paid to the employer, and provided further, That since the intent of this paragraph is to prevent an employee of the state or any of its political subdivisions from collecting both temporary total disability benefits and sick leave benefits for the same time period, nothing herein may be construed to prevent an employee of the state or any of its politicalsubdivisions from electing to receive either sick leave benefits or temporary total disability benefits but not both.

In compliance with this statutory directive, the Division of Personnel's Administrative Personnel Rule (1998), Section 15.9, provides:

(a)In the event an employee is injured in the course of and resulting from covered employment, the employee may elect to receive either temporary total disability benefits from the Workers' Compensation Division or sick leave benefits, but not both. Employees may collect sick leave benefits and, upon exhaustion of sick leave benefits, annual leave benefits until they receive temporary total disability benefits. If an employee has elected to receive temporary total disability benefits, upon receipt of the initial temporary total disability payment the employee shall pay or assign to his or her employer the net value of the sick

and/or annual leave paid. Employees' sick leave and, if used, annual leave shall be restored on a day-for- day basis which corresponds to the net value of the sick and/or annual leave paid. If the employee fails to pay or assign to the employer the net value of the sick and/or annual leave paid, then the employer shall deduct from the employee's subsequent wage payments an amount equal to the net value of the sick and/or annual leave paid. Upon payment of this amount the employer shall restore sick and/or annual leave previously paid.

The Administrative Rule also addresses annual and sick leave as follows. Section 15.3 "Annual Leave", provides that "[a]nnual leave cannot be accrued for hours not paid nor for hours worked beyond the normal work week which shall not exceed 40 hours." Section 15.4 "Sick Leave" includes identical language, "[s]ick leave cannot be accrued for hours not paid nor for hours worked beyond the normal work week which shall not exceed 40 hours." These provisions apply in all circumstances when an employee is off the payroll, including leaves of absence without pay, suspensions, and when an employee isreceiving temporary total disability benefits from Workers' Compensation. (See footnote 1) It was the application of these provisions which led to McCauley, and subsequently to the pending grievance.

Quite simply, an employee who is injured on the job and elects to use sick leave continues to accrue sick leave, annual leave, and seniority, for all the purposes it is used. An employee who elects to buy back his or her sick leave, thereby going off the payroll while receiving Workers' Compensation benefits, does not continue to accrue sick leave, annual leave, or seniority, while absent. In McCauley, the ALJ determined that these circumstances constitute a violation of W. Va. Code §23-5A-1, which provides that "[n]o employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter." (See footnote 2) Respondent was ordered to reinstate the grievant McCauley's seniority, including his annual pay increment.

Grievants Cole and Knight assert they are entitled to the same benefits granted in the McCauley decision. Respondent argues that the recent enactment of W. Va. Code§23-5A-4, to provide that state employees "shall continue to accrue increment pay during absences from work due to a work related compensable injury", effectively overruled McCauley, to the extent that it illustrates the legislative intent that employees receive only seniority credit for

increment pay. Respondent further asserts that Grievants are not entitled to the incremental seniority because the complaints were not timely filed. By Grievants' own admission, they were aware of the facts of this matter years before the grievances were filed, but did not pursue their claims until the discovery of a legal theory in McCauley.

Discussion

The timeliness of the filings will first be discussed. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed under the provisions of W. Va. Code §29-6A-4(a), the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

W. Va. Code §29-6A-4(a) provides in pertinent part:

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of

the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

W. Va. Code §29-6A-4(a) provides for a "discovery rule", addressed in Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990), Syl. Pt. 1. This rule provides that "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Thus, "it is not the discovery of a legal theory which triggers the statute, but the event." Lynch v. W. Va. Dept. of Transp., Docket No. 97-DOH-060 (July 16, 1997). If an employee knows of the event or practice he must file a grievance within ten days of the event or an occurrence of the practice. Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989). Finally, the Grievance Board has specifically held that "learning of the success of another employee's grievance . . . does not constitute discovery of an 'event' giving rise to a grievance." Pryor v.W. Va. Dept. of Transp./Div. Of Highways, Docket No. 97-DOH- 341 (Oct. 29, 1997); Adkins v. W. Va. Dept. of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996) at 7.

As previously noted, Grievants admit they were aware of the facts upon which their claim is based for many years. However, both testified they were advised by Gert Campbell, an employee in the payroll office, that their claims were not grievable. Grievant Cole testified that his commanding officer had given him the same advice. If an employer affirmatively misleads or confuses an employee regarding a grievable matter, the timelines for submission of a grievance may be equitably tolled. See Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). That would not appear to be what occurred in this case.

W. Va. Code §29-6A-2(g), defines employer as "that state department, board, commission or agency utilizing the services of the employee covered under this article." Neither Ms. Campbell nor the commanding officer meet the definition of employer, and there is no evidence that Grievants' employer engaged in any action to mislead or confuse them regarding their grievance rights. Therefore, it is determined that Grievants failed to pursue their claims in a timely manner.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); W. Va. Code §29-6A-6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990).

2. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed under the provisions of W. Va. Code §29-6A-4(a), the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998).

3. W. Va. Code §29-6A-4(a) requires that a level one grievance be filed within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance.

4. W. Va. Code §29-6A-4(a) provides for a “discovery rule”, i.e., “the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance.” Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990), Syl. Pt. 1. Thus, “it is not the discovery of a legal theory which triggers the statute, but the event.” Lynch v. W. Va. Dept. of Transp., Docket No. 97-DOH- 060 (July 16, 1997). 5. Learning of the success of another employee's grievance does not constitute discovery of an 'event' giving rise to a grievance. Pryor v. W. Va. Dept. of Transp./Div. Of Highways, Docket No. 97-DOH-341 (Oct. 29, 1997); Adkins v. W. Va. Dept. of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996) at 7.

6. W. Va. Code §29-6A-2(g), defines employer as “that state department, board, commission or agency utilizing the services of the employee covered under this article.” 7. Neither Ms. Campbell nor the commanding officer meet the definition of employer, and there is no evidence that Respondent engaged in any action to mislead or confuse them regarding their grievance rights.

Accordingly, the grievance is DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: July 23, 1999

Sue Keller

Senior Administrative Law Judge

Footnote: 1

The Division of Personnel has also adopted a "Workers' Compensation / Sick Leave Policy (May 1, 1993), which discusses the interplay between temporary total disability benefits and sick leave.

Footnote: 2

McCauley was based in part on a previous decision, Baker v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-514 (July 8, 1997). In Baker seniority was restored to the grievant for the period of time she was on Workers' Compensation based upon the provision of W. Va. Code §18B-7-1, which provides that seniority for higher education employees is measured by permanent employment in the higher education system, and on a finding that to deny the seniority resulted in discrimination under Code §23-5A-1.