LILLIAN WILSON,

Grievant,

v. **Docket No. 99-MCHD-004**

MARION COUNTY HEALTH DEPARTMENT,

Respondent.

DECISION

Lillian Wilson (Grievant) challenges the seniority credit she has been given for her employment with various agencies of the State of West Virginia during the past 11 years. The grievance was denied at the lower levels, and Grievant appealed to level four on January 5, 1999. A level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on March 19, 1999. Grievant was represented by counsel, Bill Pennington; the Marion County Health Department (MCHD) was represented by counsel, Frances Whiteman; and the Division of Personnel (DOP) was represented by Perry Dotson of the Employee Information Unit. The parties declined to submit post-hearing briefs, so this matter became mature for consideration at the conclusion of the level four hearing.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant was most recently employed as a home health aide for MCHD, where she began employment on July 19, 1995, as a 90-day exempt employee. Grievant became a permanent employee of MCHD on October 31, 1995. 2. Pursuant to a layoff implemented because of cuts in funding, Grievant was laid off from her position with MCHD, because she was determined to be the least senior employee in her classification.

3. Prior to Grievant's layoff, the Division of Personnel (DOP) calculated her total seniority

throughout her years of employment with the State of West Virginia; Grievant was credited with 2,480 total days of employment.

4. Grievant was credited with employment with the state for the following periods of time:

7/5/78 through 1/31/80

10/28/80 through 5/16/81

8/23/81 through 10/19/81

10/20/81 through 11/3/81

4/6/92 through 8/31/92

9/4/92 through 9/30/93

11/7/94 through 12/11/94

11/1/95 through 9/31/98

5. Grievant's state tenure was calculated by DOP as follows:

Employed by Fairmont State College from 7/5/78 until she resigned on 1/31/80

Beginning on 10/28/80, became a nine-month employee of Fairmont State College

Grievant was injured on the job on 5/7/81, while employed at Fairmont State College

Because she was a nine-month employee, Grievant received tenure credit through the end of her contract term on 5/16/81, although she was off on Workers' Compensation

Returned to work at Fairmont State College on 8/23/81, and again went on Workers' Compensation, receiving benefits from 9/2/81 through 10/19/81 (See footnote 1)

Returned to Fairmont State College, working from 10/20/81 until her resignation on 11/3/81

Grievant began employment with the Harrison County Health Department on 4/6/92, and was injured again on 8/31/92

Grievant was granted tenure credit from 9/4/92 through 9/30/93, because she was awarded temporary total disability benefits for that time period

She was also granted temporary total disability benefits for 11/7/94 through 12/11/94

Grievant's position with the Harrison County Health Department was terminated on July 3, 1995

Grievant began employment with MCHD as a 90-day exempt employee on 7/19/95; she then became a permanent employee, hired from a register, on 11/1/95

6. An order of the Workers' Compensation Office of Judges dated February 22, 1996, states that Grievant received temporary total disability benefits for the additional periods of September 1, 1992, through September 3, 1992; from October 1, 1993, through October 4, 1993; and her final period of temporary total disability ended on December 12, 1994 (not December 11, 1994, as reflected on her tenure chart). 7. The time periods set forth in the preceding finding of fact represent eight additional days during which Grievant received Workers' Compensation benefits, but did not receive tenure credit.

8. The next most senior employee in the home health aide job classification was Kathleen Oiler, who had 2646 days of total seniority, 166 more days than Grievant.

Discussion

In a non-disciplinary matter, Grievant must prove the allegations of her complaint by a preponderance of the evidence. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996). Grievant contends that she should not have been laid off, because she is entitled to credit for over 200 additional days of work. She argues that there have been various miscalculations and errors in determining her tenure credit with the state, which will be discussed below. With the additional credit to which Grievant believes she is entitled, Grievant would be the more senior employee in her classification and would not have been subject to layoff. MCHD and DOP maintain that Grievant has been given credit for every single day of employment to which she is entitled, and that her layoff was proper.

Layoffs of classified state employees are governed by the provisions of DOP's Administrative Rule, Section 12.4, which provides that permanent employees are to be laid off based upon “tenure as a permanent employee of a state agency or in the classified service regardless of job class or title.” Grievant does not contest the implementation of a layoff in and of itself, but argues that, if her seniority had been properly calculated, Ms.Oiler would have been determined to be the less senior employee and, therefore, subject to the layoff.

The first error cited by Grievant concerns her seniority while a nine-month employee at Fairmont State College in 1980 and 1981. She contends that, because she was a nine- month employee and began her employment on October 28, 1980, her employment term continued through the end of July, 1981. She does not understand how DOP determined that, once she suffered her on-the-job injury, she was entitled to seniority credit only through May 16, 1981, the end of the school year.

It is well-established in education law that nine-month employees of higher education institutions are employed for a contract term that coincides with the school year, usually from August through May. They have no expectation of summer employment, and are considered to be employed only for the nine-month school year. See Houston v. Bd. of Trustees, Docket No. 92-BOT-500 (Jan. 28, 1998). As explained by Mr. Dotson, DOP had no authority to give Grievant tenure credit beyond her contract term ending in May, because she was not considered to be employed by Fairmont State

College after that time. It is unfortunate that Grievant has misunderstood the meaning of “nine-month employment,” but she has not established any legal entitlement to tenure credit during the summer of 1981.

Grievant's chief argument surrounds the lengthy gap in her seniority credit between October of 1993 and November of 1994. The evidence in this case is less than enlightening regarding Grievant's employment status during this time period. She had been injured in August 31, 1992, while employed by the Harrison County HealthDepartment (HCHD), and then received Workers' Compensation benefits from August 31, 1992, through October 4, 1993. DOP has given her credit for the period during which she received temporary total disability benefits (with the exception of the first few days of October, as discussed in Findings of Fact 6 and 7, above). However, between October of 1993 and November of 1994, Grievant was not working and was not receiving benefits of any kind. She contends that she was on a “leave of absence” from HCHD during this time, although there is no evidence in the record to support this allegation.

Section 12.4(f) of DOP's Administrative Rule states that, when tenure as a permanent state employee is calculated, “[t]ime spent on leave without pay . . . shall not be counted.” Further, Section 12.6 of the Rule provides that “[n]o tenure credit accrues for periods during which an employee is not paid a wage or salary unless . . . [the employee] is paid temporary total disability [benefits].” Accordingly, if Grievant's contention is accepted, while she was on unpaid leave of absence from HCHD, she was not entitled to seniority credit. Since she also was not receiving temporary total disability benefits, she has not established entitlement to seniority credit for this time period.

Grievant also argues that, because she is currently attempting to obtain Workers' Compensation benefits for this period, she should be given seniority credit. Grievant introduced documents from her physician and attorney in order to show her entitlement to further temporary total disability benefits. However, the undersigned is not a Workers' Compensation Administrative Law Judge and is without authority or jurisdiction to make a determination regarding Grievant's entitlement to these benefits. Any such determination in this regard by the Grievance Board would be purely speculative in nature and beyondthe undersigned's authority. Grievant has provided no basis for entitlement to seniority credit between October of 1993 and November of 1994.

Grievant further contends that she attempted to return to work at HCHD in June of 1994, but that HCHD would not allow her to return. However, aside from her own testimony, Grievant has

introduced no evidence to support this allegation. Without supporting information explaining why HCHD may have refused to allow Grievant to return to work, she cannot maintain her burden of proving entitlement to tenure credit during this time.

Finally, Grievant alleges that she is entitled to additional tenure credit during her initial employment with MCHD. She introduced a form she signed upon her hiring on July 18, 1995, entitled “Exempt/Temporary Employment Appointments.” The types of appointments covered by the form are listed at the top, and include 90 and 30-day appointments, intermittent appointments, temporary appointments, and student appointments. Grievant contends that, because none of the categories were checked on the form she signed, MCHD cannot now contend that she was a 90-day exempt employee and not entitled to seniority credit during this time.

The WV-11 Personnel Action Form, which is required for all personnel actions involving classified employees, reflects that Grievant began employment on July 19, 1995, as a 90-day exempt employee. Grievant claims she had no knowledge of her status as a 90-day employee. However, the appointment form she signed states that, regardless of which type of employment category is checked, the employee is accepting specific terms of employment, including temporary employment for only the term specified, no eligibilityfor retirement, leave, or insurance, and no status as a permanent employee. Again, it is unfortunate that Grievant did not understand the nature of her appointment, but she willingly signed the appointment form designating her employment as temporary, and DOP's records establish that she was, indeed, a 90-day exempt employee. Further, Section 12.4(f) specifies that tenure is calculated based upon employment as a “permanent employee.” Accordingly, DOP properly excluded Grievant's employment as a 90-day employee from her seniority calculation, and began her tenure credit on November 1, 1995, when she was hired from a register as a permanent employee of MCHD. Grievant's seniority while employed by MCHD has been properly calculated.

Finally, Grievant has alleged that Ms. Oiler's tenure calculation is erroneous. She claims that she believed that Ms. Oiler's initial state employment was part-time, entitling her to no seniority credit. She also alleges that Ms. Oiler did not attain status as a five-year state employee until eight months before Grievant did, also lending support to her contention that Ms. Oiler could not possibly have 166 days more of seniority than her. Grievant has introduced no evidence to support these contentions, which she admits are based only upon what she has “heard” from unidentified parties. These

contentions have no foundation and are insufficient to meet Grievant's burden of proof. She has not established that Ms. Oiler's seniority was improperly calculated.

As set forth in the findings of fact above, Grievant has established that there are a few periods of time during which she is entitled to additional credit for state employment. Mr. Dotson admitted that Grievant should have received credit for working at Fairmont State College from August 23, 1981, through September 2, 1981, an additional ten daysof credit. Also, she is entitled to eight additional days during which she received temporary total disability benefits. Therefore, Grievant is entitled to a total of eighteen additional days of tenure credit, which falls far short of placing her above Ms. Oiler in total seniority with the state. Accordingly, Grievant has failed to establish that she was more senior than Ms. Oiler, and that her layoff was, consequently, improper.

In accordance with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary matter, Grievant must prove the allegations of her complaint by a preponderance of the evidence. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996).

2. Permanent state employees are to be laid off according to seniority, which is based upon "tenure as a permanent employee of a state agency or in the classified service regardless of job class or title." Division of Personnel Administrative Rule, Section 12.4(f).

3. "[N]o tenure credit accrues for periods during which an employee is not paid a wage or salary unless . . . [the employee] is paid temporary total disability [benefits]." Division of Personnel Administrative Rule, Section 12.6.

4. Grievant proved by a preponderance of the evidence that she is entitled to eighteen additional days of seniority as a state employee. 5. Grievant failed to prove by a preponderance of the evidence that she was more senior than the other employee in her job classification or that her layoff was improper.

Accordingly, this 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, and 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 § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: April 7, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant had not been given credit for working from 8/23/81 through 9/2/81. Perry Dotson testified at level four that Grievant should be given credit for an additional 10 days of employment during this time period.