KIMBERLY SIMONS,

Grievant,

v. **Docket No. 98-DOH-137**

WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION/DIVISION
OF HIGHWAYS and DIVISION
OF PERSONNEL,

Respondents.

DECISION

Kimberly Simons (Grievant) initiated this grievance on September 27, 1996, alleging that Respondent Division of Highways (DOH) wrongfully denied her tenure credit during a medical leave of absence. She seeks to receive tenure credit for the time period she was on leave, “to raise [her] pay up with that of other employees” and to be reimbursed for lost overtime hours. Grievant's immediate supervisor denied the grievance at level one on October 1, 1996. The grievance was denied at level two on October 4, 1996. Grievant appealed to level three on October 11, 1996, and a level three hearing was held on November 19, 1997. (See footnote 1) A level three decision, denying the grievance, was issued on April 17, 1998. Grievant appealed to level four on April 27, 1998, at which time the parties agreed to submit this grievance for a decision based upon the lower level record. On July 24,1998, this matter was remanded to level three, pursuant to a joint request of the parties, for further development of the record at that level. An additional level three hearing washeld, but after a timely decision was not rendered at level three after remand, Grievant again appealed to level four on July 29, 1999. The parties once again agreed to submit this matter on the lower level record, supplemented by proposed findings of fact and conclusions of law, which were submitted by October 15, 1999. (See footnote 2) In order to expedite the level four decision, this grievance was reassigned to the undersigned administrative law judge on November 19, 1999.

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

Findings of Fact

1. Grievant is employed by the Division of Highways (DOH) as an Equipment Operator III.

2. Grievant suffered a work-related injury in 1984, and was granted a medical leave of absence from her employment from September 23, 1984, through April 30, 1986. During this time she received Workers' Compensation benefits.

3. Since 1995, Grievant's supervisor has refused to give her tenure credit for the time period of her leave of absence for purposes of awarding overtime and other seniority-related benefits. (See footnote 3)

Discussion

In a non-disciplinary matter, a grievant must prove the allegations in her complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). The parties do not dispute that Grievant was on an approved medical leave of absence due to a work related injury for the entire period of September 24, 1984, through April 30, 1986. Rather, the underlying dispute in this grievance surrounds the issue of whether an employee who is off work on a medical leave of absence, due to a compensable work-related injury, receives seniority or tenure credit for purposes of overtime, promotions, raises, and other tenure-related benefits. (See footnote 4)

Grievant contends that DOH's refusal to consider her time on leave of absence as part of her total tenure of employment violates the anti-discrimination provision of the Workers' Compensation statute, (See footnote 5) which states that "[n]o employer shall discriminate in any manner against any of his present or former employees because of such . . . employee's receipt of or attempt to receive benefits under this chapter." W. Va. Code § 23-5A-1 (1978). The West Virginia Supreme Court of Appeals has held that, in order to make a prima facie case of discrimination under this section, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against theemployee. Syl. Pt. 1, Powell v. Wyoming Cablevision, Inc., 184 W.Va. 700, 403 S.E.2d 717 (1991); Sizemore v. Peabody Coal Co., 188 W.Va. 725, 426 S.E.2d 517 (1992); St. Peter v. AMPAK-

Division of Gatewood Prods., Inc., 199 W.Va. 365, 484 S.E.2d 481 (1997); Rollins v. Mason County Bd. of Educ., 200 W.Va. 386, 489 S.E.2d 768 (1997). Once a prima facie case has been made, the burden is then upon the employer to show a "legitimate, nonpretextual, and nonretaliatory reason" for its actions. Powell, supra,184 W. Va. at 705.

Respondents contend that the practice of denying tenure credit under these circumstances is mandated by the Division of Personnel's (DOP) “Workers' Compensation/Sick Leave Policy,” effective May 1, 1993, which requires employees receiving temporary total disability Workers' Compensation benefits to take a medical leave of absence, and during such an absence “an employee will not accrue service tenure.” However, Grievant has pointed out that this policy did not exist at the time she was on leave of absence, so she argues that it should not be used against her.

Similar issues were recently addressed by this Grievance Board in Lohr v. W. Va. Div. of Corrections, Docket No. 99-CORR-191 (Aug. 31, 1999). Lohr, supra, partially overruled a prior decision in McCauley v. W. Va. Div. of Corrections, Docket No. 97- CORR-354 (Mar. 5, 1999), which held that it was a discriminatory practice, in violation of W. Va. Code § 23-5A-1, for an employer to deny an employee seniority credit while on leave of absence due to a work-related injury. In Lohr,supra, it was noted that the administrative law judge in McCauley, supra, had failed to consider DOP's “Workers' Compensation/Sick Leave Policy.” Therefore, the administrative law judge in Lohr, supra,found that, pursuant to the policy, “employees receiving [temporary total disability] benefits [are] in exactly the same circumstances as every other employee who is absent from work for medical reasons.” Accordingly, no discrimination under W. Va. Code § 23- 5A-1 had occurred.

The instant case presents a situation that, although similar, involves a factual “twist” which was not present in Lohr or McCauley, supra, in that Grievant's leave of absence occurred prior to the existence of the DOP policy. Grievant argues that, just as statutes which affect substantive rights or liabilities are not to be retroactively applied, a policy depriving her of seniority benefits should likewise not be retroactively applied. See Public Citizen, Inc., v. First National Bank in Fairmont, 198 W. Va. 329, 480 S.E.2d 538 (1996); Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980); W. Va. Code § 2-2-10(bb) (1989).

Unfortunately, the record contains little evidence regarding what policies, rules or regulations existed at the time of Grievant's leave of absence. The only material produced by Grievant in this regard was DOH's Administrative Operating Procedures, Chapter 9, “Attendance, Leave and

Overtime Regulations," Section 13.07(c), which states that an employee is to be reinstated to his or her former position at the end of a leave of absence without pay "without loss of rights." Grievant contends that this language refers specifically to seniority rights; however, she produced no witness or DOH official to support this allegation. Accordingly, she has not established a violation of this regulation.

Although Grievant's point may be well taken that the DOP policy should not be retroactively used against her, she has nevertheless failed to meet her burden ofestablishing a prima facie case of discrimination under W. Va. Code § 23-5A-1. Specifically, the evidence in this case does not establish that discrimination actually occurred, nor that Grievant's receipt of Workers' Compensation benefits was related in any way to DOH's decision to deprive her of tenure credit during a medical leave of absence. As was the case in Lohr, supra, in this case it is unknown whether or not Grievant has been placed in exactly the same position as any other DOH employee who took an unpaid leave of absence between 1984 and 1986. In order to establish discrimination, Grievant would need to provide evidence that she was treated differently from other employees who took leaves of absence, but who were not receiving Workers' Compensation benefits. This is not a case where the employer has admitted, as in McCauley, supra, that the employee who was off work due to a compensable injury was deprived of benefits that were granted to other employees. Grievant bears the burden of proving her claim by a preponderance of the evidence, and she has failed to prove that she was the victim of discrimination as a result of her receipt of Workers' Compensation benefits.

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

Conclusions of Law

1. In a non-disciplinary matter, a grievant must prove the allegations in her complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. The West Virginia Workers' Compensation statute provides that "[n]oemployer shall discriminate in any manner against any of his present or former employees because of such . . . employee's receipt of or attempt to receive benefits under this chapter." W. Va. Code § 23-5A-1 (1978).

3. In order to make a prima facie case of discrimination under this section, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee. Syl. Pt. 1, Powell v. Wyoming Cablevision, Inc., 184 W.Va. 700, 403 S.E.2d 717 (1991); Sizemore v. Peabody Coal Co., 188 W.Va. 725, 426 S.E.2d 517 (1992); St. Peter v. AMPAK-Division of Gatewood Prods., Inc., 199 W.Va. 365, 484 S.E.2d 481 (1997); Rollins v. Mason County Bd. of Educ., 200 W.Va. 386, 489 S.E.2d 768 (1997).

4. Grievant has failed to make a prima facie case of discrimination under W. Va. Code § 23-5A-1.

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 andshould 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: December 17, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The record does not explain the lengthy delay between the level three appeal and the scheduling of the level three hearing.

Footnote: 2

Grievant was represented by counsel, William Garrett; the Division of Highways was represented by counsel, Krista Duncan; and the Division of Personnel was represented by counsel, Donald Darling.

Footnote: 3

Grievant testified that she believed her previous supervisor gave her tenure credit for the time period she was on her leave of absence.

Footnote: 4

Grievant has not raised the issue of annual increment pay, so it is assumed that Grievant believes her tenure for increment pay purposes has been properly calculated.

Footnote: 5

Grievant has not alleged discrimination under W. Va. Code § 29-6A-2(d).