RAYMOND CANFIELD, et al.,

Grievants,

v. **Docket No. 02-CORR-269**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL
CENTER,

Respondent.

DECISION

Raymond Canfield, Gary Roy, and Richard Teter ("Grievants") initiated separate grievances in July of 2002, alleging entitlement to restoration of leave, holiday pay, increment pay, and seniority credit which they did not earn while off work and receiving Workers' Compensation benefits. The grievances were denied at level one, then consolidated and denied at level two on July 31, 2002. A level three hearing was held on August 9, 2002, followed by a written decision denying the grievance dated August 12, 2002. Grievants appealed to level four separately on August 29, 2002, where they were consolidated by Order dated September 17, 2002. A hearing was held in the Grievance Board's office in Elkins, West Virginia, on January 10 and February 21, 2003. Grievants represented themselves, and Respondent was represented by Charles Houdyschell Jr., Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on March 11, 2003.

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

Findings of Fact

1. Grievants are employed by Huttonsville Correctional Center ("HCC"). Each suffered a work-related injury which caused him to be absent from work temporarily.

2. Grievant Roy's injury occurred in 1997, and Grievants Canfield and Teter suffered injuries

which occurred in 2001.

3. Each Grievant initialy drew sick leave until he began to receive temporary total disability benefits. Once the Workers' Compensation benefits began, Grievants “bought back” their sick leave, meaning that they reimbursed their employer the amount of pay they received while on sick leave due to their injuries, and that sick leave time was restored to them.

4. While receiving Workers' Compensation benefits, Grievants did not accrue sick leave, annual leave, or seniority time. They did continue to accrue time credit for annual increment pay.

5. Brian Simmons, Charles Collett, and John Miller are also HCC employees who suffered on-the-job injuries in 1992, 1999, and 1992, respectively. Due to an error in the payroll office, these employees continued to accrue leave time and seniority credit during the time they were receiving Workers' Compensation benefits. As a result of the instant grievance, HCC officials have corrected the seniority time for these employees, deducting the time period they were on Workers' Compensation. HCC officials have not deducted the applicable amount of sick and annual leave from these employees' records, because it could result in them losing all their leave time.

Discussion

As 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 theW. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

Grievants contend that they have been deprived of benefits to which they were entitled, in violation of W. Va. Code § 23-5A-1, which prohibits employers from discriminating against employees because of their receipt of or attempt to receive Workers' Compensation benefits. They also contend that, although DOC claims to be correcting the “mistake” it made in allowing other employees to continue to accrue leave and seniority time, they have been subjected to discrimination because of this practice.

DOC's position is based upon the policies and administrative regulations of the Division of Personnel (“DOP”), which apply to all classified state employees. By administrative rule, 143 CSR 3 (2000), DOP has addressed employees' receipt of temporary total disability benefits in detail, providing that, once sick leave has been exhausted, employees may “buy back” that leave, (See

footnote 1) just as Grievants did. In addition, the rule specifically provides that an employee who elects to receive temporary total disability benefits must apply for a medical leave of absence without pay. These employees do continue to accrue credit for increment pay, but do not receive years of service credit, annual leave, or sick leave, in accordance with DOP's "Workers' Comp/Sick Leave Policy" (2000). This policy comports with DOP's Administrative Rule §§ 14.3 and 14.4, whichprovide that both annual leave and sick leave accrue at the end of each pay period and "cannot be accrued for hours not paid[.]"

Much of Grievants' argument is based upon a prior decision of this Grievance Board, McCauley v. West Virginia Division of Corrections, 97-CORR-354 (March 5, 1999), in which it was held that to allow employees to accrue seniority while receiving sick leave, yet not allow the same for employees who are on Workers' Compensation, was discriminatory in violation of W. Va. Code § 23-5A-1. However, as Grievants are aware, the McCauley decision was expressly overruled in the subsequent decision of Lohr v. West Virginia Division of Corrections, Docket No. 99-CORR-191 (Aug. 31, 1999). The pertinent portion of that decision states:

> Unfortunately, the McCauley decision did not include consideration of [DOP's policy], which requires an employee electing to receive TTD benefits to request a Medical Leave of Absence Without Pay. This important factor places employees receiving TTD benefits in exactly the same circumstances as every other employee who is absent from work for medical reasons, and is off the payroll. As stated in the policy, employees on a medical leave of absence without pay experience a break in their employment, during which time they do not accrue leave and seniority, and do not receive holiday pay. Under these circumstances, employees receiving TTD benefits are not subject to discrimination . . . . Because the [DOP] policy is a controlling factor in these matters, but was not considered, it is concluded that McCauley was clearly wrongly decided, and it is therefore overruled.

As Grievants have correctly noted, Kanawha County Circuit Judge Stucky was not persuaded by the reasoning in Lohr when he upheld the Grievance Board's prior decision in McCauley. W. Va. Division of Corrections v. McCauley, Civil Action No. 99-AA-72 (Circuit Court of Kanawha County, Apr. 17, 2000). He reasoned that, because the employee would have continued to accrue annual leave, sick leave, and seniority time if he utilized sick leave instead of temporary total disability benefits, he was beingdiscriminated against for electing to receive Workers' Compensation, in violation of West Virginia Code § 23-5A-1.

As a general rule, this Grievance Board adheres to the doctrine of *stare decisis* in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & Human Resources, Docket No. 92-

HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. Shaffer v. Kanawha County Bd. of Educ., Docket No. 00-20- 085 (June 12, 2000); Belcher v. W. Va. Dep't of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995). A decision from a circuit court reversing a Grievance Board decision, while instructive, does not mandate that the circuit court's reasoning be followed by the Grievance Board in future cases dealing with the same issue. See Lane v. Raleigh County Bd. of Educ., Docket No. 02-41-176 (Aug. 29, 2002).

Reviewing the reasoning set forth in Lohr, supra, the undersigned is not persuaded that the decision in that case is legally incorrect. The circuit court opinion in McCauley neither discusses nor addresses the reasoning set forth in Lohr regarding the status of employees receiving Workers' Compensation vis-a-vis all other employees who are in a non-paid status due to a medical leave of absence. Accordingly, the circuit court's reversalof McCauley does not present a reasoned determination sufficient to overrule the Grievance Board's decision in Lohr, finding that employees receiving temporary total disability benefits are not victims of discrimination, because they are treated equally to all other employees on leave of absence.

Grievants further contend that, because three other employees at HCC were allowed to continue to accrue seniority credit, annual leave and sick leave while receiving temporary total disability benefits, DOC has engaged in discrimination in violation of West Virginia Code § 29-6A-2(d). That statute defines “discrimination” as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a *prima facie* case of discrimination, Grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their employer in a manner that

the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once Grievants establish a *prima facie* case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). While DOC has conceded that its prior granting of leave and seniority credit was a mistake, such an error does not necessarily constitute discrimination, Ritchie v. W. Va. Div. of Corrections/Huttonsville Correctional Center, Docket No. 98-CORR-105 (Nov. 30, 1998); Ritchie v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-181 (May 30, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996), nor is DOC obliged to commit further mistakes with Grievants . See Akers v. W. Va. Dep't of Tax and Revenue, 194 W. Va. 956, 460 S.E.2d 702 (1995). Mistakes by employers do not usually entitle a grievant to relief. White v. Div. of Highways, 00-DOH- 313D (Jan. 17, 2001); Crosston v. W. Va. Div. Highways, Docket No. 96-DOH-503 (Oct. 31, 1997). Specifically, it is not discriminatory for an employer to refuse to grant a benefit to an employee that was granted to another in error. White, *supra*. The Grievance Board has consistently refused to grant the type of relief Grievants seek because of a mistake or a violation of a policy, because such actions constitute ultra vires acts, and because two wrongs do not make a right. See Guthrie v. W.Va. Dep't of Health and Human Resources Docket No. 95-HHR-277 (Jan. 31, 1996); Earnest and Hatfield v. Southern W.Va. Community College, Docket Nos. 91-BOD-352/290 (Sept. 30, 1992), rev'd, Circuit Court of Kanawha County, Civil Action No. 92-AA-296 (Apr. 23, 1993); Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec 18, 1989). See also Roberts v. W.Va. Dep't of Transp., Docket No. 96-DOH-017 (May 2, 1996), aff'd, Circuit Court of Kanawha County, Civil Action No. 96-AA-72 (May 25, 1997); Gilliam v. W.Va. Dep't of Transp., Docket No. 96-DOH-511 (Apr. 24, 1997).

Accordingly, Grievants have not established entitlement to the relief requested. The following conclusions of law support the decision reached.

Conclusions of Law

1. In non-disciplinary matters, 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 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. W. Va. Code § 23-5A-1 prohibits employers from discriminating against employees because of their receipt of or attempt to receive Workers' Compensation benefits.

3. A state employee who suffers an on-the-job injury and elects to receive Workers' Compensation benefits rather than using sick leave is placed in a medical leave of absence without pay, experiencing a break in employment, and does not accrue annual leave, sick leave, or seniority time credit. West Virginia Division of Personnel Workers' Compensation Temporary Total Disability Rule, 143 CSR 3 (2000); West Virginia Division of Personnel "Workers' Comp/Sick Leave Policy;" Lohr v. W. Va. Division of Corrections, Docket No. 99-CORR-191 (Aug. 31, 1999).

4. Mistakes by employers do not usually entitle a grievant to relief. White v. Div. of Highways, 00-DOH-313D (Jan. 17, 2001); Crosston v. W. Va. Div. Highways, Docket No. 96-DOH-503 (Oct. 31, 1997). Specifically, it is not discriminatory for an employer to refuse to grant a benefit to an employee that was granted to another in error. White, *supra*.

5. Grievants have failed to prove by a preponderance of the evidence that they are entitled to credit for sick leave, annual leave, and seniority time while off work and receiving Workers' Compensation benefits.

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 18, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The so-called "buy back" option comports with W. Va. Code § 23-4-1, which is designed to prevent employees from receiving both sick leave pay and temporary total disability benefits for the same time period.