DONALD HIGGINS,

Grievant,

v. **Docket No. 03-CORR-295**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL
CENTER and DIVISION OF PERSONNEL,

Respondents.

DECISION

On June 4, 2003, Donald Higgins ("Grievant") filed a grievance alleging he had been discriminated against by his employer, the Division of Corrections ("DOC"), because he was not allowed to accrue leave, seniority, and holiday pay while he was off work due to a job-related injury. On September 22, 2003, Grievant filed a default notice with this Grievance Board, alleging a default occurred at level three. A hearing was held on October 15, 2003, regarding the default issue. By Order dated October 31, 2003, the undersigned concluded that a default had occurred, and directed that this matter proceed to a hearing regarding whether the requested remedy is contrary to law or clearly wrong. A telephone conference was conducted on November 15, 2003, at which time the parties agreed that a hearing would be not necessary, the parties agreeing to the pertinent facts of the underlying grievance. Grievant was represented by Jack Ferrell, CWA representative, and the Division of Corrections was represented by Assistant Attorney General Charles Houdyschell, Jr. This matter became mature for consideration upon receipt of the parties' written arguments on December 16, 2003.

The following findings of fact contain the undisputed facts giving rise to thisgrievance.

Findings of Fact

1. On an unspecified date, Grievant suffered an on-the-job injury in the course of his employment as a correctional officer for DOC.

2. Grievant received Workers' Compensation temporary total disability benefits while he was off work due to this injury.

3. Grievant did not accrue leave time or seniority credit for the period of time that he was off work and receiving temporary total disability benefits. He also was not paid for holidays which occurred during that time period.

Discussion

When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed that the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3. The burden of proof is on Respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong. This standard requires Respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

Respondent contends that Grievant's requested remedy of granting him credit for leave, seniority time, and holiday pay while on Workers' Compensation would be contrary to law, as it has been interpreted by this Grievance Board. Indeed, this Grievance Board has held in Lohr v. West Virginia Division of Corrections, Docket No. 99-CORRR-191 (Aug. 31, 1999) that, because employees who are off work and receiving Workers'Compensation are placed on a medical leave of absence, they experience a break in their employment, during which time they do not accrue leave and seniority, and do not receive holiday pay. This holding was based, in part, upon the provisions of the Division of Personnel's (DOP) policy regarding Workers' Compensation/Sick Leave, which sets forth the requirement that employees who elect to receive temporary total disability benefits must request a medical leave of absence without pay. Lohr, supra, overruled a previous ruling in the case of McCauley v. Division of Corrections, Docket No. 97-CORR-354 (Mar. 5, 1999), which found DOC's practice to be discriminatory, but had failed to give consideration to the DOP policy, which effectively places all employees on medical leave of absence in the exact same position regarding accrual of leave and seniority.

In the instant case Grievant argues, as did the grievants in McCauley, supra, and Lohr, supra, that Respondent's practice and DOP's policy violate the provisions of W. Va. Code § 23-5A-1, which prohibits discrimination “in any manner against . . . employees because of [their] receipt of or attempt to receive [Workers' Compensation] benefits.” Despite the holding in Lohr, supra, which notes that employees receiving Workers' Compensation benefits are treated like all other employees on a medical leave of absence, Grievant continues to argue that this practice is discriminatory. Discrimination is defined in W. Va. Code § 29-6A-2(d) 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.” This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code §§ 29-6A-2(d), must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one ormore other employee(s);

(b) that he has, to his detriment, been treated by his 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 grievant and/or the other employee(s) and were not agreed to by the grievant 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 the grievant establishes 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).

As observed in Lohr, supra, the requirement that they be placed in a medical leave of absence places employees receiving Workers' Compensation benefits in exactly the same circumstances as every other employee who is absent from work for medical reasons, and is off the payroll. Therefore, such employees are not “similarly situated” to employees who are not on a medical leave of absence. Accordingly, Grievant cannot establish a prima facie case of discrimination under these circumstances.

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 thediscretion 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). As recently discussed in Canfield v. Division of Corrections, Docket No. 02-CORR- 269 (Apr. 18, 2003), the undersigned is not persuaded that Lohr, supra, is legally incorrect, and Grievant has failed to provide sufficient justification for overruling it.

In Harmon v. Fayette County Board of Education, 205 W.Va. 125, 516 S.E.2d 748 (1999), the West Virginia Supreme Court of Appeals addressed the issue of granting the remedy requested after a finding of default. In that case, an attendance director and his assistant sought payment of an annual salary supplement. A default issue was raised and granted by this Grievance Board. In affirming the Grievance Board's ruling on the default issue, the Court concluded it would be contrary to law to grant the relief grievants requested, because the statutory supplement was intended only for employees classified as “classroom teachers.” Grievants were not classified as classroom teachers, and were not entitled to that classification due to the default. Likewise, in the instant case, it would be contrary to law to award Grievant pay and benefits to which he is not entitled under applicable state personnel rule and policy.

The following conclusions of law support the decision reached.

Conclusions of Law

1. When determining whether the remedy requested is contrary to law or clearlywrong, it is presumed that the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3.

2. The burden of proof is on Respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong, which requires Respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to

prove the matter beyond a reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

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

4. 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, supra.

5. Respondent has proven by clear and convincing evidence that granting Grievant's requested relief would be contrary to law and clearly wrong.

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 grievanceoccurred, 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: January 21, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge