SAM HENRY,

Grievant,

v. **DOCKET NO. 04-DOH-228**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant filed this grievance against Respondent on December 8, 2003, stating: “Once transferring from Juvenile Services to DOT October 1-2003, I was told I would only receive 10 hrs per mo. annual leave, [not] the 12 hrs per mo. I was receiving for more than the past year before transferring.” Grievant stated the relief sought as: “Continue to receive 12 hrs per mo annual leave beginning October 1-2003.”

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on August 20, 2004 and February 4, 2005. Grievant appeared in person and was unrepresented, and Respondent was represented by counsel, Barbara Baxter. This matter became mature for decision at the close of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant has been employed by Respondent as an Equipment Operator 2. since October 1, 2003. 2. Prior to his employment with Respondent, Grievant was employed by the West Virginia Division of Juvenile Services (DJS), from July 17, 2000 to October 1, 2003. Prior to that, he was

employed in the State Treasurer's office, from October 8, 1998 to February 28, 1999.

3. When Grievant transferred, he was informed his annual and sick leave balances would transfer. Grievant's 34 hours of annual leave and 90 hours of sick leave were transferred. Grievant was not given any other promises relating to these benefits. Specifically, he was not told he would continue to accrue leave at the same rate he did when he worked for DJS. Level three Grievant's Exhibit No. 5.

4. Respondent was unable to verify Grievant's past state employment work history, so it based his annual leave accrual rate on the employment it could verify. This amount was different than that used by DJS, and resulted in a lower accrual rate. Grievant earned 12 hours per month of annual leave when he worked for DJS and now earns 10 hours per month. 5. Prior to his employment with DJS, Grievant was employed by the Private Industry Council of West Virginia (PIC), from November 30, 1994 to May, 1996. (See footnote 1) PIC ceased operations in June, 2000 and the West Virginia Development office, which administered that federal grant that funded the program Grievant ran for PIC, purged all its relevant records in 2002. While he worked for PIC, he was housed at the Department of Employment Programs' Parkersburg Job Service offices. At the time, Grievant was considered a contract worker for PIC and was not an employee of the State of West Virginia.

7. At some point in 2000, another former PIC employee filed a grievance or civil suit, the result of which was that all PIC employees were credited with state employment for the time they worked with PIC. However, 1995 was outside the statute of limitations for thataction, and Grievant was not reimbursed for his self-employment and social security taxes for that year like he was for subsequent years. Grievant's Exhibit No. 7.

6. Between day one and day two of the level four hearing, Grievant obtained documentation that verifies his employment with PIC during 1996 and part of 1997 was “state employment” for accrual purposes, and his leave accrual rate was changed to 12 hours per month, effective February 1, 1004, and he was credited with an additional 20 hours of leave balance. Now, all Grievant seeks is credit for 1995.

DISCUSSION

Since this grievance is not about discipline, Grievant must prove all of his claims by a

preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

In the level three decision, Respondent erroneously used the definition of “eligible employee” contained in W. Va. Code § 5-5-2 as the basis for determining Grievant was not a state employee when he worked for PIC, hence he was not eligible for a greater leave accrual rate. This Code definition is strictly limited to annual increment calculations, and has no bearing on the issue at hand. Instead, accrual of annual leave is controlled by the Division of Personnel's Administrative Rule.

> Personnel's Rules on the accrual of annual leave are found in § 14.3. An employee accrues annual leave at varying rates, depending upon her length of service. With regard to what service is included in this determination, Rule 14.3 provides:
>
> > (b) Service to Qualify - Qualifying service for length of service category is based on State employment or employment in the classified service. No service credit accrues for periods during which an employee is not paid a wage or salary unless otherwise provided by State or Federal statute.
>
> Personnel argued that Grievant's employment with Clay County was not "qualifying service." At first blush it would appear this is correct, because Grievant's service was not State employment or employment in the classified service. However, paragraph (a) states that, "[e]xcept as otherwise noted in this rule, each employee is eligible to accrue annual leave with pay and benefits." "Employee" is defined in Personnel's Rules at § 3.37 as, "[a]ny person who lawfully occupies a position in an agency and who is paid a wage or salary and who has not severed the employee-employer relationship." "Agency" is defined broadly in Rule 3.4 as, "[a]ny administrative department of state government or a political sub-division established by law or executive order." As previously noted, counties are political subdivisions of the state.

Childers v. Dep't of Tax and Revenue and Div. of Personnel, Docket No. 01-T&R-142 (July 17, 2002). This still leaves the question of whether Grievant's service with PIC was “qualifying service,” but gives us a different drift net with which to capture the relevant years.

On Grievant's application for his current position, he lists PIC as a “Non Profit Inc.” However, at some point in the past, another former PIC employee filed a grievance or civil suit, the result of which was that all PIC employees were credited with state employment for some unspecified period of time they worked for PIC. Grievant testified about documents he had that show he was considered a state employee, and provided some of these to Respondent after the first day of the level four hearing, but

never placed them in evidence. Nevertheless, Respondent accepted this documentation as proof that at least part of Grievant's PIC employment should be added to Grievant's length of qualifying service.

Unfortunately for Grievant, he bears the burden of proof in this matter and he has provided little substantive proof that he was a “qualified employee” for the year of 1995, while he worked for PIC. The best that can be said is that an inference could be made that, if part of his PIC employment should be counted, it all should be counted. However, this inference is fairly strong. In effect, the issue becomes self-proving. Respondent has offered nothing to rebut the presumption, or Grievant's testimony, that there was nothing inherently differentin his PIC employment that would distinguish the period that is considered qualifying and the period that is not.

Even with that inference, Grievant has provided no material proof of the dates of his employment with PIC. However, Respondent does not challenge Grievant's time of service, only the characterization of that service. It is undisputed that Grievant actually worked for PIC. As noted above, Grievant claims credit for all of 1995. His application lists employment dates with PIC from “03/95" to “06/99." A résumé he has on file with the Charleston job service lists dates of employment with PIC as January 1995 to January, 1997. Cecil Roberts, who apparently was in charge of the overall program, submitted a letter stating Grievant was employed from November 30, 1994 to May 1996 when the grant expired. (See footnote 2) Mr. Roberts stated any records he would have to refer to had been destroyed, though, so he is obviously relying only on his memory. An employee of the Job Service office where Grievant worked submitted a letter stating her general recollection was that Grievant worked there in 1995, but she was “unable to provide exact dates of employment.” She later submitted another letter stating she believed he started working there after Christmas, 1994. Grievant's application, from his own recent memory of his employment is deemed most reliable and also gives the benefit of the doubt to Respondent.

Grievant originally was a contract worker for PIC, and normally contract workers are not “state employees” and their service is not “qualifying service.” The determination DJS made is not definitive, because if it was mistaken, as Respondent contends, it need not be relied upon. A “previous [error] may not be used to require an agency to perpetuate the violation. *Singleton v. Dep't of Health and Human Res.*, Docket No. 95-HHR-490 (May 24, 1996).” *Cook v. Dep't of Health and Human Res.*, Docket No. 00-HHR-352 (June 29, 2001). Nonetheless, Grievant made reference to a court case or grievance that supposedly converted his PIC employment to state service on the grounds it should

have been so all along. In order for that outcome to have happened, a competent authority must have decided Grievant was not a contract worker, but that PIC was a state employer. He was able to provide documentation for part of that service, in the form of amended tax documents, and that documentation was enough to convince Respondent to credit him with qualifying service for the documented time. In doing so, it admits the validity of Grievant's assertion about the conversion. However, due only to a statute of limitations that ran in 2000, Grievant was unable to provide similar tax records for the 1995 tax year.

Since Respondent admits at least part of Grievant's PIC employment is “qualifying service,” and has failed to rebut Grievant's assertion that all his PIC service was equivalent, it must credit Grievant as having been employed in “qualifying service” for the entire time Grievant has proven he worked for PIC. There is no evidence to counter Grievant's sworn claim that he performed the same duties for the same entity the entire time he was working for PIC. The fact that he was able to gain reimbursement for erroneously-paid self- employment tax for 1995 does not change the nature of the work he performed that year or who he performed it for. If part of that time is considered qualifying service, then it should all be so characterized since there is nothing to distinguish it other than a date on a calendar and the passage of time.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. For purposes of annual leave accrual, “Qualifying service” is based on State employment or employment in the classified service. No service credit accrues for periods during which an employee is not paid a wage or salary unless otherwise provided by State or Federal statute. *See Childers v. Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 01-T&R-142 (July 17, 2002).

3. Grievant's employment with PIC in 1995 was “qualifying service.”

For the foregoing reasons, this grievance is hereby **GRANTED**. Respondent is **ORDERED** to credit Grievant with "qualified employment" from March, 1995 through December 1995.

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.

March 3, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant's application for employment submitted for his current job listed dates of employment with PIC as March, 1995 to June, 1999. This discrepancy remains unresolved.

Footnote: 2

See Grievant's Exhibit No. 4 at level three.