THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRENT D. GIBSON,

Grievant,

v. **Docket No. 2009-0773-DOC**

WEST VIRGINIA DIVISION
OF NATURAL RESOURCES,

Resources.

DECISION

Grievant Brent Gibson has been employed by the Division of Natural Resources ("DNR") for nine years and is assigned to Beech Fork State Park. For the last four years, he has been classified as a Building Maintenance Supervisor 1. On July 14, 2008, Grievant was injured in an automobile accident while he was on duty. As a result of his injuries, Grievant has been receiving Temporary Total Disability ("TTD") benefits through Workers Compensation. When he signed up for Workers Compensation benefits, he had two options: one that would allow him to exhaust his sick leave and annual leave before receiving benefits; or, one that would allow him to keep his accumulated leave and receive TTD benefits from the start. Grievant chose the later of the two. As the year reached an end, Grievant realized that he would lose some of his accumulated annual leave at the end of the year since he could not take the leave while receiving TTD benefits.

On or about November 19, 2008, Mr. Gibson filed a grievance alleging that by losing his annual leave he was being penalized for the accident that was not his fault. As relief, he asked that his annual leave be held for him until returns to work. On November 20,

2008, Frank Jezioro, DNR Director, issued a letter to Grievant stating that Jezioro did not have authority to resolve the grievance and waived the matter to level three.[1] A level three hearing was held in the Charleston office of the Public Employees Grievance Board on March 5, 2009. Grievant appeared in person and was represented by Fred Tucker with the WVSEU/UMWA.[2] Respondent was represented by William R. Valentino, Assistant Attorney General. The parties agreed to present post-hearing fact/law proposals which were received on April 8 and 9, 2009. The grievance became mature for decision on April 9, 2009.

Synopsis

Grievant was injured in an automobile accident while he was performing his duties for his employer, DNR. He applied for and received Workers Compensation TTD benefits while recovering from his injuries. Grievant avers that it is unfair for him to lose accrued annual leave that cannot be carried into the next employment year while he is off work. He seeks to require DNR to hold these accrued annual leave days until he returns to work. Respondent has followed all statutes, policies and rules related to the accrual of annual leave and Workers Compensation benefits. Grievant was unable to show that Respondent's actions were arbitrary or discriminatory. The grievance must be denied.

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[1] There is some question as to whether this was procedurally proper. However, the Grievant made no objection and the parties may bring a grievance directly to level three by *mutual agreement* pursuant to W. VA. CODE § 6C-2-4(a)(4). No party was prejudiced by hearing the matter first at level three, so there appeared to be no reason to remand the case for further proceedings at the lower levels. No one should assume from this decision that this procedure will be accepted in the future.

[2] West Virginia State Employee Union/United Mine Workers of America

The following findings of fact are based upon a thorough review of the record created in this grievance.

Findings of Fact

1. Grievant has been employed by DNR for nine years, the last four of which he has been classified as a Building Maintenance Supervisor 1. Grievant works at Beech Fork State Park, near Barboursville, West Virginia.

2. On July 14, 2008, Grievant was riding in an automobile driven by another DNR employee when they were involved in an automobile accident. Grievant and the other DNR employee were on duty and in the course of performing their jobs when the accident occurred.

3. Grievant sustained serious injury in the accident which has required him to have surgery performed to repair his shoulder and back. At the time of the level three hearing, Grievant was still unable to work and was awaiting additional back surgery.

4. Following the injury, Grievant applied for Workers Compensation and was approved for TTD benefits.

5. A state employee who is eligible for TTD benefits for an injury that occurred while he[3] was engaged in his state employment, may not receive sick or annual leave pay at the same time he receives TTD benefits. W. VA. CODE St. R. § 143 C.S.R. 3.3.1 (2007).

6. Before receiving TTD benefits a state employee must fill out an "Election of Options" form developed by the Division of Personnel ("DOP"). This form was developed

[3] Since Grievant is a male, all gender references in this decision will be male.

pursuant to authority set out in the DOP Legislative Rules. W. VA. CODE St. R. § 143 C.S.R. 3.3.1 (2007).

7. The employee has two options on the Election of Options form. The first option allows the employee to keep his accumulated sick and annual leave and receive only TTD benefits. The second option allows the employee to exhaust his accrued sick and annual leave before receiving TTD benefits. TTD benefits are only a portion of the employee's actual salary so there are reasons to pick one option over the other depending upon the employee's particular situation. After completing the form, the employee has thirty days to change his option, but he may only do so once.

8. On July 18, 2008, Grievant filled out and signed an Election of Options form. Grievant selected Option 1 which allowed him to receive TTD benefits as soon as they were approved but he could not use his accumulated sick or annual leave once TTD benefits were available. By selecting Option 1, Grievant was not required to exhaust his sick and annual leave, plus he continued to accrue annual leave while he was off work. Respondent's Exhibit 1.

9. Grievant did not change his election of Option 1 during the thirty days following his selection of that option.

10. The DOP Legislative Rule provides that state employees with the number of years of service held by Grievant, accumulate one and one half days of annual leave per month. Those employees are allowed to carry thirty days of annual leave forward into a new employment year. Any days over thirty days will be lost if not used. W. VA. CODE St. R. § 143 C.S.R. 1.14.3(a) (2007).

11. Near the first of November 2008, Grievant realized that he had more accrued annual leave days than he could carry forward into the next year. He was going to lose some of those days because he could not take annual leave while he was receiving TTD benefits.

12. In November, a co-worker asked Dee Twohig, the Payroll Administrator for DNR, if Grievant could switch to Option 2 so he could use his annual leave days and not lose them. Grievant could not switch options because more than thirty days had passed since he made his original selection.

13. On January 1, 2008, Grievant lost eighty and one half hours of accrued annual leave that he could not carry forward into the 2009 employment year.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

There is no dispute regarding the facts in this case. Grievant believes that DNR should hold his annual leave for him until he returns from his injuries. Grievant was unable to use the leave due to an accident which was not his fault. He asserts that DNR's unwillingness to preserve his annual leave is "arbitrary and discriminatory." Respondent seems sympathetic to the Grievant's plight, but claims they are constrained by the legislative rules related to annual leave and Worker's Compensation benefits. These rules

do not allow DNR to make an exception for Grievant to carry over annual leave into the new employment year.

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). All of Respondent's actions in this matter were in compliance with the DOP's Legislative Rules. While Grievant may find the rules to be unfair in this instance, Respondent must follow them[4] and is not acting arbitrarily by doing so.

Discrimination is defined in the grievance procedure as "any differences in the treatment of similarly situated employees, unless such differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he has been treated differently from one or more similarly-situated employee(s);

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[4] "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977)." *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999).

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 221 W. Va. 306, 655 S.E.2d 52 (2007);[5] *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

All state employees who become eligible for TTD benefits must fill out an Election of Options form. All employees who select Option 1 are allowed to keep their accrued annual and sick leave benefits while receiving TTD benefits. There was no evidence presented that other employees in Grievant's situation were able to carry more annual leave from one year to the next than is allowed by the WEST VIRGINIA CODE OF STATE RULES § 143 C.S.R. 1.14.3(a) (2007). Grievant has failed to prove that he is being treated differently than any other similarly-situated employee and his discrimination claim must be denied.

This is a difficult situation because Grievant did not know the full extent of his injury when he completed his Election of Options form. Had he known that he would not be able to return to work prior to the end of the year, he may have selected to exhaust all of his sick and annual leave under Option 2 instead of losing some of his accrued leave when the year ended. However, he will still have the majority of his leave when he does return and he continues to accrue annual leave while he is receiving TTD benefits. Regardless of

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[5] *Frymier, supra,* was decided utilizing the definition of discrimination found in the old grievance statutes, W. VA. CODE §§ 18-29-2(m) and 29-6A-2(d). However, the definition of "discrimination" in the new grievance statute is virtually identical to the definitions found in the old grievance statutes. W. VA. CODE § 6C-2-2(d). Therefore, *Frymier* remains controlling on this issue.

whether the selection of Option 1 turns out to be the best choice for Grievant, DNR is powerless to provide the remedy he seeks and the grievance must be denied.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985).

3. Grievant failed to prove that Respondent's action were arbitrary or capricious.

4. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 221 W. Va. 306, 655 S.E.2d 52 (2007).

5. Grievant did not prove that any similarly-situated employee was treated differently than he was and his discrimination claim must fail.

Accordingly the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: APRIL 23, 2009

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE