JAMES R. COGAR

v. Docket No. 95-HHR-207

DEPARTMENT OF HEALTH AND HUMAN RESOURCES

DECISION

___Grievant, James R. Cogar, employed by the Department of Health and Human Resources (DHHR) as a Health Service Assistant at the William R. Sharpe Jr. Hospital, appealed the termination of his employment directly to level four on May 24, 1995. An evidentiary hearing was conducted on September 25, 1995, and the matter became mature for decision on December 18, 1995, the deadline for filing proposed findings of fact and conclusions of law.

The facts of this matter are not in dispute.

1. Grievant suffered hip and back injuries on May 11, 1990, while providing direct care to a combative patient.

2. Grievant was reinjured on July 24, 1990, but continued to work through August 11, 1990.

3. Grievant began receiving temporary total disability benefits from Workers' Compensation, effective August 12, 1990.

4. On August 29, 1990, Grievant began a medical leave withoutpay.

5. On February 29, 1991, Grievant began a personal leave, without pay, for medical reasons.

6. Effective October 29, 1991, the temporary total disability benefits ceased and Grievant was awarded a ten percent permanent partial disability. This award was increased to fifteen percent permanent partial disability on November 12, 1992.

7. By decision dated April 27, 1995, a Workers' Compensation Administrative Law Judge reopened the May 11, 1990, claim.

8. By letter dated April 13, 1995, Hospital Administrators notified Grievant that unless he could obtain a physician's release and return to work, his employment would be terminated effective May 1,

1995.

9. A physician's statement dated May 23, 1995, indicated that Grievant would be able to return to work on July 1, 1995, so long as he was not required to engage in heavy lifting or prolonged standing.

10. Grievant's duties as a Health Service Assistant require that he engage in heavy lifting and prolonged standing on a regular basis.

At hearing Grievant testified that he continues to receive Workers' Compensation benefits, but that he hopes to ultimately return to work with successful treatment and therapy. He concedes that he cannot perform the essential functions of a Health Service Assistant, but asserts that he will accept any position at the Hospital which he can perform with his disabilities. At the timeof the hearing, he had not applied for reinstatement or for any other position.

DHHR argues that Grievant was afforded all the medical and personal leave to which he was entitled and that his employment was properly terminated when the temporary total disability benefits were discontinued in April 1995. Because he cannot perform the essential duties of his position, and because no permanent light- duty assignments are available, DHHR concluded that it was no longer economically feasible to keep the position open.

W. Va. Code §23-5A-3 addresses this situation as follows:

(a) It shall be a discriminatory practice within the meaning of section one [§23-5A-1] of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four [§23-4-1 et seq.] of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. . . .

(b) It shall be a discriminatory practice within the meaning of section one of this article for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position. If the former position is not available, the employee shall be reinstated to another comparable position which is available and which the employee is capable of performing. A comparable position for the purposes of this section shall mean a position which is comparable as to wages, working conditions and, to the extent reasonably practicable, duties to the position held at the time of injury. A written statement

from a duly licensed physician that the physician approves the injured employee'sreturn to his or her regular employment shall be prima facie evidence that the worker is able to perform such duties. In the event that neither the former position nor a comparable position is available, the employee shall have a right to preferential recall to any job which becomes open after the injured employee notifies the employer that he or she desired reinstatement. Said right of preferential recall shall be in effect for one year from the day the injured employee notifies the employer that he or she desires reinstatement. . . .

Grievant submitted no documentary evidence in this matter. DHHR submitted a Workers' Compensation determination dated October 30, 1991, which advised Grievant that he was granted a ten percent permanent partial disability award. This apparently closed the claim arising from the May 1990 injury. DHHR Exhibit 4, a Chronology Chart of Grievant's multiple claims, indicates that on April 27, 1995, an Administrative Law Judge reopened the claim for the May 1990 injury. Grievant stated at hearing that he continues to receive Workers' Compensation benefits, but did not identify their type or source.

Because the termination of Grievant's employment was for a non-disciplinary reason, Grievant bears the burden of proving that the action was improperly taken. Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). He has failed to prove that any benefits he may be receiving are for a temporary total disability. Grievant readily admits that he cannot return to his former position and this claim is supported by a physician's statement which restricts Grievant from engaging in heavy lifting and prolonged standing. Based upon the record in its entirety, itcannot be determined that the termination of Grievant's employment was in violation of any statute, rule, regulation, or policy, or was otherwise improper. (See footnote 1)

In addition to the foregoing facts and discussion it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

___1. In non-disciplinary dismissals the Grievant bears the burden of proving that the action was contrary to law. Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Grievant has failed to prove that the termination of his employment, nearly five years after his

last working day, was in violation of any statute, rule, regulation, or policy.

3. Grievant is entitled to "preferential recall to any job which [he] is capable of performing which becomes open after [he] notifies the employer that he . . . desire[s] reinstatement." This entitlement is valid for a period of one year from the date he notifies DHHR that he desires reinstatement. W.Va. Code §23-5A- 3(b).

Accordingly, the grievance is DENIED.

February 27, 1996

Footnote: 1 *Although Grievant's representative mentioned the Americans with Disabilities Act, no specific claims were stated under the provisions of that Act and the evidence indicates that no reasonable accomodations could be made to allow Grievant to return to work as a Health Service Assistant. In any event, the Grievance Board has no juridiction over ADA claims. Keatley v. Mingo County Bd. of Educ., Docket No. 95-29-257 (Sept. 25, 1995).*