TERESA BAKER,

Grievant,

v. DOCKET NO. 96-BOT-514

BOARD OF TRUSTEES/
WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

Grievant, Teresa Baker, filed this grievance alleging that she was unlawfully denied seniority credit by Respondent while she was off work and receiving Workers' Compensation benefits. The grievance was denied at the lower levels and appealed to level four on December 5, 1996. By mutual agreement of the parties, the grievance was submitted for decision based upon the lower level record, accompanied by proposed findings of fact and conclusions of law. This matter became mature for decision on April 4, 1997, the deadline for the parties' proposals.

The undisputed facts, as ascertained from the record developed below, are contained in the following findings.

Findings of Fact

1. Grievant is employed by Respondent as a Food Service Worker, assigned to Stalnaker Hall. Prior to November, 1995, Grievant worked Monday through Friday from 6:00 a.m. until 2:00 p.m.

2. On November 28, 1995, Grievant suffered an on-the-job injury, as a result of which she was eligible for benefits pursuant to the West Virginia Workers' Compensation Act, W. Va.Code § 23-1-1, et seq.

3. As a result of her injury, Grievant missed approximately five and one-half months of work. For the first two months, she received pay from Respondent pursuant to accrued sick

leave. During the remaining time Grievant was off work because of the injury, she received workers' compensation benefits and no salary or other pay from her employer.

4. Respondent did not give Grievant any seniority credit during the time she received workers' compensation benefits. She was granted seniority credit during the period in which she was on sick leave.

5. When Grievant returned to her position as a Food Service Worker, she was reassigned to work afternoon and Sunday shifts, due to her decreased seniority.

Discussion

In non-disciplinary matters, the grievant bears the burden of proving her case by a preponderance of the evidence. W. Va. Code § 18-29-6. A grievance may be filed "alleging a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which . . . employees work." Code § 18-29-2(a). This grievance presents an issue which has not been previously addressed by this Board regarding whether it is improper for an employer to discontinue the accumulation of seniority while an employee is off work and receiving workers' compensation benefits. Grievant argues that Respondent's actions in this case are violative of Code § 23-5A-1, which states that "[n]o employer shall discriminate in any manner against any of his present or former employees because of such . . . employee's receipt of or attempt to receive benefits under this chapter."

Seniority for full-time classified employees of higher education institutions is governed byCode § 18B-7-1. This section explains how reductions in force and other layoffs are to be accomplished, giving "consideration . . . to an employee's seniority as measured by permanent employment in the service of the state system of higher education." No other definition of "seniority" is contained in the higher education statutes. Likewise, "permanent employment" is not specifically defined.

Although citing no legal authority, Respondent has argued at level four that to credit Grievant with seniority for time not actually worked would be patently unfair to other employees, i.e., "one must be serving the Institution and being at the job to receive such credit." Resp. Brief at 4. Additionally, Respondent contends that its policy is not discriminatory, because "[t]he Grievant could not show that the application of this policy has

not been done in the uniform way in the past and present." Resp. Brief at 5.

Respondent's argument that its policy is not discriminatory because it is evenly applied to all employees is misplaced. This is not a case of alleged "discrimination" as defined in Code § 18- 29-2(m), which involves "differences in the treatment of employees." Rather, Grievant is alleging a violation of Code § 23-5A-1, prohibiting discrimination against a particular employee who exercises his or her rights to Workers' Compensation benefits. In order to establish a prima facie case of discrimination under this section, an employee must prove the following:

> **(1) an on-the-job injury was sustained;**
>
> **(2) proceedings were instituted under the Workers' Compensation Act, W.Va. Code § 23-1-1, et seq.; and**
>
> **(3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee.**

Syllabus Point 1, Powell v. Wyoming Cablevision, Inc., 184 W.Va. 700, 403 S.E.2d 717 (1991). Once these facts are established, the burden is then upon the employer to show a "legitimate, nonpretextual, and nonretaliatory reason" for its actions. Id. at 705.

Respondent does not dispute that the sole reason for Grievant's loss of seniority was that she was off work receiving workers' compensation benefits, so a prima facie case has easily been proven. Respondent's "legitimate" justification for its seniority policy is, as stated above, that seniority can only be earned for actual services rendered. This reasoning, however, ignores the fact that Grievant did earn seniority for the two months she was on sick leave paid by the institution, during which time she was not actually "rendering services." In support of its position, Respondent has likened the instant case to Smith v. W. Va. Div. of Highways, Docket No. 96-DOH-083 (Aug. 2, 1996). In Smith, an employee of the Division of Highways alleged that the state had improperly reduced his annual salary increment for the

period during which he had been on workers' compensation. In that case, the administrative law judge determined that the state's action was appropriate and in accordance with the state incremental pay statute, Code § 5-5-2. Because the annual increment is part of the employee's entire annual salary, "one must be in 'pay status' to receive the annual increment." Smith, COL 5. However, the grievant did not allege any violation of Code § 23-5A-1, so it was not addressed.

A similar statute provides for an annual increment to higher education employees. Code § 18B-9-5 states that classified employees shall receive an annual salary increase based upon the employee's "years of experience." In turn, "years of experience" is defined and explained in Code § 18B-9-2(j). Respondent argues that, because partial years of employment can be prorated for salary increment purposes, the same principle governs seniority accumulation. The pertinent sectionstates:

> **"Years of experience" means the number of years a person has been an employee of the state of West Virginia and refers to the horizontal column heading of the salary schedule established in section three of this article. For the purpose of placement on the salary schedule pursuant to said section, employment for nine months or more shall equal one year of experience. . . . Employment for less than full time or less than nine months during any fiscal year shall be prorated. For the purpose of determining the [salary increment], employment for less than twelve months during any fiscal year shall be prorated.**

Code § 18B-9-2(j) (emphasis added).

The holding in Smith, supra, and Respondent's corresponding argument are not persuasive in the instant case, because Smith did not address Code § 23-5A-1 discrimination. However, even if it had, the employer in that case arguably provided a legitimate, nonretaliatory reason for its actions by attaching a "pay status" requirement to the increment, which was considered part of the employee's salary. (See footnote 1) **Such is not the case here.**

Respondent has provided no legitimate basis, legal or factual, for its policy of discontinuing seniority for employees on workers' compensation, which, on its face, violates Code § 23-5A-1. Higher education's seniority statute, Code § 18B-7-1, states clearly that seniority is only to be measured by "permanent employment in the service of the state system of higher education." (Emphasis added.) There is no provision for "proration" as set forth in

the salary increment statute. (See footnote 2) Moreover, and most importantly, Respondent has made no allegation that Grievant did not remain "permanent employed" by it during the time she was on workers' compensation. In fact, West Virginia workers are provided specific statutory protection of their jobs until they are able to return to work after a compensable on-the-job injury. Code § 23-5A-3 prohibits termination of employees who are off work on compensation and also mandates that such employees shall be allowed to return to their previous or similar positions upon their return to work. Accordingly, Grievant retained "permanent employment" during the three and one half months she received workers' compensation benefits, thus accruing seniority for that time period.

Grievant has proven by a preponderance of the evidence that Respondent discontinued her seniority in violation of Code § 23-5A-1, and that no legitimate, nonretaliatory reason for its policy existed. In addition to the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. In non-disciplinary matters, the grievant bears the burden of proving her case by a preponderance of the evidence. W. Va. Code § 18-29-6.

2. W. Va. Code § 23-5A-1 prohibits discrimination in any manner against an employee because of the employee's receipt of or attempt to receive workers' compensation benefits.

3. Once an employee establishes a prima facie case of discrimination under Code § 23-5A-1, the employer must prove a legitimate, nonpretextual and nonretaliatory reason for its actions. Powell v. Wyoming Cablevision, Inc., 184 W.Va. 700, 403 S.E.2d 717 (1991). 4. Seniority of higher education employees is measured by permanent employment in the higher education system. W. Va. Code § 18B-7-1.

5. Respondent reduced Grievant's seniority only because of her receipt of workers' compensation benefits, which is discriminatory within the meaning of W. Va. Code § 23-5A-1.

Accordingly, this grievance is GRANTED, and Respondent is hereby Ordered to reinstate Grievant's three and one half months seniority which she lost while on workers' compensation in 1996.

Any party may appeal this Decision to the Circuit Court of Kanawha County or 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 § 18-29-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATE: July 8, 1997 _____ V. DENISE MANNING

Administrative Law Judge

Footnote: 1

The undersigned feels compelled to note that the ruling in Smith is problematic from the standpoint of requiring pay only for "services rendered." In Footnote 4, the administrative law judge stated "[b]ecause increment pay is treated as a salary, an employee cannot receive payment for services not rendered." This ignores the fact that an employee may be receiving a salary pursuant to sick leave and still receive increment pay for a period in which he was not actually "rendering services." However, Smith can be distinguished on other grounds.

Footnote: 2

Once again, because it has not directly been placed in issue in this case, it will not be decided whether proration of a higher education employee's annual increment because of time off on workers' compensation would be unlawful. However, Code §§ 18B-9-2 and 18B-9-5 appear tobe directed toward new employees or others who were not actually "employed" for the entirety of a given year.