HOBERT PHILLIPS

v. Docket No. 96-45-146

SUMMERS COUNTY BOARD OF EDUCATION

DECISION

The grievant, Hobert Phillips, then a twenty-three year Custodian employed by the Summers County Board of Education (Board), received the following March 12, 1996 letter from Superintendent of Schools Charles Rhodes:

This letter is to notify you that pursuant to 18A-2-6, I shall recommend that your continuing contract be terminated. I shall make this recommendation to the Board at its regularly scheduled meeting to be held on March 28, 1996.

The reason for this action is because you are barred from performing any or all substantial gainful activity, as a matter of law, due to your receipt of social security disability benefits and your permanent absence from work due to social security disability status.

Should you desire a hearing before the board, said hearing shall be held on March 28, 1996, prior to my recommendation to terminate your contract.

Please notify me, in writing, no later than March 22, 1996, should you desire a hearing.

The grievant appeared with counsel at the March 28, 1996 Board meeting, and was afforded a hearing on the Superintendent's proposal. Following the presentation of evidenceand legal argument, the Board voted to terminate the grievant's contract of employment “effective at the close of the 1995-96 school year.” The grievant was formally notified of the Board's decision by letter dated April 1, 1996. He filed an appeal of the action to Level IV, April 8, 1996. A hearing was held June 5, 1996,

and the parties submitted proposed findings of fact and conclusions of law by July 9, 1996. Because the record and legal arguments were not well developed on at least one key issue, the undersigned subsequently requested and was furnished additional documentary evidence and brief legal memoranda; the record was effectively closed March 20, 1997.

Background

The parties do not dispute that when the Board accepted Superintendent Rhodes' March 8, 1996 recommendation, the grievant was receiving Total Temporary Disability (TTD) benefits from the West Virginia Division of Workers' Compensation because of a May 11, 1994, work-related, “compensable” injury to his back. They also do not dispute that he was receiving Social Security Administration (SSA) disability benefits at the time, per the following July 24, 1995 decision:

1. The claimant met the insured status requirements of the Act on May 11, 1994. The claimant has not performed any substantial gainful activity since May 11, 1994, except for a brief unsuccessful work attempt.

2. The claimant's impairments which are considered “severe” under the Social Security Act are bilateral inguinal herniae, chronic obstructive pulmonary disease, osteoarthritis of lumbar spine and lumbosacral sprain.

3. The claimant's impairments do not meet or equal in severity the appropriate medical findings contained in 20 CFR Part 404, Appendix 1 to Subpart P (Listing of Impairments).

4. The claimant's impairments preclude heavy lifting and repeated bending, and restrict him to work at the light exertional level.

5. The claimant is unable to perform his past relevant work.

6. The claimant was 59 years old on the date disability began, which is defined as closely approaching retirement age. The claimant has a limited education.

7. The claimant does not have transferable skills.

8. Based upon the claimant's residual functional capacity, and vocational factors, there are no jobs existing in significant numbers which he can perform. This finding is based upon Rule 202.01, Table No. 2, Appendix 2, Subpart P, Regulations No. 4.

9. The claimant has never been under a disability as defined by the Social Security Act and Regulations since May 11, 1994.

The parties further agree that on June 30, 1996, the last day of the 1995-96 school year, the grievant was not receiving TTD benefits. While it is unclear whether Superintendent Rhodes knew on March 28, 1996, that the grievant was or was not receiving these benefits, the record supports that his decision to recommend the termination of the grievant's employment was predicated on his belief that the grievant had necessarily demonstrated to SSA that he was unable to ever return to his custodial duties. It appears that Superintendent Rhodes was also of the opinion or was acting on legal advice to the effect that the termination would not befor any of the "causes" listed in Code §18A-2-8. (See footnote 1) The record does not reflect the reason for the cite to Code §18A-2-6, (See footnote 2) or explain why the Board chose to delay the effect of its March 28 vote until the end of the school year.

Argument

The grievant disputes that his physical impairments render him permanently disabled and notes that SSA regulations encourage and, in some cases, require that persons receiving disability benefits return to gainful employment. His first legal argument is that, despite the reference to W.Va. Code §18A-2-6, in Superintendent Rhodes' March 12, 1996 letter, the Board was dismissing him for cause under W.Va. Code §18A-2-8, and since "temporarydisability" is not one of the causes listed therein, the Board was without authority to terminate his employment.

The grievant's second argument is based on Code §23-5A-3(a), which, in relevant part, provides:

It shall be a discriminatory practice within the meaning of section one [§ 23- 5A-1] (See footnote 3) 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. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

Relying on Rose, et al, v. Raleigh County Bd. of Educ., No. 23450 (Feb. 24, 1997), the grievant contends that March 28, 1996, was the effective date of his dismissal. He claims that since he was then absent from work due to a compensable injury and receiving TTD benefits, he is entitled to a summary ruling that the Board engaged in a discriminatory practice. The grievant also asserts that, in any event, he was eligible for the benefits on June 30, 1996. As relief, he seeks reinstatement to the Board's inactive employee rolls until such time as his physician determines that he is able or permanently unable to return to work. The Board disputes that the termination was for cause and characterizes its burden in the case as a duty to show that "it acted properly" when terminating the grievant's contract. The Board asserts that for the purposes of applying the above provisions of W.Va. Code §23-5A-3(a), June 30, 1996, was the date of the grievant's termination.

Findings and Conclusions

In Rose, the Raleigh County Board of Education voted on March 28, 1994, to terminate its practice of allowing certain central office employees Wednesday afternoons off in summer months; the superintendent of schools provided them written notice of the action on April 6, 1994. Apparently believing that W.Va. Code §18-29-4(a)(1), did not require them to initiate a grievance before the first Wednesday of the summer, the employees did not file until June 1994. The West Virginia Supreme Court of Appeals found the superintendent's April 6 "unequivocal notice" to be the grievable event in the case, and held that the fifteen day filing period provided for in the statute began to run on that date.

The grievant's reliance on the case ignores that he, unlike the central office employees, continued to accrue the benefits in issue subsequent to the county board's vote. They lost their summer Wednesday afternoons off when the board acted on its superintendent's recommendation--the grievant maintained the advantages, whatever they may be, (See footnote 4) of hisemployer-employee relationship with the Board for an additional three months. It would be contrary to the facts of the case to find that the relationship ended any sooner.

Moreover, since W.Va. Code §§18-29-4 and 23-5A-3(a) address distinctly different subject matters and have wholly unrelated objectives, it is tenuous to say that the Court's holdings regarding the first must be applied to an interpretation of the second; there is no support for the argument in the rules for statutory interpretation. It is not inconsistent with either statute to conclude that, per the holdings in Rose, the Board's March 28 decision and/or the April 1 confirmation letter constituted

"unequivocal notice" of an adverse action for Code §18-29-4 purposes, but that July 30, 1996, was the effective date of his termination in determining whether the Board was guilty of a discriminatory practice under Code §23- 5A-3.

Further, the Board's decision to delay the effect of its March 28 vote to terminate the grievant's employment and retain him on its employment rolls until the end of the school year, effectively provided him three months in which to demonstrate his fitness to return to work. It would be illogical to hold here, that, pursuant to the holdings in Rose, its decision to do so was tantamount to an end of their employment relationship. For the above reasons, the undersigned concludes that the grievant's employment was terminated, for Code §23-5A- 3(1) purposes, on June 30, 1996.

As noted, the grievant also asserts that while he was not receiving TTD benefits on June 30, 1996, he was eligible for and "continues to seek receipt of [such benefits] for that time period through the Workers' Compensation Office of Judges appeal process." It isdifficult to discern whether the grievant is asserting that the record in the present case establishes his eligibility on June 30, or that evidence presented to Workers' Compensation will eventually establish eligibility. He does not indicate what evidence in the present case would support that he was legally entitled to the benefits on that date.

It is clear that on May 14, 1996, Workers' Compensation, acting on an October 27, 1995 report from Dr. Saghir Mir, determined that the grievant had reached "maximum medical improvement" from his injury and suspended his TTD benefits. Documents also reflect that Workers' Compensation subsequently received medical evidence, not presented in this case, which caused the agency to reopen the grievant's claim on August 26, 1996, and that the Board filed a protest of that action on August 29, 1996. Since there is no medical evidence of record which establishes that he had not reached maximum medical improvement as of June 30, 1996, the only conclusion which can be reached here is that the grievant was ineligible for the benefits on that date. See, Honaker v. Workmen's Comp. Comm'r, 298 S.E.2d 893 (W. Va. 1982). Since, as discussed, the record otherwise reflects that Superintendent Rhodes' recommendation to terminate was not motivated by the grievant's injury or receipt of Workers' Compensation benefits, there has been no violation of Code §23-5A-3(a) shown.

Additional, more concise findings on the medical evidence of record effectively renders the grievant's request for relief a moot proposition. (See footnote 5) Dr. Marshall Long, thegrievant's most

recent treating physician, confirmed that the grievant had incurred the impairments set forth in finding 2 of SSA's July 24, 1995 benefit award order. He also related that the grievant continued to experience pain in his back, legs and groin and was taking muscle relaxants and pain killers.

On the key questions of whether and when the grievant could return to his job, Dr. Long was somewhat equivocal. Without hesitation, he first testified that the grievant could return only to sedentary work; later, he represented that he would issue a release to work if the grievant wanted it. He explained that the grievant's mental attitude and/or his personal motivation to be engaged in gainful activity might allow him to overcome the pain that would be associated with janitorial work. On cross-examination, Dr. Long conceded that he would probably direct that the grievant undergo a “functional capacity evaluation” and a “job hardening” program before allowing him to return to his former position. (See footnote 6)

The grievant's testimony provides little assistance in evaluating his prospects for returning to work. He was noticeably evasive when asked to describe his physical condition and/or limitations. He consistently stated that he would return to work when his doctor advised him that his medical condition would permit it; to some extent, it appeared that he was attempting to obscure a true assessment of his physical abilities. His most direct and perhaps only response on this issue was that since his May 11, 1994 injury, he had continuously experienced a “walking on nails” sensation in his feet and legs whenever he walked. Despite Dr. Long's equivocation and the grievant's reluctance to provide a self-evaluation, their testimony as a whole supports that it is more likely than not that the grievant will never regain the physical abilities needed to carry out the duties of a school custodian. It is accepted that the grievant's desire to work is a valid consideration in a medical assessment of whether he can; for the purposes herein, however, it would be speculative to conclude that his motivation alone renders him fit to resume his duties.

A preponderance of the remaining medical evidence of record also reflects that the grievant's ailments, particularly the hernia-related problems and osteoarthritis, are substantial, permanently debilitating impairments and have restricted him to light or very light physical activity since the date of his on-the-job injury. It is significant that aside from Dr. Long's mention of a work hardening program, there is no evidence that the grievant has ever been assessed as a viable candidate for rehabilitation through professional physical therapy. The grievant's own testimony reflects that walking has caused him pain since May 1994. In short, the evidence establishes that the grievant is now less able to

perform the often physically demanding tasks of a custodian than he was when he incurred his injury. It would serve no useful purpose to return him to the Board's inactive employee rosters.

The grievant does not appear to dispute that a permanent physical inability to perform the duties for which one was hired is incompetence within the meaning of W.Va. Code §18A-2-8. While he takes issue with the Board's "use" of Code §18A-2-6 to effect his termination, he does not cite what harm he incurred as a result.

Bd. of Educ. of County of Mercer v. Wirt, 453 S.E.2d 402, 415 (W.Va. 1995) sets forth in detail the protections that must be afforded a tenured employee of a county board of education prior to a dismissal for cause. The undersigned summarily finds that the grievant's termination comported with those requirements, and that the Board has demonstrated incompetence. That the timing of the grievant's notice, hearing and termination was madeto coincide with the timeframes provided for in Code §18A-2-6, does not convert the dismissal to a termination for reasons other than those cited in Superintendent's March 12, 1996 letter, or otherwise invalidate it.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Summers County 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.

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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: March 27, 1997

Footnote: 1

The statute provides:

Notwithstanding any other provisions of law, a board may suspend to dismiss any person in its employment at any time for "Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty please or a plea of nolo contendere to a felony charge. A charge of unsatisfactory

performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board. the Employee so affected shall be given an opportunity, within five days of receiving such written notice, to request, in writing, a level four hearing and appeals pursuant to provisions of article twenty-nine [18-29-1 et seq.], chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, except that dismissal for the conviction of a felony or guilty plea or plea of nolo contendere to a felony charge is not by itself a grievable dismissal. An employee charged with the commission of a felony may be reassigned to duties which do not involve direct interaction with pupils, pending final disposition of the charges.

Footnote: 2

Provided that the employee receives notice of "cause or causes" and an opportunity to be heard, Code §18A-2-6, authorizes a county board of education to terminate a school service employee's contract of employment. The statute does not prescribe the grounds for such actions; it has generally been interpreted as providing the means for terminating employees in a need-based reduction-in-force. See, Lucion, et. al, v. McDowell County Bd. of Educ. 446 S.E.2d 487 (W.Va. 1994).

Footnote: 3

W.Va. Code 23-5A-1, in its entirety, provides:

No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter.

Footnote: 4

The record is not at all clear on what benefits, beyond the obvious opportunity to return to gainful employment, accrue to employees who are maintained on the Board's inactive rolls. The grievant gave unrebutted testimony that there were pension-related advantages.

Footnote: 5

Since it appears that the only relief available in the case at Level IV would be reinstatement to the Board's inactive employment rolls, and such relief would be whollyinappropriate if the grievant is unable to ever return to his duties, findings on his physical condition are most likely also dispositive of his Code §23-5A-3 claim. The statute seems to contemplate a circuit court retaliatory discharge action for monetary damages.

Footnote: 6

These terms were not explained. It is assumed that the functional capacity test is a form of evaluation in which the employee attempts to actually perform the type of work to which he is to be returned. The work hardening program is apparently a type of physical therapy.

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