TROY McCAULEY

Grievant,

v.

Docket No. 97-CORR-354

WEST VIRGINIA DIVISION OF CORRECTIONS/

WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant, Troy McCauley, employed by the West Virginia Division of Corrections (Corrections) at the Huttonsville Correctional Center (HCC), filed a level one grievance on May 29, 1997, in which he alleged that after being off from work for seventy-eight (78) work days, approximately four and one-half months total, as a result of an on-the-job injury, he “bought back” his used sick leave with his worker's compensation payments. Grievant further states that when he did so, he was informed by Ms. Joyce Gum and Mr. Phillip Hanline that, in accordance with West Virginia Division of Personnel policies, he would not receive credit for seniority, sick leave, and annual leave because he was in “off payroll status” during the time he was not working due to his injury.

Grievant notes that, while he was off, all income taxes (federal and state), social security, retirement, insurance and union dues deductions were taken from his pay as normal. Grievant also alleges he is being discriminated against because other employees at HCC have taken time off for worker's compensation claims, or sick leave, yet did not lose time as it pertains to seniority and retirement. Grievant adds “I would have reached 10 years service 4 ½ months earlier, which would entitle me to an additional 1/4 day a month leave had this time [off] been allowed to count towards seniority. I was alsopenalized approximately $1,400 for this time [off], plus [the loss of] sick leave,

annual leave and the loss of annual increment pay." Grievant seeks credit for the 78 days lost, including an adjustment in his annual leave and sick leave, plus any wages or payments lost as a result of not receiving credit for the 78 days.

Following denials at the lower levels, the case was appealed to Level IV on July 29, 1997. A hearing of the matter was set for October 29, 1997, but was apparently continued for good cause shown. (See footnote 1) The case was assigned to the undersigned Administrative Law Judge (ALJ) for administrative reasons on April 23, 1998. The case was set for hearing on July 14, 1998, the first available date agreeable to all parties. In the interim, Grievant requested the case be mediated and it was agreed the mediation would take place on July 14, 1998, instead of a Level IV hearing. At the beginning of the scheduled mediation, the undersigned ALJ was informed by counsel for Respondent, Corrections, that she had the wrong file and, in fact, this was not her case and neither she, nor the representative of the Division of Personnel (DOP) present, had the authority to approve any potential settlement, therefore, it would be impossible to proceed with the mediation. (See footnote 2) It was agreed that both Corrections and DOP would look into the matter and see if there was a way to resolve the grievance without the necessity of a formal hearing and decision.

On August 7, 1998, a letter was sent by the undersigned ALJ to the parties askingfor the status of any settlement negotiations and also requesting the parties to, if a settlement had not been reached, contact this office within ten (10) days to schedule a date for the hearing. The parties were further advised that since the previous scheduled mediation essentially did not take place and no confidential information was disclosed, the undersigned ALJ would continue to hear the case unless there was an objection from any party. With no objection, the matter was heard in the Elkins Office of the Education and State Employees Grievance Board on September 22, 1998. (See footnote 3) Following the hearing, the matter became mature for decision with the submission of proposed findings of fact and conclusions of law by both parties on November 3, 1998.

FINDINGS OF FACT

1. Grievant is employed by the Division of Corrections at the Huttonsville Correctional Center.

2. Grievant suffered an on-the-job injury on March 25, 1994. As a result of this injury, Grievant was unable to work for 78 days, and was eligible for benefits pursuant to the West Virginia Workers' Compensation Act, W. Va. Code § 23-1-1, et seq.

3. Pending the settlement of his Worker's Compensation claim, Grievant utilized sick leave.

4. Grievant chose to retain the Workers' Compensation benefits and to restore his sick leave.

5. Respondent did not give Grievant any seniority credit during the time he received Workers' Compensation benefits.

DISCUSSION

In non-disciplinary matters, the grievant bears the burden of proving his 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." W. Va. Code § 18-29-2(a).

W.Va. Code § 23-4-1 provides in pertinent part:

> [t]hat in the event an employee is injured in the course of and resulting from covered employment and such injury results in lost time from work, and such employee for whatever reason uses or obtains sick leave benefits and subsequently receives temporary total disability benefits for the same time period, such employee may be restored sick leave time taken by him or her as a result of the compensable injury by paying to his or her employer the temporary total disability benefits received or an amount equal to the temporary total benefits received. Such employee shall be restored sick leave time on a day for day basis which corresponds to temporary total disability benefits paid to the employer. . . . (emphasis added).

DOP Regulation, Section 15.09, provides that an employee injured in the course of employment may elect to receive either Workers' Compensation benefits or sick leave and that the employee may collect sick leave benefits until receiving temporary total disability benefits, however:

> Upon receipt of such temporary total disability benefits the employee shall pay or assign to his or her employer the temporary total disability benefits received or an amount equal to the temporary total disability benefits received. Employees shall be restored sick leave time on a day for day basis which corresponds to the temporary total disability benefits paid to the employer. If the employee fails to pay or assign to the employer the temporary total disability benefits received or an amount equal to the temporary total disability benefits received, then the employer shall deduct from the employee's subsequent wage payment an amount equal to the temporary total disability benefits received. Upon payment of this amount the employer shall restore sick leave time which corresponds to the amount of temporary total disability received by the employee.

Most of the facts leading to this grievance are not in dispute. On or about March 25, 1994, Grievant was injured while at work and undergoing a training class. Pending a ruling on a claim filed with the Workers' Compensation Commission, Grievant utilized accrued sick leave. The

compensation claim was determined compensable and, ultimately, Grievant received both temporary total disability benefits from the Workers' Compensation Fund and sick leave from Corrections for the entire 78 day period he was off work due to the injury. (See footnote 4) Because he received compensation benefits for that time, he is required to reimburse Corrections for 78 days of sick leave. Upon payment, Grievant's sick leave was restored in the same amount of work time lost, "day for day."

W. Va. Code 23-4-1 and DOP Administrative Rule 15.9 both require that employees be restored sick leave on a day for day basis which corresponds to the temporary total disability benefits received. From this amount social security, retirement, federal and state taxes, insurance, et cetera are deducted. Respondents Corrections and DOP argue that this method of calculation, which requires Grievant to repay what is essentially his net wage for the period of time in question, is consistent with the intent of W. Va. Code § 23-4-1, i.e., to "prevent an employee of the state . . . from collecting both temporary total disability benefits and sick leave benefits for the same time period." This is essentially what occurred.

It is undisputed that an injured employee may not receive sick leave and Workers' Compensation benefits for the same time period. That leaves, however, the issue of whether it is improper for an employer to discontinue the accumulation of seniority whilean employee is off work and receiving Workers' Compensation benefits. Grievant alleges that Respondent's actions in this case are violative of W. Va. 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." Although citing no legal authority, Respondents have argued that to credit Grievant with seniority for time not actually worked would be patently unfair to other employees, although there is testimony to indicate such incidents have previously occurred on occasion within Corrections.

The question arises, however, as to whether Grievant was actually ever in “off payroll” status. Although, he was told by Ms. Gum and Mr. Hanline he was, and that was the reasoning for his not being credited for seniority during the time he was off, the evidence in this matter indicates otherwise.

Respondents do not dispute that the sole reason for Grievant's loss of seniority was that he was off work receiving Workers' Compensation benefits. Respondent maintains that seniority can only be

earned for actual services rendered and not while “off payroll.” This reasoning, however, ignores the fact that employees do earn seniority for time on sick leave paid by the division, during which time one is not actually "rendering services." To allow employees to accrue seniority while off on sick leave, yet not allow such while an employee is off for Worker's Compensation is in violation of W. Va. Code § 23-5A-1, which forbids employees receiving Worker's Compensation benefits differently than those off while using sick leave or annual leave. It appears from the evidence that Grievant had sufficient sick/annual leave to cover the entire 78-day period he was off work. It would be blatantly unfair to allow him to continue to remain “on payroll” status and accumulateseniority, and the accompanying benefits, while using his sick leave, yet penalize him for choosing to use his Worker's Compensation leave, to which he is duly entitled.

Further, Respondent has made no allegation that Grievant did not remain "permanently employed" by it during the time he 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. W. Va. 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 four and one-half months he received workers' compensation benefits, and should have remained in “on payroll” status, thus accruing seniority for that time period.

Finally, Respondent's response to Grievant's allegation of discrimination stating that its policy is not discriminatory because it is evenly applied to all employees, even if true, is misplaced. This is not really a case of alleged "discrimination" as defined in W. Va. Code § 18-29-2(m), which involves "differences in the treatment of employees," Although Grievant alleges such, the undersigned is not convinced there is sufficient evidence to show that others had received Worker's Compensation, and not lost seniority credit. Grievant, however, is also alleging a violation of W. Va. Code § 23-5A-1, prohibiting discrimination against a particular employee who exercises his or her rights to Workers' Compensation benefits. There does appear to be evidence to support this allegation.

In order to make a prima facie case of discrimination under this section, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, 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. Syl. Pt. 1, Powell v.

Wyoming Cablevision, Inc., 184 W.Va. 700, 403 S.E.2d 717 (1991); Sizemore v. Peabody Coal Co., 188 W.Va. 725, 426 S.E.2d 517 (1992); St. Peter v. AMPAK-Division of Gatewood Prods., Inc., 199 W.Va. 365, 484 S.E.2d 481 (1997); Rollins v. Mason County Bd. of Educ., 200 W.Va. 386, 489 S.E.2d 768 (1997). Grievant has done so. Once these facts are established, the burden is then upon the employer to show a "legitimate, nonpretextual, and nonretaliatory reason" for its actions. Powell, supra at 705.

Respondent does not dispute that the sole reason for Grievant's loss of seniority was that he 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 and not while “off payroll.” This reasoning, however, ignores the fact that employees do apparently earn seniority for time on sick leave paid by the division, during which time one is not actually "rendering services."

In a similar case to the instant matter, this Grievance Board found in favor of an employee at West Virginia University (WVU). Baker v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-514 (July 8, 1997). In Baker, a worker at WVU was injured in the job, used sick leave until she received her Worker's Compensation benefits, then “bought” her sick days back. She was then denied seniority credit for those days missed. The ALJ held that Respondent reduced Grievant's seniority for the days she was out only because of her receipt of Workers' Compensation benefits, and such an act was discriminatory within the meaning of W. Va. Code § 23-5A-1. Id. Such is the case here. Grievant has proven by a preponderance of the evidence that Respondent discontinued his seniority in violation of W. Va. Code § 23-5A-1.

As for Grievant's argument he should receive annual increment credit, this Board previously held in Smith v. W. Va. Div. of Highways, Docket No. 96-DOH-083 (Aug. 2, 1996), that pursuant to W. Va. 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." Id. Based on the above, the undersigned finds Grievant was, or should have been, in “pay status” while off due to his work related injury and, therefore, this part of the grievance is also granted.

In addition to the foregoing narration and Findings of Fact, it is appropriate to make the following formal Conclusions of Law.

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. Any employee injured in the course of covered employment which results in lost time for work, and who, obtains sick leave benefits and subsequently receives temporary total disability benefits for the same time period, may restore the sick leave time by paying the employer the temporary total disability benefits received or an amount equal to those benefits received. W. Va. Code § 23-4-1.

3. 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.

4. To allow employees to accrue seniority while off on sick leave, yet not allow suchwhile an employee is off for Worker's Compensation is in violation of W. Va. Code § 23-5A-1, which forbids employees receiving Worker's Compensation benefits differently than those off while using sick leave or annual leave.

5. Pursuant to W. Va. 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." Grievant was, or should have been, in “pay status” while off due to his work related injury.

6. Grievant retained "permanent employment" during the four and one half months he received workers' compensation benefits, and should have remained in “on payroll” status, thus accruing seniority for that time period

Accordingly, this grievance is GRANTED, and Respondent is hereby Ordered to reinstate Grievant's four and one half months (seventy-eight working days) seniority, which he lost while on workers' compensation in 1996, with all related benefits he would have received, including his annual pay increment, had he been credited with this seniority prior to the filing of this grievance. All other relief is DENIED.

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.

DATED: March 5, 1999

R. K. MILLER

Administrative Law Judge

Footnote: 1 The record is unclear as to why the hearing did not originally take place, nor why it did not take place prior the undersigned ALJ being assigned the case on April 23, 1998. It is assumed there were scheduling problems on the part of one, or both, of the parties.

Footnote: 2 Corrections was represented by its legal counsel, Ms. Leslie Kiser. DOP was represented by Mr. Lowell Basford. Grievant was present and served as his own representative.

Footnote: 3 Grievant was again present and representing himself. Respondents were represented by Assistant Attorney General Charles Houdyshell.

Footnote: 4 It is not clear from the record or the testimony whether or not this seventy-eight (78) day period included any holidays.