REBECCA LOHR,

Grievant,

v. Docket No. 99-CORR-191

WEST VIRGINIA DIVISION OF CORRECTIONS/NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY,

Respondent.

D E C I S I O N

Grievant, Rebecca Lohr, employed by the Division of Corrections as a Correctional Counselor I at the Northern Regional Jail and Correctional Facility, filed a level one complaint on April 5, 1999, in which she stated,

[d]ue to a work related injury, I was on Workers' Compensation from Nov. 15, 1991 to Oct. 12, 1993 and from August 18, 1997 to Feb. 7, 1999. During these periods on compensation, I did not receive seniority or my yearly increment pay for the time I was off work. WV Education and State Employees Grievance Board has ruled on this grievance. Refer to Docket No. 97- CORR-354 Dated March 5, 1999, Troy McCauley/WV Division of Corrections/WV Division of Personnel Level IV response. I did not become aware that I was being discriminated against under WV Code 23-5A-1; WV Code 23-5A-3 and WV Code 5- 5-2 until April 1, 1999.

Grievant requested that she be given credit for seniority and increment pay for the period of time in question.

Grievant's immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied at level two by Warden Evelyn Seifert, and appeal was made to level three. Following an evidentiary hearing, Commissioner Paul Kirby accepted the recommended decision of the grievance evaluator, and denied the grievance. The matter was advanced to level four on May 13, 1999, and a hearing was conducted in the Grievance Board's Wheeling office on July 14, 1999. Grievant was represented by herspouse, Rick Lohr, and Respondent was represented by Charles Houdyschell, Jr., Assistant Attorney General. The matter became mature for decision with the filing of post hearing submissions by the parties on or before July 28, 1999.

The essential facts of this matter are undisputed and are set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been employed by Respondent as a Correctional Counselor I at the Northern Regional Jail and Correctional Facility at all times pertinent to this decision.

2. Due to injuries incurred during the course of her employment, Grievant received temporary total disability (TTD) Workers Compensation benefits from November 15,1991, to October 12,1993, and from August 18,1997, until February 7, 1999.

3. Grievant did not accrue seniority or receive increment pay during the periods of time she received Workers Compensation benefits.

4. Grievant did not file a grievance until April 5, 1999.

Argument

Grievant denies that she filed her complaint based upon a level four decision issued in the matter of McCauley v. W. Va. Div. of Corrections/W. Va. Div. Of Personnel, Docket No. 97-CORR-354 (Mar. 5, 1999), which addressed the same issue as raised in the present matter, and granted Mr. McCauley the same forms of relief requested by Grievant. Grievant asserts that she “had no knowledge at that time this [McCauley] case had been ruled on”, and that the grievance was filed as the result of research by her representative, who determined the practice was in violation of the Code. Grievant asserts that she had not filed a grievance prior to April 1999, because she had been misinformed in 1993 by West Virginia Penitentiary Personnel Director Gertrude Campbell, that the matter was not grievable, and that she understood when an employee was told a complaint was not grievable, they could not proceed. Grievant stated that she relied upon Ms. Campbell's representation until late March 1999, when she spoke with Hilda Williams, who advised her that she had not lost her seniority. It was apparently at this time that her representative began his research. Grievant argues that Respondent's timeliness argument is not valid, because she did file within the statutory time lines when it became known to her that the denial of her seniority and annual increment pay was in violation of the law.

Finally, Grievant concludes that denial of her seniority and increment pay penalizes her for suffering a compensable injury, and that she remained a permanent employee in “pay status” throughout the periods of time she received the Workers Compensation benefits, thereby entitling her

to the accrued seniority and increment pay, as was held in McCauley.

Respondent argues that the grievance was not timely filed, as it relates to the 1991- 1993 period of time, because Grievant was aware of the fact that she would not receive the claimed benefits upon her return to work in October 1993, and failed to file a grievance within ten days. Respondent cites a number of Grievance Board decisions in support of the argument that time begins to run when the employee becomes aware of the facts that give rise to the claim, not at the point the employee learns that another has prevailed on a similar claim, or when the employee learns of her legal rights. Warden Seifert stated inthe level two decision that Grievant learned on April 1, 1999, that she would not receive seniority or increment pay for the 1997-1999 absence, and Respondent does not argue that this portion of the grievance is time barred.

Respondent notes that the West Virginia Legislature recently amended W. Va. Code §23-5A-4, to provide that employees "shall continue to accrue increment pay during absences from work due to a work related compensable injury". However, Respondent argues that this amendment clearly indicates legislative intent was to only provide increment pay to state employees receiving temporary Workers' Compensation benefits, and to the extent that McCauley provides otherwise, it must now be considered legislatively overruled. Consistent with the statutory amendment, Respondent agrees to credit Grievant with seniority for increment pay purposes for the 1997-1999 injury, but asserts that she is not entitled to any other relief for that period of time.

Discussion

Some background information may be helpful in understanding the present grievance. W. Va. Code §23-4-1 provides in part:

. . . employees may collect sick leave benefits until receiving temporary total disability benefits. The division of personnel shall promulgate rules pursuant to chapter twenty-nine-a [§29A-1-1 et seq.] of this code relating to the use of sick leave benefits by employees receiving personal injuries 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 his or her employer the temporary total disability benefits received in an amount equal to the temporary total disabilitybenefits paid to the employer, and provided further, That since the intent of this paragraph is

to prevent an employee of the state or any of its political subdivisions from collecting both temporary total disability benefits and sick leave benefits for the same time period, nothing herein may be construed to prevent an employee of the state or any of its political subdivisions from electing to receive either sick leave benefits or temporary total disability benefits but not both.

In compliance with this statutory directive, the Division of Personnel's Administrative Personnel Rule (1998), Section 15.9, provides:

(a)In the event an employee is injured in the course of and resulting from covered employment, the employee may elect to receive either temporary total disability benefits from the Workers' Compensation Division or sick leave benefits, but not both. Employees may collect sick leave benefits and, upon exhaustion of sick leave benefits, annual leave benefits until they receive temporary total disability benefits. If an employee has elected to receive temporary total disability benefits, upon receipt of the initial temporary total disability payment the employee shall pay or assign to his or her employer the net value of the sick and/or annual leave paid. Employees' sick leave and, if used, annual leave shall be restored on a day-for-day basis which corresponds to the net value of the sick and/or annual leave paid. If the employee fails to pay or assign to the employer the net value of the sick and/or annual leave paid, then the employer shall deduct from the employee's subsequent wage payments an amount equal to the net value of the sick and/or annual leave paid. Upon payment of this amount the employer shall restore sick and/or annual leave previously paid.

The Administrative Rule also addresses annual and sick leave as follows. Section 15.3 "Annual Leave", provides that "[a]nnual leave cannot be accrued for hours not paid nor for hours worked beyond the normal work week which shall not exceed 40 hours." Section 15.4 "Sick Leave" includes identical language, "[s]ick leave cannot be accrued forhours not paid nor for hours worked beyond the normal work week which shall not exceed 40 hours."

Personnel has also issued a policy, “Workers' Compensation/Sick Leave”, effective May 1, 1993, which requires an employee electing to receive TTD benefits to request a Medical Leave of Absence Without Pay. The policy further states in pertinent part, “[w]hile absent from work due to a Medical Leave of Absence Without Pay, an employee will not accrue service tenure. The resulting break in service will affect the eligibility for, and may affect the amount of, the employee's annual increment

pay. Additionally, annual and sick leave will not accrue while an employee is on a Medical Leave of Absence Without Pay. Holidays occurring during this period will not be paid." (See footnote 1)

In McCauley, it was determined that the employer acted in violation of W. Va. Code §23-5A-1, which provides that "[n]o 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", when it denied an employee receiving TTD benefits, sick leave, annual leave, and accrued seniority during his absence from work. Respondent was ordered to reinstate grievant McCauley's seniority, and all related benefits, including his annual pay increment.

Unfortunately, the McCauley decision did not include consideration of Personnel's "Workers' Compensation/Sick Leave" policy, which requires an employee electing to receive TTD benefits to request a Medical Leave of Absence Without Pay. This important factor places employees receiving TTD benefits in exactly the same circumstances as every other employee who is absent from work for medical reasons, and is off the payroll. As stated in the policy, employees on a medical leave of absence without pay experience a break in their employment, during which time they do not accrue leave and seniority, and do not receive holiday pay. Under these circumstances, employees receiving TTD benefits are not subject to discrimination as addressed by W. Va. Code §23-5A-1, or W. Va. Code §29-6A-2(d). Because the Personnel policy is a controlling factor in these matters, but was not considered, it is concluded that McCauley was clearly wrongly decided, and it is therefore overruled.

W. Va. Code §23-5A-4, which allows state employees receiving TTD benefits to accrue increment pay during their absence from work, did not become effective until March 11, 1999. Because Grievant returned to work in February 1999, she is not entitled to any relief relating to increment pay. The Grievance Board recently held in Bowrey v. Div. of Corrections/Huttonsville Correctional Center, Docket No. 99-CORR-145 (July 30, 1999), that it is a well-settled principle of statutory construction in this state that a statute is presumed to operate prospectively, unless retroactive applicability is clearly expressed or necessarily implied from the statute's language. Syl. Pt. 3, Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980); See Conley v. Workers Compensation Div./Hercules, 199 W. Va. 196, 483 S.E.2d 542 (1997); W. Va. Code § 2-2-10(bb) (1989). However, statutes which are merely procedural, rather than substantive, in nature may be retroactively applied. Shanholtz, supra. In Syllabus Point 2, Public Citizen, Inc. v. First National Bank in Fairmont, 198 W. Va. 329, 480 S.E.2d 538 (1996), the Supreme Court of Appeals of

West Virginia stated, "[a] statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute . . . unless the statute provides explicitly for retroactive application." See generally, Conley, supra; State ex rel. Blankenship v. Richardson, 196 W. Va. 726, 474 S.E.2d 906 (1996). "Accordingly, an initial determination must be made as to whether the statute in question affects procedural or substantive rights." Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24,1998); Dismissal Order, Sharifpour v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 98-DOH-265 (Sept. 9, 1998).

Black's Law Dictionary 997 (6th ed. 1991), defines "substantive law" as “[t]hat part of law which creates, defines, and regulates rights and duties of parties, as opposed to 'adjective, procedural, or remedial law' which prescribes [the] method of enforcing the rights or obtaining redress for their invasion. The basic law of rights and duties . . . as opposed to procedural law . . . . “

In Bowrey, supra, it was determined that a statute requiring an employer to compensate a grievant for actions taken and decisions made prior to its enactment could create substantial liability for a respondent; and thus, would be substantive and not merely procedural. Therefore, Grievant is not entitled to increment pay for the 1997-1999absence. (See footnote 2)

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

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); W. Va. Code §29-6A-6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990).

2. W. Va. Code §23-5A-1, which provides that "[n]o 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."

3. An employee who in injured in a work-related activity and elects to receive Workers' Compensation benefits rather than using sick leave, is placed on a medical leave of absence without pay, and experiences a break in his or her employment.

4. Grievant was not discriminated against, in violation of W. Va. Code §23-5A- 1, when she

was not given seniority or credit for purposes of calculating her annual increment entitlement for the time she was receiving temporary total disability benefits. To the extent that McCauley holds to the contrary, it was wrongly decided and is hereby overruled. 5. Effective March 11, 1999, employees "shall continue to accrue increment pay during absences from work due to a work related compensable injury." W. Va. Code §23- 5A-4.

6. Because the language of W. Va. Code §23-5A-4 does not clearly express or necessarily imply that it is to be applied retroactively, and is substantive in nature, Grievant is not entitled to increment pay for her 1997-1999 absence.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: August 31, 1999 _____

Sue Keller Senior Administrative Law Judge

Footnote: 1

Subsequent to the level four hearing in this matter, Personnel issued a revised "Workers' Compensation/Sick Leave" policy, effective July 15, 1999, reflecting the legislative amendment. It states, "[e]ffective March 11, 1999, employees of the State of West Virginia continue to accrue tenure for the calculation of annual increment pay while receiving TTD benefits during absences from work due to a work related, compensable injury." The policy also provides that employees receiving TTD benefits, and who are on a leave of absence, will receive tenure for layoff purposes.

Footnote: 2

Due to the rulings on the merits, and the retroactive applicability of W. Va. Code §23-5A-4, no further discussion of the timeliness issue is necessary.