THE WEST VIRGINIA EDUCATION AND PUBLIC EMPLOYEES GRIEVANCE BOARD

TERESA LOY,

Grievant,

v. **Docket No. 07-52-022**

Sue Keller

Senior Administrative Law Judge

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Teresa Loy ("Grievant"), employed by the Wetzel County Board of Education ("WCBE") as a bus operator, filed a level one grievance on September 15, 2006, in which she alleged a violation of *W. Va. Code* § 23-5A-4, when she was denied experience credit for pay purposes while receiving Workers' Compensation benefits. For relief, Grievant requests an adjustment of her experience credit, and back pay equal to the difference between the pay she received, and the pay she claims she should have received. The grievance was denied at levels one and two, and Grievant elected to bypass consideration at level three, as is permitted by *W. Va. Code* § 18-29-4(c). A level four appeal was filed on February 7, 2007. During a prehearing conference conducted on March 5, 2007, Grievant's counsel Eric Gordon, and WCBE counsel Richard Boothby, agreed to submit the grievance for decision based on the lower-level record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on April 12, 2007.

Synopsis

___Grievant elected to receive Workers' Compensation benefits for the period of time she was absent due to a work-related injury. WCBE granted Grievant seniority credit, but did not grant her experience credit for pay purposes for this period of time, in compliance with State Board of Education Policy 5612. Grievant relies on *Canfield v. W. Va. Div. of Corr.*, 217 W. Va. 340, 617 S.E.2d 887 (2005), in

which such credit was granted to state employees. WCBE's argument that *Canfield* extended only seniority credit is not persuasive as the decision refers to “credit for years of service” several times, and has been implemented by the Division of Personnel as such. The DOE policy, adopted in 2002, is contrary to *Canfield* in that there is no rational basis for denying this benefit to employees who elect to receive Workers' Compensation benefits.

The following facts essential to this matter are undisputed.

Findings of Fact

1. Grievant has been employed by WCBE as a bus operator at all times pertinent to this grievance.

2. Grievant was injured in a work-related accident on October 23, 2004.

3. As a result of the aforesaid accident, Grievant was absent from work from October 24, 2004 through August 22, 2006.

4. Grievant elected to receive Workers' Compensation wage replacement benefits for the time she was absent from work. 5. Per West Virginia State Board of Education Policy 5612, WCBE granted Grievant seniority credit for both years during which she was off from work, but did not grant her experience credit for pay purposes for the same period of time. (See footnote 1)

Discussion

As 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 § 4.21 (2004); *Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). *See W. Va. Code* § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues that the reasoning in *Canfield v. West Virginia Division of Corrections*, 217 W. Va. 340, 617 S.E.2d 887 (2005), is supportive of her claim. WCBE asserts that *Canfield* is not applicable because the equal protection analysis was used to compare benefits earned by employees who received Workers' Compensation disability benefits and those who used sick leave, while the present grievance involves a comparison of employees who use sick leave that was earned prior to any absence from work with employees who opt to accept TTD benefits.

WCBE has applied the West Virginia State Board of Education Policy 5612, which provides in pertinent part that Employees of county boards of education continue to accrue seniority credit while receiving TTD benefits during absences from work due to a work-related, compensable injury, but do not accrue credit for years of experience.

The language of this Policy, which was implemented in 2002, is similar to that previously relied upon by state agencies. However it is presently contrary to law which addresses state employees, and is also instructive for county boards of education. First, *W. Va. Code* §23-5A-4 provides that "[a]ll employees of the state of West Virginia shall continue to accrue increment pay during absences from work due to a work-related compensable injury." Although Grievant does not receive the lump-sum increment salary awarded to state employees, her statutory salary does include annual incremental increases which she has been denied.

Second, the West Virginia Supreme Court of Appeals has determined that policies and rules prohibiting employees who are receiving Workers' Compensation Temporary Total Disability benefits from also accruing credit for years of service and annual leave are not related to a proper government purpose and, therefore, violate the equal protection clause of Section 10, Article III, of the West Virginia Constitution. Syl. Pt. 2, *Canfield, supra.* (See footnote 2) WCBE argues that *Canfield* does not apply in this grievance because it addressed seniority, which it has granted to Grievant. This argument is not persuasive. Certainly, Grievant was entitled to seniority credit, and has been given that credit. However, *Canfield* discussed seniority in relation to experience credit, or years of service, which is the basis for annual increment salary earned by state employees. This increment pay is comparable to the annual salary increase awarded to public school employees for each year of service. To that extent, the reasoning of *Canfield* is applicable.

WCBE attempts to distinguish *Canfield* by arguing that it addresses different sets of benefits earned by state employees while receiving Workers' Compensation benefits and on sick leave, whereas the present matter involves a comparison of employees who use sick leave that was earned prior to their absence from work to those employees who have opted to accepted Workers' Compensation benefits. Counsel asserts that school employees choose to use accrued sick leave or Workers' Compensation, and are thereby choosing not to exercise their earned right not to work while ill, thus preventing them from earning experience credit for pay purposes. That is, the employee elects to use the earned benefit now, rather than later.

This argument is also unpersuasive. Employees who are injured while on the job are entitled to Workers' Compensation. As in *Canfield*, there is no rational basis to penalize employees, by depriving them of the opportunity to accrue years of service time, for a period they are unable to work solely due to an injury they sustained on the job.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). *See W. Va. Code* § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Policies and rules prohibiting employees who are receiving Workers' Compensation Temporary Total Disability benefits from also accruing credit for years of service and annual leave are not related to a proper government purpose and, therefore, violate the equal protection clause of Section 10, Article III, of the West Virginia Constitution. Syl. Pt. 2, *Canfield, supra.*

3. Grievant has been improperly denied credit for years of service while receiving Workers' Compensation benefits.

Accordingly, the grievance is **GRANTED**, and WCBE Ordered to adjust Grievant's years of service of service for pay purposes to include the time she received Workers' Compensation benefits.

This Decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal. *W. Va. Code* § 6C-2-5(c). Neither the WestVirginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named.

DATE: MAY 7, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.W. Va. Department of Education was notified of this grievance, but declined an opportunity to participate.

Footnote: 2

.The West Virginia Division of Personnel has subsequently produced the Workers' Compensation Temporary Total Disability Rule (143 CSR 3), which states:

An employee electing to receive temporary total disability benefits continues to accrue annual increment pay and years of service while on leave without pay and while receiving temporary total disability benefits.