THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DANIEL T. BISHOP,

Grievant,

v. **Docket No. 2010-0773-CONS**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION

Daniel T. Bishop, Grievant, was employed in the West Virginia Department of Health and Human Resources ("DHHR") in that agency's Boone County office. Mr. Bishop filed a level one grievance form dated November 3, 2009, and as his statement of grievance he wrote:

> Agency refused employee receipt of donated leave for an unpaid medical absence.

As relief, Grievant Bishop sought "[t]o be made whole, including compensation for unpaid leave for what time was made available."[1]

A level one hearing was held and recorded on January 4, 2010, and a decision denying the grievance was issued on January 14, 2010. A level two mediation was held on May 10, 2010, and an Order related to the mediation was entered on May 12, 2010. Thereafter, Grievant made a timely appeal to level three.

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[1] At level one this grievance was consolidated with the grievance of another DHHR employee in the Boone County office. The two grievances proceeded together through level two. Prior to the level three hearing, the grievances were separated by an Order dated September 29, 2010, pursuant to a motion of the second grievant. The grievance of Mr. Bishop retained the docket number set out above.

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on September 23, 2010.[2] Grievant was represented by Gordon Simmons, UE Local 170, WVPWU[3] and Respondent DHHR was represented by Heather Laick, Assistant Attorney General. At the level three hearing, the parties agreed to submit the grievance for decision based upon the factual record developed at the level one hearing, supplemented by the testimony of one witness taken at level three and proposed findings of fact and conclusions of law submitted by the representatives of the parties. The last fact/law proposal was received on November 12, 2010, and the grievance became mature for decision on that date.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant, Daniel T. Bishop, was employed by the DHHR in that agency's Boone County, West Virginia office.

2. Grievant suffered from a medical condition that required him to take an unpaid medical leave for the period of August 27, 2009, through November 2, 2009.

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[2] Prior to the level three hearing, Respondent DHHR filed a Motion to Dismiss the grievance based upon the fact that Grievant voluntarily left employment with the DHHR on April 1, 2010. Respondent argued that Grievant's resignation rendered the grievance moot. Grievant's representative filed a written response to the Motion. At the level three hearing, the Motion to Dismiss was denied. Mr. Bishop filed his grievance while he was employed by the agency and if he were to prevail he would likely be entitled to compensation that he earned while employed. Therefore, the grievance was not rendered moot by his resignation.

[3] West Virginia Public Workers Union

3. Grievant applied to receive donations of annual leave from other state employees through the Leave Donation Program established by W. VA. CODE § 29-6-27 and administered pursuant to the West Virginia Division of Personnel Legislative Rule 143 C.S.R. 2.

4. Grievant was approved to receive voluntary leave donations and Respondent DHHR posted a notice for employees of the agency to let them know they could make leave donations for Grievant Bishop. Grievant received leave donations from a number of employees and he received pay during his absence from work pursuant to those donations.

5. Upon Grievant's return to work on November 3, 2009, he discovered that the donated annual leave he received was insufficient to cover the entire period he was absent and he would not be paid for a number of days.[4]

6. At least one employee offered to donate some of her accumulated annual leave to Grievant after he returned to work to cover for the days he was absent without pay. Grievant was told by an employee in the DHHR payroll section that he could receive such donations after he had returned to work.

7. Grievant's supervisor, Dan Holstein, was also interested in helping Grievant receive leave donations and contacted the DHHR Office of Human Resource Management to inquire about Grievant receiving leave donations after Grievant returned to work from an unpaid medical leave.

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[4] The specific number of days for which Grievant was paid and the number of days for which he was not paid were not presented as evidence.

8. Supervisor Holstein was informed by Harold Clifton, Director of the DHHR Office of Human Resource Management, that an employee was no longer eligible to receive donated annual leave after the employee returned to work.

9. Supervisor Holstein informed Grievant that he would not be able to receive additional leave donations related to his medical leave and the present grievance was filed.

10. Grievant voluntarily left employment with the DHHR on April 1, 2010.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

The West Virginia Legislature, through the enactment of W. VA. CODE § 29-6-27, required the West Virginia Division of Personnel to:

> establish a program under which annual leave accrued or accumulated by an employee of an agency may, if voluntarily agreed to by the employee, be transferred to the annual leave account of another designated employee if the other employee requires additional leave because of a medical emergency.

Id. Pursuant to this legislative mandate, the Division of Personnel passed a legislative rule

to implement this program titled, *Leave Donation Program.* 143 C.S.R. 2 § 1 *et seq*. Respondent's Exhibit 1. With regard to when an employee's right to receive leave and use donations ends for any particular qualifying event, the legislative rule states the following:

> d. A recipient's use of donated leave shall cease:
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> A. if the recipient, for any reason, ceases employment with the state;
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> B. if the recipient voluntarily requests termination of the use of donated leave;
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> C. if the recipient fails to provide the required physician/practitioner's verification or otherwise fails or ceases to meet eligibility requirements;
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> D. upon the exhaustion of the total dollar value of all leave donated to the recipient; or
>
> E. upon the recipient's return to work.
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> e. Any unused leave donation shall be returned to the donor and re-credited to his or her annual leave balance according to procedures established by the Director of Personnel.

143 C.S.R. 2 § 5.2 (d) & (e).

Respondent DHHR interprets this section of the rule to mean that once the leave recipient returns to work he may no longer use leave donations and may no longer receive leave donations. Grievant offers a counter interpretation. He suggests that this provision means the recipient may not apply donated leave to any absence taken after he returns to work, but the provision does not preclude the recipient from receiving and using leave for his original absence after he has returned to work.

At level three, Teresa Crouse, Assistant Director of Communications and Information for the Division of Personnel, testified regarding the Division of Personnel's interpretation of this section of its legislative rule. Ms. Crouse was one of the managers

who helped draft the voluntary leave program.[5] She indicated that the purpose of this section was to establish a definite beginning and end to the leave donations for each incident. The Division of Personnel has consistently interpreted this section to prohibit any further donation or use of leave once an employee returns to work.

There are two rules of construction for statutes and legislative rules which are particularly pertinent to this matter. The first being, interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous. *CB&T Operations Co., Inc. v. Tax Comm'r,* 211 W.Va. 198, 202, 564 S.E.2d 408, 412 (2002) (quoting *Syl. Pt. 4, Security Nat'l Bank & Trust Co. v. First W.Va. Bancorp., Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (1981)). The statute creating the voluntary leave donation program for state employees charged the West Virginia Division of Personnel with establishing the program in a legislative rule. Under these circumstances, that agency's interpretation of the rule as disclosed by Ms. Crouse, must be given great weight.

The second applicable rule of construction is that statutory provisions which are clear and unambiguous and plainly express the legislative intent will not be interpreted by the courts but will be given full force and effect. *Syl. pt. 2*, *State v. Epperly,* 135 W.Va. 877, 65 S.E.2d 488 (1951)." *Syl. pt. 1*, *Sowa v. Huffman*, 191 W.Va. 105, 443 S.E.2d 262 (1994). The provision in this case states that "[a] recipient's use of donated leave shall cease . . . upon the recipient's return to work." This simple statement is clear. Once a recipient returns to work he may no longer use donated leave. If he may no longer use

[5] Teresa Crouse has worked for the Division of Personnel for many years and has served as the interim director of the agency on more than one occasion.

donated leave there is absolutely no need for him to receive additional donations that he may not use.

Other interpretations can be offered for this provision of the rule, and it is easy to be sympathetic to Grievant who needed the leave, and to his co-workers who willingly intended to give leave to him. Unfortunately, the language of this section of the provision is clear and unambiguous and must simply be applied as written. The provision prohibited Grievant from receiving or using donated leave for his unpaid medical leave once he returned to work. Consequently, the grievance must be denied.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous. *CB&T Operations Co., Inc. v. Tax Comm'r,* 211 W.Va. 198, 202, 564 S.E.2d 408, 412 (2002) (quoting *Syl. Pt. 4, Security Nat'l Bank & Trust Co. v. First W.Va. Bancorp., Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (1981)).

3. Statutory provisions which are clear and unambiguous and plainly express the legislative intent will not be interpreted by the courts but will be given full force and

effect. *Syl. pt. 2*, *State v. Epperly,* 135 W.Va. 877, 65 S.E.2d 488 (1951)." *Syl. pt. 1*, *Sowa v. Huffman*, 191 W.Va. 105, 443 S.E.2d 262 (1994).

4. 143 C.S.R. 2 § 5.2 (d) provides, in plain and unambiguous terms, that a recipient of leave donations may not use or receive donated leave after the recipient has returned to work. Under the legislative rule creating the Leave Donation Program, Grievant's co-workers could not donate additional leave to him after he returned to work from his unpaid medical leave.

Accordingly, the Grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: APRIL 12, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE