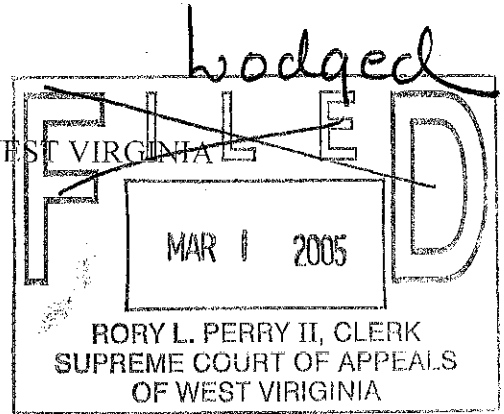


NO. 32287

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON



WEST VIRGINIA DIVISION OF
CORRECTIONS, and WEST VIRGINIA
DIVISION OF PERSONNEL,
Appellants

v.

RAYMOND CANFIELD
GARY ROY and
RICHARD TETER,
Appellees

FROM THE CIRCUIT COURT OF
RANDOLPH COUNTY, WEST VIRGINIA

APPELLEES' BRIEF

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RAYMOND CANFIELD
GARY ROY and
RICHARD TETER,
Appellees

APPELLEE'S BRIEF

STATEMENT OF PERTINENT FACTS

Appellees, all current or former employees of the West Virginia Division of Corrections ("DOC") at Huttonsville Correctional Center ("HCC"), were injured in the course of their employment with the Division of Corrections. As a result, each Appellee sought and was awarded temporary total disability benefits for the time that they were away from work due to their compensable injuries. Initially, Appellees used sick leave during their absence from work as a result of this injury. Upon receipt of their first temporary total disability benefit check, and all subsequent checks, Appellees surrendered the benefit checks to DOC/HCC for the purpose of

“buying back” their sick leave used while on temporary total disability status.¹ Appellees Teter and Canfield were injured on December 26, 2000, and Appellee Roy was injured on February 9, 1998. Appellee Canfield remained on temporary total disability until he determined he would be unable to return to work and subsequently retired. Appellees Teter and Roy returned to work on January 15, 2001, and January 10, 2000, respectively.

The Appellees chose to “buy back” their sick leave by surrendering their temporary total disability benefits, and expected by DOC actions and, under applicable law, to continue to accrue annual leave, sick leave, holidays and seniority. Notwithstanding, Appellant has refused to afford Appellees these accrued benefits solely on the basis that they applied for and received temporary total disability benefits. The Appellees having exhausted their administrative grievance remedies appealed to the Circuit Court of Randolph County, which reversed the decision of the level IV administrative law judge and required Appellant to award Appellees their accrued benefits.

Appellant asks this Court to review the decision of the Randolph County Circuit Court.

STANDARD OF REVIEW

The Supreme Court of Appeals of West Virginia will review decisions of lower courts involving administrative appeals using a two-prong deferential standard of review. Final orders and ultimate disposition are reviewed under an abuse of discretion standard, and factual

¹ No mention of this important fact is contained in Appellant’s “Statement of the Facts of the Case”, except in the verbatim inclusion of the Appellees’ grievance. Further, this fact is omitted from the argument submitted by Appellant in support of its petition for review.

findings are reviewed under a clearly erroneous standard; questions of law are reviewed de novo. *Walker v. W.Va. Ethics Comm.* 492 S.E2d 167, 201 W.Va. 108 (W.Va. 1997).

A circuit court reviews, *de novo*, the decisions of an administrative law judge, regarding conclusions of law and the application of law to facts. [*Martin v. Randolph County Board of Education*, 465 S.E.2d 399, 195 W.Va. 257 (W.Va. 1995)].

STATEMENT OF THE ISSUES

- I. **Whether Appellant can refuse to award the Appellees sick leave, annual leave, seniority and holidays earned while receiving temporary total disability benefits which benefits were surrendered to Appellant.**
- II. **Whether Appellant's refusal to award these benefits to Appellees constitutes a violation of *W.Va. Code* §23-5A-1, *et. seq.*, as an act of discrimination for seeking or receiving temporary total disability benefits.**
- III. **Whether the policy, as applied in this case, is arbitrary and capricious, and contrary to *W.Va. Code* §23-4-1 and §23-5A-1, *et. seq.***

ARGUMENT

- I. **Appellant cannot refuse to award sick leave, annual leave, holiday pay and seniority (service credit) to employees who receive temporary total disability benefits.**

Abundant authority exists which requires appellant to award sick leave, annual leave, holiday and seniority to Appellees. Statutes, circuit court decisions, administrative decisions and the Code of State Rules consistently hold that Appellant has erroneously denied Appellees their benefits.

Provisions of *W.Va. Code* §23-4-1 in effect at the time of each Appellees' injury provide that they may collect sick leave benefits until receiving temporary total disability², and

² Contrary to Department of Personnel's assertion that statute requires exhaustion of sick leave before "buy back" provision is available (See Division of Personnel Brief page 9).

then may “buy back” all sick leave by surrendering their temporary total disability benefits to their employer. At the time each appellee received worker’s compensation benefits they were surrendered to and accepted by, DOC. The language of this code section simply provides that an employee cannot receive both temporary total disability benefits and sick leave benefits.

A review of 143 CSR 3.1, *et. seq.*, reveals that the employer is required to award sick leave to an employee. Initially, 143 CSR 3(a) affords the employee the opportunity as outlined in *W.Va. Code* §23-4-1, that being to choose to surrender temporary total disability benefits for sick leave benefits. This section goes on to allow an employee to use accumulated sick leave and “buy back” the used sick leave when temporary total disability benefits are surrendered. Upon surrendering temporary total disability benefits, the employer, “...shall restore(d)...sick leave...” (§143-3-3.1 (b)(2), and *W.Va. Code* §23-4-1) (Note CSR differs from statute in that CSR requires exhaustion of sick leave before buy back can occur. The statute makes no mention of this condition).

The issue of service credit, or seniority is likewise raised. The Rule provides that an employee shall receive service credit if they use their sick leave, but cannot receive service credit if they receive temporary total disability benefits. But compare this provision with CSR §162-5-26, which requires that service credit be awarded to an employee receiving temporary total disability benefits.³

³ This argument will be more fully developed in the following section regarding discrimination by the employer for electing to receive temporary total disability benefits. The Public Employee Retirement System adds the provision that the employee must return to work to receive service credit.

As to both issues, the Circuit Court of Kanawha County, on April 12, 2000, entered an order (which was not appealed) in *W.Va. Div. of Corr. v. Troy McCauley*, 99-AA-72, which required Appellant to award all sick leave, annual leave, seniority and related benefits to Mr. McCauley. Mr. McCauley was an employee of HCC who was injured while working and chose to receive temporary total disability benefits, and then "bought back" his sick leave by surrendering his temporary total disability payments.

In reaching this decision, the Honorable James C. Stucky found that Mr. McCauley was "penalized for 'buying back' this time and receiving worker's compensation. Had he chosen to continue taking 'sick leave' rather than worker's compensation, he would have continued to accrue seniority time, sick leave, annual leave and his related benefits." The Court went further to say that reinstating these benefits was "...not unjust enrichment, and does not defeat the purpose of the Division's Personnel Policy." This decision is consistent with §3.2(a) and §4.1.

In part, Judge Stucky relied on the decision in *Baker v. Board of Trustees/W.Va. Univ.* Docket No. 96-BOT-514(July 8, 1997). That decision (also not appealed) required the employer to reinstate seniority time for the period that Baker was receiving temporary total disability benefits.

In sum, based upon the legislative enactment of *W.Va. Code* §23-4-1; the Kanawha County Circuit Court decision in *McCauley*; the Administrative Law Judge ruling in *Baker*; and the provisions of 143 CSR 3 and 162 CSR 5, the decision of the Randolph County Circuit Court is correct. Appellant has wrongfully denied benefits to Appellees, and they are entitled to have such benefits restored.

II. Appellant's actions are discriminatory within the meaning of *W.Va. Code* §23-5A-1.

Appellant's refusal to award to the injured employees their accumulated benefits is based solely on their application for temporary total disability benefits. The Appellant's interpretation of the policy relied upon in this denial (CSR §143-3-4) is discriminatory on its face. This section states:

“4.1 An employee electing to receive accumulated sick leave continues to accrue sick and annual leave and service credit...”

However, this policy is interpreted by Appellant to mean that an employee who elects to receive temporary total disability benefits (rather than sick leave), and buy back sick leave, will not accumulate sick leave during the period of time temporary total disability benefits are paid. Thus Appellant intends to discriminate against an employee who suffers a compensable injury and elects to collect temporary total disability benefits rather than use accumulated sick leave.

It is important to note that Appellants urge the following distinction between temporary total disability benefit recipients, and accrued sick leave recipients. Under Appellants' argument employees who attend work everyday accumulate annual increment pay, annual leave, service time, sick leave and seniority. Those employees who suffer a compensable injury and elect to use sick leave continue to accumulate annual increment pay, annual leave, service time and sick leave (143 CSR 3-4.1). However, an injured employee who claims temporary total disability benefits and opts. under *W.Va. Code* §23-4-1 to buy back sick leave only accumulates annual increment pay. (*W.Va. Code* §23-5A-4). Clearly the dichotomy urged makes a significant distinction which injures the employee who elects to collect temporary total disability benefits.

Clearly this practice violates the language and intent of the anti-discrimination statute in *W.Va. Code* §23-5A-1 which states:

“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.” (Emphasis added).

In its brief, Division of Personnel argues that the lower court decision violates the legislative history of *W.Va. Code* §23-5A-4. It is clear that the legislature directed Division of Personnel to create a policy regarding this issue. However, the policy which was created is contrary to *W.Va. Code* §23-5A-1 in that it treats employees who suffer compensable injury differently, depending solely upon their choice of sick leave benefits or worker’s compensation benefits.

Again the discriminatory nature of this policy is seen regarding the issue of service credit. The policy Appellants seek to apply states:

- “b. An employee electing to receive temporary total disability benefits continues to accrue annual increment pay while receiving temporary total disability benefits, but does not accrue credit for years of service” CSR 143-3-3.2(b).

The policy appears magnanimous at first blush, yet when one considers the legislative enactment of *W.Va. Code* §23-5A-4, (which requires the State to award all employees their accrued annual pay while they receive temporary total disability benefits) it injures only the employee who seeks worker’s compensation benefits. (Compare §143 CSR 3.2(a) which awards service credit for those compensably injured employees who choose to use sick leave). The policy as it is applied denies the accrual of sick leave, annual leave and service credit only to those employees who choose to collect temporary total disability benefits, while awarding it to

those injured who use sick leave. This denial is inconsistent with the Public Employee Retirement System which requires that State employees be awarded seniority while on temporary total disability benefits. (See CSR §162-5-26). Once more, the suggested interpretation makes a distinction based solely upon the election to receive temporary total disability benefits when it awards accrual to those employees using sick leave but not worker's compensation. (See §4.1). The provision of §143 which denies seniority not only discriminates based upon the application for temporary total disability, but also is in direct conflict with the Public Employee Retirement System Rules.

The third way in which this policy is discriminatory is reflected in §3.1(b)(2):

- "2. 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 leave, or sick and annual leave paid, after which his or her sick and annual leave, if used, shall be restored." (emphasis added).

While the policy requires "net value of sick leave...", the legislative enactment simply requires that an employee "...pay(ing) to his or her employer the temporary total disability benefits received or an amount equal to the temporary total disability benefits received." (*W. Va. Code* §23-4-1). Once again the policy is contrary to other provisions, and in this case, contrary to statute. When there is a conflict between rules and statutes the statute must control [See *Repass v. Worker's Compensation Division* 569 S.E. 2d 162, 212 W.Va. 86 (2002) and *Maikotter v. University of West Virginia Board of Trustees/West Virginia University* 527 S.E. 2d 802, 206 W.Va. 691 (1999)].

Appellant urges this Court to follow the Administrative Law Judge's decision in *Lohr v. W.Va. Div. of Corr./Northern Regional Jail & Correctional Facility*; Docket No. 99-

CORR-191 (August 31, 1999). However, a reading of this decision plainly shows that this ruling, but for the medical leave policy of CSR §143, is itself discriminatory.

This Court has identified the test for a prima facie showing of discrimination in *Powell v. Wyoming Cablevision, Inc.*, 403 S.E.2d 717, 184 W.Va. 700 (W.Va. 1991). This is a three part test:

1. Employee sustains an on-the-job injury;
2. Employee institutes a proceeding or claim under the worker's compensation act; and
3. The filing of this claim is a significant factor in the employer's decision to discharge or otherwise discriminate against that employee (Emphasis added).

The Appellees clearly have met the first two elements of this test. The third showing is achieved by the language of CSR §143, which makes separate classes of employees who suffer compensable injuries; one class which receives sick leave benefits, and a separate class who receive temporary total disability benefits. The first class receives seniority, incremental pay, sick leave, annual leave, and holiday pay. The second class receives only increment pay, yet surrenders their temporary total disability benefits.

The *Lohr* decision points out this discrimination in its conclusions of law:

- “3. An employee who was injured in work-related activity and elects to receive worker's 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.[Lohr] was not given seniority or credit for purposes of calculating her annual increment entitlement for the time she was receiving temporary total disability benefits.”

Since CSR §143 makes a distinction in the benefits employees receive depending solely upon whether or not they file a claim for worker’s compensation, it is discriminatory. The policy established to address this issue violates the legislative enactment in *W.Va. Code §23-5A-1*.

It is argued that the policy urged by Appellants treats temporary total disability recipients and medical leave of absence equally. This argument misses the mark of this discussion. An employee who elects medical leave of absence may do so for reasons other than a compensable injury. The policy does not treat equally those employees who suffer a compensable injury and elect temporary total disability benefits as compared to those who elect accumulated sick leave. As a result, the policy violates *W.Va. Code §23-5A-1*, and *Powell (supra)*. In the instant case, appellees did not elect medical leave of absence, and therefore the “default option is accumulated sick leave” 143 CSR 3.3. By using accumulated sick leave Appellees must be treated the same when they “buy back” as provided by *W.Va. Code §23-4-1*.

When one compares the position of DOC/DOP regarding Appellees’ claims to other recent decisions by this Court, it is clear that the relief sought by Appellants is contrary to law. For example, in *Wriston v. Raleigh County Emergency Services Authority*, 518 S.E.2d 650, 205 W.Va. 409, (W.Va. 1999), this Court held that an employer who refuses to pay its share of medical insurance for an injured employee while receiving temporary total disability benefits violatest the discrimination statute of *W.Va Code §23-5A-1, et. seq.*

Discrimination as to the issue of medical insurance benefits is consistent with other benefits offered by an employer. Since an employer is required to continue that benefit, DOC/DOP is required to award other benefits they offer as well.

III. Application of the policy as urged by Appellant is arbitrary and capricious and does not achieve its stated purpose.

To apply the policy to the current factual scenario fails to recognize two important points, e.g., 1) DOC accepted Appellees' surrendered temporary total disability benefits, so no unjust enrichment occurs to Appellees; and 2) by surrendering temporary total disability benefits, Appellees were essentially not receiving temporary total disability benefits. Instead they were using accumulated sick leave, and buying it back as provided for by statute. Thus, according to 143 CSR 3, they should be awarded sick leave time and other benefits accrued during their period of disability. (See §3.2(a) and §4.1).

Appellants, as pointed out earlier, have neglected to factor into their arguments that each Appellee surrendered temporary total disability benefits, as they were permitted to do by *W.Va. Code* §23-4-1. Upon doing so, each Appellee was placed in essentially the same position as an employee who used sick leave benefits, only DOC received remuneration in the form of temporary total disability benefits. Therefore, DOC deprived the Appellees of both sick leave and temporary total disability benefits. In exchange the Appellees got nothing in return.

To deny Appellees of both sick leave (accumulated or redeemed), seniority and other benefits and temporary total disability benefits is contrary to public policy, applicable law and an arbitrary and capricious act which does nothing to further the stated purpose of the policy - - to prevent receipt of both temporary total disability benefits and sick leave benefits.

Conversely, if the policy is applied to these facts as Appellant suggests, the Appellees will have no temporary total disability benefits (they having been surrendered), nor will Appellees accumulate sick leave, seniority, holiday pay and other benefits. If Appellant is successful in this argument, DOC will be unjustly enriched at the expense of employees injured in their duties.

An arbitrary and capricious decision is one which is unreasonable, without consideration, and in disregard of facts and circumstances of the case. [*Arlington Hospital v. Schwaiker* 547 F.Supp. 670 (C.D.Va. 1982)]. The decision of the administration law judge and the proposed ruling by Appellants rises to this level. To apply such a suggested ruling is without reason or consideration and contrary to the facts of this matter. Appellees who were injured during and as a result of their employment will be denied benefits other similarly situated employees would receive merely because they chose to collect worker's compensation benefits rather than sick leave.

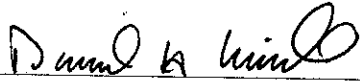
Application of the policy to these facts shows that Appellees are not being unjustly enriched, therefore they would not violate *W.Va. Code* §23-4-1. However, application of the policy as urged by Appellant would discriminate against Appellees in violation of *W.Va. Code* §23-5A-1, *et. seq.* Appellants' argument that all state agencies implement this policy does nothing to eradicate the discriminatory nature of the policy.

Moreover, DOC willingly continued to accept temporary total disability benefit checks from the employees, however now argues that they could not "buy back" sick leave (the purpose of surrendering these benefits) because no sick leave was available to them.

CONCLUSION

Appellants' efforts to deny Appellees the accrued sick leave, seniority, holidays and other benefits grossly violates West Virginia law, policy and court decisions, and is in conflict with other state rules. When the Appellees surrendered temporary total disability benefits they were to continue to accrue these benefits. To do otherwise does not achieve the stated purpose of applicable law, and is an act of discrimination in violation of *W.Va. Code* §23-5A-1. The relief sought should be denied, and the decision of the Circuit Court of Randolph County should be affirmed.

Respectfully submitted,
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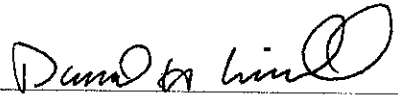
CERTIFICATE OF SERVICE

I, David H. Wilmoth, counsel for Appellees, do hereby certify that on this date I served a true copy of the foregoing upon the following by depositing a true copy in the United States mail, certified mail, return receipt requested, postage prepaid, addressed as follows:

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