DONALD BUMGARNER, PEGGY BROWNING,

and BERTIE MOORE,

Grievants,

V. Docket No. 96-23-440

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Donald Bumgarner, Peggy Browning, and Bertie Moore allege the Logan County Board of Education ("LCBOE") violated W. Va. Code § 18A-5-2 when it did not pay them for their school holidays while they were on Workers' Compensation. This grievance was originally filed in December 1994, and consolidated by Administrative Law Judge Albert Dunn, with another grievance involving these same Grievants, and dealing with the issue of personal leave days while on Workers' Compensation. ALJ Dunn rendered a Decision on the personal leave day issue in May 1995, but did not address the issue of holiday pay. The grievance was appealed to Circuit Court, and on September 26, 1996, Judge Eric O'Briant remanded the holiday pay issue to this Grievance Board and this grievance was assigned to the undersigned. The parties did not desire a hearing and wished to submit the grievance on agreed stipulations of fact. These stipulations were received on December 17, 1996. This case became mature for decision on February 23, 1997, the deadline for the parties' proposed findings of fact and conclusions of law.

The following are the verbatim stipulations of fact agreed to by the parties. They have been double-spaced to make them more readable.

Stipulations of Fact

1. All of the Grievants are regularly employed by the Respondent as full-time, service personnel and have been so employed by the Respondent for the 1993-1994, 94-95, 95-96, and 1996-1997 school years.

2. All of the Grievants held continuing contracts of employment with the Respondent for the 1993-1994 school years and subsequent school years.

3, Grievant Bumgarner is employed as a carpenter/mason. Grievant Bumgarner held an employment term of 261 days during the 1993-1994 and 1994-1995 school years. This term of employment was not modified in subsequent school years.

4. Grievant Browning is employed as a transportation/ teacher's aide. Grievant Browning held an employment term of 200 days during the 1993-1994 and 1994-1995 school years. This term of employment was not modified in subsequent school years.

5. Grievant Moore is employed as a school bus operator. Grievant Moore held an employment term of 200 days during the 1993-1994 and 1994-1995 school years. This term of employment was not modified in subsequent school years.

6. Grievants Browning and Moore suffered work-related injuries during the 1993-1994 school year. Grievants' [W]orkers' [C]ompensation claims have been ruled compensable by the West Virginia Workers' Compensation Division.

7. Grievant Bumgarner successfully reopened a previously filed [W]orkers'[C]ompensation claim during the 1993-1994 school year. Grievant Bumgarner received temporary [total] disability benefits until this claim was closed on a temporary [total disability] basis on January 8, 1996. Grievant Bumgarner has filed a protest to the closure of this claim with the Workers' Compensation Office of Judges and this protest has been submitted for decision.

8. Grievant Bumgarner was awarded Social Security disability benefits by decision dated June 28, 1996.

9. Grievant Browning was unable to work after March 3, 1994 due to a work-related injury and did not return to work until February 3, 1997. Grievant Browning received temporary total disability benefits from the Workers' Compensation Division while she was off. (See footnote 1)

10. Grievant Moore was unable to work after March 3, 1994 due to a work-related injury and has not yet returned to work. Grievant Moore continues to receive temporary total disability benefits from the Workers' Compensation Division.

11. The Respondent has refused to pay and the Grievants have not received their

respective wages for the legal school holidays as set forth in West Virginia Code §18A-5-2 from July 1, 1994 until the present time.

12. The Grievants were awarded personal leave benefits by decision of the West Virginia Education and State Employees Grievance Board in Donald Bumgarner, et al. v. Logan County Board of Education, Docket No: 94-23-583 (May 9, 1995). The Respondent has appealed this decision to the Circuit Court of Logan County where the appeal is still pending. A stay of the decision of the Grievance Board has never been entered by the circuit court,

13. Notwithstanding the decision of the Grievance Board, the Respondent has not permitted the Grievants to draw or use their accrued leave benefits since July 1, 1994.

14. All of the Grievants have accrued positive personnel leave balances in each of their respective leave accounts.

After a review of these stipulations, the undersigned makes the following Finding of Fact to clarify the parties' stipulations.

Finding of Fact

Grievant Bumgarner was not an employee of LCBOE during the 1996-1997 school year, as he began receiving social security disability benefits in June 1996.

Discussion

W. Va. Code § 18A-5-2 states:

> Schools shall not be kept open on Saturday nor on the following days which are designated as legal school holidays, ... When any such holiday falls within the employment term, it shall be considered as a day of the employment term and the full-time school personnel shall receive his or her pay for the same.

This Grievance Board has previously interpreted § 18A-5-2 to mean employees absent because of injury are not entitled to compensation for those days enumerated in W. Va. Code § 18A-5-2, once they have been compensated for all accrued personal leave days. Thomas v. Boone County Bd. of Educ., Docket No. 03-88-087 (Oct. 18, 1988). "However, when employees have not been compensated for all accrued personal leave days they are entitled to

compensation for all holidays . . . which occur during the time they are off due to injury." (See footnote 2) Taylor v. Mingo County Bd. of Educ., Docket No. 96-29-131 (Aug. 19, 1996). See White v. Mingo County Bd. of Educ., Docket No. 96-29-115 (June 4, 1996); Toney v. Lincoln County Bd. of Educ., Docket No. 22-88-005-1 (Nov. 29, 1988); Thomas, supra.

Since Grievants have not exhausted their accrued personal leave, they are entitled to compensation for the legal school holidays that occurred during the terms of their employmentcontracts. Specifically, Grievant Bumgarner is entitled to all holidays that occurred from the date he successfully reopened his Workers' Compensation claim until January 8, 1996. Grievant Browning is entitled to all the holidays identified in W. Va. Code § 18A-5-2, that occurred during the remainder of the 1993-1994 school year after March 1, 1994, and for the holidays that occurred during her 200 day employment contract for the following school years, up to February 3, 1997. Grievant Moore is entitled to all the holidays identified in W. Va. Code § 18A-5-2, that occurred during the remainder of the 1993-1994 school year after March 3, 1994, and for the holidays that occurred during her 200 day employment contract for the following school years, up to the present.

One other issue must be addressed. As the Division of Workers' Compensation has not ruled on Grievant Bumgarner's protest of the closing of his case on temporary total disability benefits, the time period from January 8, 1996 to June 28, 1996, cannot be addressed in this grievance. Grievant Bumgarner's entitlement to holiday pay is dependent upon his receiving Workers' Compensation benefits as it is a derivative-based claim. Accord, Rollins v. Mason County Bd. of Educ., Slip Op. No. 23549 (W. Va. July 3, 1997).

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. W. Va. Code § 18A-5-2 states:

> Schools shall not be kept open on Saturday nor on the following days which are designated as legal school holidays, ... When any such holiday falls within the employment term, it shall be considered as a day of the employment term and the full-time school personnel shall receive his or her pay for the same.

2. "[W]hen employees have not been compensated for all accrued personal leave days,

they are entitled to compensation for all holidays . . . which occur during the time they are off due to injury." Taylor v. Mingo County Bd. of Educ., Docket No. 96-29-131 (Aug. 19, 1996). See White v. Mingo County Bd. of Educ., Docket No. 96-29-115 (June 4, 1996); Toney v. Lincoln County Bd. of Educ., Docket No. 22-88-005-1 (Nov. 29, 1988); Thomas v. Boone County Bd. of Educ., Docket No. 03-88-087 (Oct. 18, 1988).

3. Grievants have met their burden of proof and have demonstrated they are entitled to compensation for all holidays that occurred during their employment term while they were off work due to a work-related injury.

Accordingly, this grievance is GRANTED.

Grievant Bumgarner is entitled to all holidays that occurred from the date he successfully reopened his Workers' Compensation claim until January 8, 1996. Grievant Browning is entitled to all holidays identified in W. Va. Code § 18A-5-2, that occurred during the remainder of the 1993-1994 school year after March 1, 1994, andfor the holidays that occurred during her 200 day employment contract for the following school years, up to February 3, 1997. Grievant Moore is entitled to all holidays identified in W. Va. Code § 18A-5-2, that occurred during the remainder of the 1993-1994 school year after March 3, 1994, and for the holidays that occurred during her 200 day employment contract for the following school years, up to the present (See footnote 3) . Additionally, LCBOE is directed to grant Grievant Bumgarner the holidays from January 8, 1996, to June 28, 1996, if the Division of Workers' Compensation later determines he was entitled to total temporary disability benefits during this time period.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan County 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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: July 15, 1997

Footnote: 1

The data concerning Grievant Browning return to work was submitted later by her attorney and stipulation nine has been edited accordingly.

Footnote: 2

Grievants' counsel urged this Grievance Board to adopt the theory applied in Hale & Brown v. Mingo County Board of Education, Docket No. 95-29-315 (Jan. 25, 1996). That case dealt with the use of donated leave time when Grievants did not have accrued personal leave time. In this case, all Grievants have accrued personal leave time, and to reach the issue suggested by Grievant would require the undersigned to discuss an issue not in controversy; thus, Grievants' suggestion will not be followed.

Footnote: 3

Grievant Moore may be entitled to additional holidays, depending on the future status of her Workers' Compensation benefits and her employment status.