OLLIE HUNTING,

Grievant,

v. **Docket No. 99-22-208**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Ollie Hunting, filed this grievance against the Lincoln County Board of Education ("LCBOE" or "Board") on or about April 26, 1999. (See footnote 1) His Statement of Grievance says:

> Violation of WV Code 18-29-2(p) "reprisal". Grievant was not allowed to take unpaid days, same as other directors. Grievant was given additional contract days as a result of a Circuit Court decision .
>
> RELIEF SOUGHT: Return of person (sic) days taken for spring break and retaliation to stop.

This case was denied at Levels I and II and waived at Level III. Grievant appealed to Level IV on May 24, 1999. A Level IV hearing was held on July 16, 1999, and this case became mature for decision on August 4, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

___1. Grievant is employed as the Attendance Director, and he also assists his supervisor, Donna Martin, as a Textbook Custodian. 2. As the result of a prior

grievance, on January 19, 1999, Grievant was awarded a 240 day contract in place of the 210 day contract he previously had. (See footnote 3)

3. Because of the lengthy appeal process, Grievant received payment for thirty additional days, or the difference between the 210 and the 240 day contract, in January 1999, for school years 1996 - 1997 and 1997 - 1998. Also in January 1999, Grievant received the payment for the additional thirty days for the 1998 - 1999 school year.

4. From the beginning of school until January 19, 1999, Grievant had worked 113 days.

5. From January 20, 1999, until June 30, 1999, the end of the school year, there were only 112.5 regular work days left in the school year.

6. If Grievant worked every day, for the rest of the year, he could only work 225.5 days, 14.5 days short for the of the 240 he had been paid for the1998 - 1999 school year. Thus, he would be paid for 14.5 days he had not worked.

7. On, or about, February 4, 1999, Grievant went to his supervisor to request "NA" days for the rest of the school year.

8. The words, "NA" days, are a record-keeping phrase. This phrase is used to identify the 21 days, a 240 day employee is not at work during the 261 term, and signifies these days are not to be charged against the employee's sick or personal leave. 9. "NA" days are not a benefit, and no employee is entitled to them. The reason for their use is to keep track of the 21 days, a 240 day employee does not work during the school year.

10. At the time of this meeting with his supervisor, Dr. Martin believed "NA" days were a benefit afforded 240 day employees, and she agreed Grievant could take 8 "NA" days during the reminder of the school year. Both Grievant and Dr. Martin agreed it would be impossible for him to take the full 21 days, but apparently this was discussed. If these eight days had been allowed, Grievant would then have worked only 216.5 days of his 240 day contract.

11. There was no expectation Grievant should work holidays, etc., to achieve the 240 days for which he was paid for the 1998 - 1999 school year.

12. Grievant did take 3 of the "NA" days he discussed with Dr. Martin in February.

13. Later, Dr. Martin found out from the Business Manager and Treasurer, Birdie Gandy, that "NA" days were not a benefit, but the phrase was merely a record keeping tool. Ms. Gandy believed Grievant could not receive "NA" days because he was already receiving wages he had not earned. For Grievant to take additional "NA" days would result in more wages paid for work not performed.

14. When Dr. Martin received this information, she notified Grievant orally on March 16 and 18, 1999, and in writing, on March 23, 1999, that he would not be allowed any more "NA" days for the 1998 - 1999 school year .

15. While a 240 day employee is not required to work more than the days he has contracted for, the scheduling and taking of the 21 unpaid "NA" days must be approved byhis or her supervisor, before they are permitted. Dr. Martin had informed Grievant he would not be allowed to take any more "NA" days.

16. Normally, a 240 day employee would have the entire school year in which to plan when to schedule to take the 21 days, without pay off, during the 261 scheduled work days. Because Grievant's prior grievance was not granted until the middle of the school year, there were no "empty" or non-work days for Grievant to take off. He needed to work all the remaining days in the school year in order to at least come close to the number of days for which he was paid. As it was, he still was paid for approximately 14.5 days he was unable to work.

Issues and Arguments

Grievant's argument at Level IV changed from his original statement. Upon initial filing, his focus was that he was being retaliated against for filing and winning a grievance. At Level IV, he argued Ms. Gandy did not have the authority to overturn a

decision made by his direct supervisor.

Respondent argues "NA" days are not a benefit, and it would be fiscally irresponsible for LCBOE to allow an employee to take off days in this situation. Respondent notes these days are to be unpaid days, but Grievant had already been paid for them. LCBOE maintains that its action is not reprisal, but merely the requirement Grievant work the days for which he has already received payment. Respondent alsopoints out the fallacy in Grievant's argument for requested relief, that he have his personal leave days returned or be paid for them. (See footnote 4)

Discussion

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 § 4.19 (1996); 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.

Grievant's claim of reprisal will be addressed first. It is important to examine the definition of the word, and the elements necessary to prove the charge. Reprisal is defined in W. Va. Code § 18-29-2(o) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

> 3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
>
> 4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or
>
> 5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant has not proven or established a prima facie case of reprisal. Although chronologically, Grievant did not receive the requested "NA" days after he won his grievance, this action is not evidence of reprisal, or that Grievant was "subsequently treated in an adverse manner by the employer . . . ." All 240 day employees are required to work the full length of their contract. The expectation for Grievant was the same. Although the timing prevented Grievant from working 240 days, LCBOE was correct in preventing Grievant from taking "NA", or unpaid, days for which he had already been compensated. It should be clearly noted that Grievant was not prevented from taking offduring the requested time, he was merely required to use his personal leave days, as are all employees, when they wish to take off scheduled, paid work days.

Grievant's argument that Ms. Gandy did not have the authority to overturn Dr. Martin's decision is also without merit. Dr. Martin's interpretation of "NA" days was inaccurate, which led her to an erroneous approval of Grievant's request for "NA" days. Once she was informed that "NA" days were not a benefit, and Grievant would need to work the rest of the school year to at least meet part of the contract for which he had been paid, she realized her first decision was in error. Dr. Martin was very clear about this in her testimony. It cannot be incorrect for a supervisor to rectify an error made through a misinterpretation, and in this instance it would have been fiscally irresponsible for LCBOE to approve "NA" days for an individual who did not have enough time to take them. Quite simply put, Grievant was not allowed to take unpaid leave days, as there were no unpaid leave days available or left to take.

The above-discussion will be supplemented by the following 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 § 4.19 (1996); 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. 2. Grievant has not met his burden of proof and demonstrated that LCBOE engaged in reprisal.

3. LCBOE's determination that "NA" days are not a benefit, but are a record keeping tool is correct.

4. Once Dr. Martin learned that her prior understanding of "NA" days was inaccurate, that they were not a benefit, her determination to rescind her prior decision was the proper course of action. (See footnote 5) The fact she received this information from the Business Manager and Treasurer does not make her decision incorrect or

invalid.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln County. Any 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 30, 1999

Footnote: 1

The grievance form was not signed or dated.

Footnote: 2

Grievant was represented by Anita Mitter from the West Virginia Education Association, and LCBOE was represented by Attorney Erwin Conrad.

Footnote: 3

Hunting v. Lincoln County Bd. of Educ., Docket No. 97-22-103 (Sept. 18, 1997), aff'd Lincoln County Circuit County, 97-AA-9 (Oct. 8, 1997), ref'd West Virginia Supreme Court of Appeals, No. 982687 (Dec. 3, 1998).

Footnote: 4

This argument is without merit. Grievant has already been paid for days he did not work, to then pay him again for these days would be inappropriate.

Footnote: 5

It should be noted Grievant did received three "NA" days in February 1999 as the result of this prior, erroneous decision and agreement.