**MARTHA ALEXANDER,**

**Grievant,**

**v. Docket No. 05-40-051**

**PUTNAM COUNTY BOARD OF EDUCATION,**

**Respondent,**

# D E C I S I O N

**Grievant, Martha Alexander, is employed by the Putnam County Board of Education ("PCBOE"), as an aide. She filed this grievance on October 18, 2004, asserting:**

> **lost sick day. On November 26, 2003 I had surgery and was off of work for several days and ran out of sick leave and even missed holiday pay as I was unable to return to work on Martin Luther King Day, January 19, 2004. I was informed that I had not worked enough days to earn my sick leave so they said I owed them time and that is why I had so many unpaid days while I was off.**
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> **This year I received my second check on September 30, 2004 and at that time I noticed that payroll had deducted two sick leave days and I knew I had only missed one day. I then tried to call and talk to Brenda Dillon in payroll and was unable reach her that day. I then tried again the next day and finally got to talk to Debra Hughes and at that time she told me I still owed them a day from last school year (2003-2004). I had never been notified of that and was quite surprised that they had not taken care of that last year. I feel that they have broken state code 18A-4-10 and would like to have that sick leave day back.**
>
> **Relief sought: lost sick day return[ed].**

**The grievance was denied at Level I, but was granted before Grievant filed to Level II. On October 28, 2004, Superintendent Harold Hatfield wrote Grievant informing her he had directed Brenda Dillon to add the day back to Grievant's accumulated sick leave for the current year. He also noted W. Va. Code § 18A-4-10 required an employee to reimburse a board of education for unaccumulated leave at the time of retirement or resignation, and the**

**leave issue would be reconciled at that time. Grievant filed to Level II after receiving this letter. On November 15, 2004, Superintendent Hatfield wrote Grievant stating that as her relief sought had already been granted that there was no justification for a Level II grievance. A Level II hearing was held, and the grievance was denied by Decision dated February 7, 2005. Level III was by- passed. Grievant appealed to Level IV on April 14, 2005. This Statement of Grievance reads:**

> **Grievant contends that Respondent erred in deducting a personal leave day from her for the 2003-2004 school year. Although the Respondent has restored that day for the time being, it has notified her that the day will be taken back upon her eventual separation from employment with the board of education. Grievant alleges a violation of West Virginia Code § 18A-4-10.**

**The relief sought was "permanent restoration of the personal leave day in question." Grievant appealed to Level IV on February 14, 2005. A Level IV hearing was held on April 14, 2005, and this case became mature for decision on May 9, 2005, after receipt of the parties' proposed findings of fact and conclusions of law.** (See footnote 1)

## Issues and Arguments

**Grievant asserts she has been "chastised" enough by her illness, and as she was under contract to PCBOE, even though she was not working, she was entitled, pursuant to W. Va. Code § 18A-4-10, to receive all of her personnel leave allotment for the year, and PCBOE committed error when it reduced her allotment for the 2004-2005 school year.**

**First, Respondent maintains that because the personal leave day was restored to Grievant pursuant to her request, that this grievance is speculative and not ripe fordecision. Respondent asserts the time to file a grievance over this issue would be when the day is actually taken away. Second, Respondent also asserts that because Grievant was off due to personal illness, she did not earn all her personal leave days, and W. Va. Code § 18A-4-10 directs the board of education to seek restitution for any overages paid to Grievant.**

**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 classified as an aide and has worked for PCBOE for sixteen years as regular employee. Part of her employment was part-time. Grievant has a 200-day contract.**

**2. Regular employees receive 1½ days of personal leave/sick leave each month they work. Typically the fifteen days each employee receives is added at the beginning of each school year, and then any leave is deducted from that amount as the year progresses.**

**3. A week before school started, Grievant was informed she needed surgery. Her doctor recommended immediate surgery, but Grievant delayed this treatment until November 2003 so she would not have to be absent from work for such a long time.**

**4. Grievant was absent from work from November 26, 2003, to January 20, 2004 for surgery and recovery.**

**5. PCBOE did not and does not question whether Grievant's sick leave usage was appropriate. 6. Because Grievant had to use a considerable amount of leave several times previously due to personal and family illness, she did not have much sick leave accumulated.**

**7. Grievant exhausted her sick leave before she was able to return to work, and she had to take approximately 17 days of unpaid leave.**

**8. While Grievant was off with her surgery, the fifteen personal leave days were paid to Grievant, and then she was on unpaid leave.**

**9. PCBOE discovered it had paid Grievant for a personal leave day that she had not earned. Grievant had not earned all of her personal leave days because she was off work without pay. In September 2004, this day was deducted from Grievant's personal leave days for the 2004-2005 school year.**

## 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).**

**The resolution of this grievance revolves around the wording in W. Va. Code § 18A-4-10, as both parties cite this Code Section to support their assertions. This Code Section discusses personal leave for illness and other causes and states in pertinent part:**

> **At the beginning of the employment term, any full-time employee of a county board of education shall be entitled annually to at least one and one-half days personal leave for each employment month or major fraction thereof in the employee's employment term. Unused leave shall be accumulative without limitation and shall be transferable within the state. A change in job assignment during the school year shall in no way affect the employee's rights or benefits.**
>
> **A regular full-time employee who is absent from assigned duties due to . . . sickness, . . . shall be paid the full salary from his regular budgeted salary appropriation during the period which such employee is absent, but not to exceed the total amount of leave to which such employee is entitled: Provided, That each such employee shall be permitted three days of such leave annually, which may be taken without regard to the cause for the absence, except that personal leave without cause may not be taken on consecutive work days unless authorized or approved by the employee's principal or immediate supervisor, as the case may be: . . . If an employee should use personal leave which the employee has not yet accumulated on a monthly basis and subsequently leave the employment, the employee shall be required to reimburse the board for the salary or wages paid to him for such unaccumulated leave.**
>
> **Prior to the first day of January, one thousand nine hundred eighty-nine, the state board shall establish rules, effective on said date, to restrict the payment of personal leave benefits and the charging of personal leave time used to an employee receiving a workers' compensation benefit from a claim filed against and billed to the employee's board. If an employee is awarded such benefit, such employee shall receive personal leave compensation only to the extent such compensation is required, when added to the workers' compensation benefit, to equal the amount of compensation regularly paid such employee. If personal leave compensation equal to the employee's regular pay is paid prior to the award of the workers' compensation benefit, such amount which, when added to the benefit, is in excess of the employee's regular pay shall be deducted from the employee's subsequent pay. The employee's accrued personal leave days shall be charged only for such days as equal the amount of personal leave compensation required to compensate the employee at the employee's regular rate of pay.**
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> **The board may establish reasonable rules for reporting and verification of absences for cause; and if any error in reporting absences should occur, it shall have authority to make necessary salary adjustments in the next pay after the employee has returned to duty or in the final pay if the absence should occur**

**during the last month of the employment term.**

**(Emphasis added). The first issue to address is whether the grievance is ripe for decision. Respondent states Grievant cannot file a grievance on this issue until the day is taken, and Grievant states she should be able to file now because she is on notice of Respondent's intent. As PCBOE has informed Grievant about the action it will take, the undersigned Administrative Law Judge sees no reason why this issue cannot be addressed now.**

**Grievant cites to Bumgarner v. Logan County Board of Education, Docket No. 94- 23-583 (May 9, 1995), as support for her assertion that as long as Grievant is under contract she is entitled to earn and take all fifteen of her personal leave days, even if she is on unpaid leave. Bumgarner dealt with employees on Worker's Compensation and found "[an] employee is entitled to earn and accrue personal leave for the time he/she is off work due to an injury suffered while at work and which is determined to be compensable by the Worker's Compensation fund. Sanders v. Monongalia Co. Bd. of Educ., Docket No. 92-30-368 (May 10, 1993); Beverly v. Wyoming Co. Bd. of Educ., Docket No. 91-55-408 (Jan. 23, 1992); Parker v. Summers Co. Bd. of Educ., Docket No. 45-89-052 (Aug. 8, 1989); Aftanas v. Brooke Co. Bd. of Educ., Docket No. 05-87-295-3 (Jan. 29, 1988); Cline v. Mingo Co. Bd. of Educ., Docket No. 29-86-287-4 (Mar. 3, 1987)." Bumgarner also found the respondent had "violated W. Va. Code §18A-4-10 (1991) by deducting from their accrued personal leave days the number of days Grievants had earned while off work due to an injury sustained while on the job." The reasoning in Bumgarner indicates a work- related injury is treated differently, as the reason for the employee's absence is an injury received while employed by the board of education. That reasoning is reflected in paragraph three of W. Va. Code § 18A-4-10 which reflects the current interplay between personal leave days and Worker's Compensation. Grievant was not absent from work because of a work-related injury. She was absent because of one the reason in paragraph two of W. Va. Code § 18A-4-10, sickness. "If an employee should use personal leave which the employee has not yet accumulated on a monthly basis and subsequently leave the employment, the employee shall be required to reimburse the board for the salary or wages paid to him for such unaccumulated leave." W. Va. Code § 18A-4-10. Additionally, the Code Section goes on to indicate, "if any error in reporting absences should**

**occur, [the board of education] shall have authority to make necessary salary adjustments in the next pay after the employee has returned to duty or in the final pay if the absence should occur during the last month of the employment term."**

**That is what PCBOE did here. Grievant took leave she had not yet accumulated. It is understandable how this can occur, since the full fifteen days is placed in an employee's "bank" prior to the beginning of the school year. It is then deducted as used. This treatment of leave is different from other state settings where leave is accrued on a monthly basis, and it is not paid if there is none there at the time the employee is absent. Here, Grievant used all her personal leave for her entire school year before she returned to work in January, and could not accrue leave while she was off without pay. Unfortunately, Grievant was on unpaid leave for too many days to earn all fifteen personal leave days, and the extra day was subtracted the next school year. Grievant was not penalized or "chastised." While it is unfortunate she was ill and required surgery, PCBOE is only following the directions stated in W. Va. Code § 18A-4-10.**

**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 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).**

**2. If an employee uses personal leave which she has not yet earned and subsequently leaves employment with a board of education, the employee is required to reimburse the board for the salary or wages paid to her for this unearned leave. W. Va. Code § 18A-4-10.**

**3. Grievant has not met her burden of proof and demonstrated by a preponderance of the evidence that PCBOE violated W. Va. Code § 18A-4-10 when it notified Grievant it will seek reimbursement for unearned leave at the appropriate time.**

**Accordingly, this grievance is DENIED.**

**Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Putnam 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 GrievanceBoard. 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: June 30, 2005**

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***Footnote: 1***

***Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and Respondent was represented by Attorney Greg Bailey from Bowles Rice McDavid Graff and Love.***