WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LAWRENCE A. BARBER, III,
Grievant,

v. **Docket No. 2009-0458-McDED**

MCDOWELL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Lawrence A. Barber, III, ("Grievant") filed this grievance against his employer, Respondent McDowell County Board of Education ("BOE"), on October 2, 2008. His "Statement of Grievance" generally provides that the BOE did not properly pay Grievant during the 2007-2008 school term because it docked his pay for the dates of May 14-15, 2008. Grievant also asserts that a ½ personal leave unspecified ("PLU") day was deducted from his leave account and the conduct of Mount View High School's secretary was unprofessional.[1] As relief, the Grievant seeks "(1) $406.08 + interest for . . . [two] days docking (2) ½ PLU returned to sick leave bank & days returned that I was counted absent & was at work. [sic] (3) Public reprimand of secretary Cindy Smith, Dee Mullins (BOE) & Carla Horne (BOE)."[2]

This Grievance was denied at Level One on or about November 26, 2008. A Level Two mediation was held on April 7, 2009. A Level Three evidentiary hearing was held before the undersigned Administrative Law Judge ("ALJ") on September 23, 2009.

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[1] The "Statement of Grievance" was approximately two single-spaced pages in length.

[2] Grievant did not testify why he believed Carla Horne or Dee Mullins should be reprimanded. Neither were called to testify. Any remedy or claim concerning Mrs. Horne or Mrs. Mullins is not further addressed and deemed abandoned. *See Louk v. Barbour County Bd. of Educ.*, Docket No. 95-01-386 (May 23, 1996).

Grievant appeared pro se. Respondent BOE appeared by and through its counsel, Kathryn R. Bayless. The West Virginia Department of Education appeared by and through its counsel, Sherry Goodman.[3] This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about October 2, 2009.

Synopsis

Grievant, a teacher, was not paid for two days he was absent, even though he had leave time to cover these absences and filled out the necessary form. Further, Grievant was charged a ½ PLU day from his leave account, when he did not utilize leave. Upon recognizing his pay was docked for two days and he was charged with leave time he did not take, Grievant brought the situation to the attention of his school's principal who, after contacting the central office, instructed Grievant to bring in a doctor's statement. Grievant provided the appropriate doctor's statement. Thereafter, the principal told Grievant that the situation would be dealt with at the beginning of the next school year because the fiscal year had expired. At the beginning of the next school year, the principal was informed by the central office that it would not pay Grievant because he did not tender a doctor's statement within five days. Grievant was further informed by the BOE that it was not crediting his account with a ½ PLU day.

The Grievant's claims relating to the conduct of the school secretary are untimely

[3] It is unclear why the West Virginia Department of Education ("WV DOE") appeared in this grievance. It was not listed as a party in the original grievance filing. In some documents contained within the file, it is listed as a party. This ALJ assumes the WV DOE appeared because it has taken over operation of the BOE. An order of joinder or order granting intervention was never entered in this grievance.

as they were not filed within fifteen days of the last grievable event. Grievant's other claims are timely. Grievant has established, by a preponderance of the evidence, that the BOE failed to properly pay him for absences on May 14, 2008, and May 15, 2008. Insofar as the Grievant seeks to recover a ½ PLU day for time docked in May of 2008, Grievant has also met his burden of proof. The BOE's decisions were arbitrary and capricious. This grievance is **DISMISSED**, in part, and **GRANTED**, in part.

Based upon a detailed review of the record, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant is a special education teacher at Mount View High School. He has held this position for approximately six years. He has worked for the BOE for approximately fourteen years.

2. On at least two separate occasions, the first in March of 2007, and the second in February of 2008, Mount View High School secretary, Cindy Smith, made derogatory comments about the Grievant's attendance in front of students. Level One, Testimony of Lawrence A. Barber, III, 10, 13.[4] Grievant complained of these incidents to Mount View High School Principal, Mr. Adam Grygiel, on May 30, 2008. Principal Grygiel agreed to look into it. *Id*. Principal Grygiel cautioned Mrs. Smith about her conduct. Level One, Testimony of Adam Grygiel, 27.

3. Grievant did not file a grievance within at least 7 months of the last derogatory

[4] At Level Three, Grievant stated that an additional comment was made in November, 2007. This incident was never expounded upon. *See* Level Three, Testimony of Lawrence A. Barber, III (cross examination).

comment made by Mrs. Smith.

4. Mrs. Smith generally handled teacher sign-in sheets at Mount View High School. She would sometimes change the time on the time sheet that the arriving teacher entered. Level One, Testimony of Lawrence A. Barber, III. Level One, Testimony of Adam Grygiel, 28.

5. On May 14, 2008, and May 15, 2008, Grievant was unable to attend work because of illness.[5]

6. On May 14, 2008, and May 15, 2008, Grievant was under the care and direction of a doctor. *See* Level One, Grievant's Exhibits 2 and 3.

7. Upon returning to work on or about May 19, 2008, Grievant turned in an "Employee Absence and Claim for Personal Leave" form (hereinafter referred to as the "Green Sheet"). Level One, Grievant's Exhibit 2.

8. The "Green Sheet" is used to report absences and make claims for personal leave. On the front of the "Green Sheet," the employee fills out the necessary absence claim information. Some directions are contained on the front of the sheet. For example, it vaguely provides "[d]ue within 5 days of absence."[6] Likewise, the front of the form requires the employee to sign and attest that the "[e]mployee recognizes that the Board of Education reserves the right to request evidence to document the request of any of the

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[5] Principal Grygiel indicated that the Grievant's absences had no real affect upon student instruction and a substitute teacher was called. Level One, Testimony of Adam Grygiel. Further, Principal Grygiel testified that he has never had a problem with the Grievant failing to call in when he is running late or sick. *Id*.

[6] Grievant turned in his "Green Sheet" within five days of his absence. He was absent from work on May 14-16, 2008. May 17-18, 2008, was the weekend.

above areas and that falsification of this report may lead to charges of dismissal on grounds of insubordination or immorality."

9. The back of the "Green Sheet" contains the BOE's attendance policy and "[i]nstructions for reporting claims for personal illness."[7] This policy provides, in pertinent part, as follows:

I. <u>PERSONAL LEAVE POLICY</u>

Instructions for Reporting Claims for Personal Illness

A. Report all absences regardless of whether it is one-half or a full day.

B. No absence reports are necessary for employees who have authorized out-of-county trips which have been approved by the Superintendent.

C. The employee is responsible for filling out the appropriate forms for which personal leave is being claimed. The principal or immediate supervisor is to provide the forms to the employee and is to complete his appropriate section prior to submitting the claim to the central office. Sections VI and VII of the claim are to be filled out by the employee only if claiming personal leave.

D. If the employee is incapacitated, the principal or supervisor--in the presence of a witness--may sign the employee's name and the principal or supervisor write his initials beside the employee's name and forward it to the finance office within five (5) working days of the employee's absence.

II. <u>PERSONAL LEAVE AUTHORIZATIONS</u>

Personal leave, a valuable fringe benefit granted all employees under 18A-4-10, **SCHOOL LAWS OF WEST VIRGINIA,** is designated primarily as a wage continuation plan to assist employees during periods of personal or family illnesses and/or absences occasioned by death in the employee's immediate family. Personal leave privilege should not be abused, nor should the Board of Education restrict its use except as stated hereafter.

A. The first five (5) days or seven percent (7%) of the accumulated personal leave days recorded at the beginning of the school year (whichever is the greater) for which personal leave is claimed for personal illness will be

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[7] The Level One Decision appears to identify the policy on the back of the "Green Sheet" as "McDowell County Schools' Policy 8-018," though this was never made explicit at Level Three. *See generally* Level Three, Testimony of Suzette Cook.

verified by employee's signature only. Thereafter, each succeeding personal leave claim for personal illness or any illness in the immediate family must be verified by a doctor's statement.

* * * *

III. PERSONAL LEAVE DEFINITIONS

B. Personal illness- Any illness that renders the employee physically or emotionally unable to perform assigned duties.

E. Personal Leave Unspecified, PLU: A valuable benefit provided by State Law subject to the following restrictions:

1) PLU may not be taken on consecutive days unless authorized by the principal or immediate supervisor.
2) The employee must give twenty-four hours advance notice, at least, of a planned PLU day.
3) In cases of sudden and unexpected circumstances, notice shall be given to the principal, or immediate supervisor as soon as reasonably practical.
4) The use of PLU day may be denied if, at the time notice is given, either fifteen percent (15%) of the employees or three (3) of the employees (whichever is greater) have previously notified the principal or immediate supervisor of their intention to use . . .[8]

10. The "Instructions for Filing Claims for Personal Illness" contained on the back page of the "Green Sheet" does not state that an employee is required to submit a "Green Sheet" and/or doctor's statement within five days of the absence. *See* Level One, Respondent's Exhibit 4. Nor does the policy provide that if a "Green Sheet" and/or doctor's statement is not submitted within five days of the absence the employee's pay will be docked. *Id*.

[8] The document submitted as Level One, Respondent's Exhibit 4 was cut off and Paragraph E(4) did not contain an entire sentence.

11. On his "Green Sheet," Grievant took personal leave for May 14-16, 2008.[9] He marked "PL" on the sheet indicating he sought "personal leave" for the days he was absent. He indicated on the form that he was absent because of "personal illness." Further, he marked on the form that he was under the care of a doctor.

12. Grievant's pay check covering the work period of May 14-16, 2008, was issued on or about June 15, 2008. In mid-June, 2008, Grievant realized that he did not receive pay for his absences on May 14, 2008, and May 15, 2008, and was docked a ½ PLU day from his leave account for the month of May, 2008. He was docked four-hundred and six dollars and eight cents ($406.08) for the two absences.

13. Grievant was docked a ½ PLU day in May of 2008. He did not use a ½ PLU day in May of 2008. Level One, Testimony of Lawrence A. Barber, III: Level Three, Testimony of Lawrence A. Barber, III. *See* Level One, Respondent's Exhibit 3.

14. In mid-June, 2008, Grievant approached Principal Grygiel about the errors. Level One, Testimony of Lawrence A. Barber, III. Principal Grygiel instructed the Grievant to write a letter explaining the scenario and detailing the reasons for the absences, and he would provide it to the business office. On July 1, 2008, Grievant wrote the letter and provided it to Principal Grygiel. Level One, Grievant's Exhibit 1.

15. Two days after receipt of the letter, Principal Grygiel told Grievant that there was a "mistake" and Grievant should bring in a doctor's statement on the first day of school, August 22, 2008. He told the Grievant not to worry about anything. Level One, Testimony of Lawrence A. Barber, III, 8. Grievant turned in the doctor's statement as directed.

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[9] Grievant received pay for his absence on May 16, 2008. Though not made explicitly clear, it appears this was a scheduled absence for the Grievant.

16. Principal Grygiel told Grievant that the problem would be handled at the beginning of the next school year. He told Grievant this because Principal Grygiel had been instructed by the finance department at the business office that nothing could be done until the following school year. Level One, Testimony of Adam Grygiel, 24.

17. On his paycheck for September 15, 2008, Grievant was still not reimbursed for his absences on May 14-15, 2008. *Id*. Nor was Grievant credited with a ½ PLU day. After receipt of his September 15, 2008, paycheck, Grievant again approached Principal Grygiel. At this time, Principal Grygiel informed the Grievant that he was told by the "board office" that Grievant was required to turn in a doctor's statement within five days of the absence. *Id*. at 9-10. Grievant was informed that he would not be reimbursed for the days he was sick, even though he had not exhausted his leave time and was under the care of a doctor. Further, Grievant was denied credit to his leave account for a ½ PLU day.

18. This grievance was filed on October 2, 2008.

Discussion

There are two primary considerations in this grievance. The first consideration is whether some or all of the Grievant's claims were timely filed. The second consideration is whether the Grievant has met his burden of proof upon the merits of his timely claims.

I. Timeliness

The burden of proof is on the Respondent to prove this grievance was not timely filed by a preponderance of the evidence. *See Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25,1996). If the Respondent meets this burden, the Grievant may then attempt to demonstrate that he should be excused from filing within the

statutory time frames. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997). As to when a grievance must be filed, WEST VIRGINIA CODE § 6C-2-3(a)(1) states that, "[a]n employee shall file a grievance within the time limits specified in this article." WEST VIRGINIA CODE § 6C-2-4(a)(1) provides, in pertinent part, that:

> Within fifteen days[10] following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the board.

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

Grievant's claims challenging the conduct of Mrs. Cindy Smith, secretary at Mount View High School, are untimely. First, Grievant knew of his claims concerning Mrs. Smith's statements in front of students in February of 2008. He complained of these comments to Principal Grygiel and the principal discussed Grievant's concerns with Mrs. Smith. Grievant did not file this grievance within fifteen days of the statements. Accordingly,

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[10] Pursuant to WEST VIRGINIA CODE § 6C-2-2(c) "'[d]ays' means working days exclusive of Saturday, Sunday, official holidays and [a]ny day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice."

Respondent has met its burden of proving this claim is untimely.

Secondly, Grievant's claim concerning Mrs. Smith's changing employee sign-in times is also untimely. Grievant has not testified to any specific instance of Mrs. Smith changing his time sheet. From the limited evidence, it is more likely true than not that these incidents occurred at a date prior to May 14, 2008. Grievant has not testified otherwise and was unable to provide a precise date when questioned. He did not complain of this conduct to Principal Grygiel in the period of time preceding May 14, 2008. In light of the evidence, Grievant did not file this claim within fifteen days of any incident. This claim is also untimely.

Grievant's other claims related to his absences on May 14-15, 2008, and his loss of a ½ PLU day were timely filed because they were filed within fifteen days of the Grievant being "unequivocally notified" of the BOE's refusal to reimburse him. *Harvey*, *supra*. After recognizing that he was docked pay and leave time in May, 2008, Grievant approached Principal Grygiel. Principal Grygiel instructed the Grievant to provide a doctor's statement. Principal Grygiel stated the problem would be handled at the beginning of the next school year. Thereafter, on September 15, 2008, Principal Grygiel, for the first time, notified Grievant that the BOE would not pay him for the absences or credit him with a ½ PLU day. Grievant was "unequivocally notified" of the BOE's denial after September 15, 2008. *Harvey*, *supra*.

This grievance was filed on October 2, 2008. October 2, 2008, is within fifteen working days of the date Grievant was "unequivocally notified" of the BOE's denial. *Id*.[11]

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[11] It is additionally recognized that "[a] grievant is excused for his delay in filing a grievance when the untimely filing 'was the result either of a deliberate design by the

Only twelve working days elapsed between September 15, 2008, and October 2, 2008. Accordingly, Grievant's remaining claims are timely. The merits of these claims are now considered.

II. Merits

In non-disciplinary matters, a grievant bears the burden of proving his allegations by a preponderance of the evidence. 156 C.S.R. 1 § 3 (2008); *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Id*. Hence, the claims raised by the Grievant must be considered within the context of the burden of proof.

It is well-recognized that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. Pt. 3, *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). This same arbitrary and capricious standard applies in this grievance. *See generally* W.VA. CODE § 18A-4-10(a)(5).

Generally, an action is considered arbitrary and capricious if the board of education

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employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge.' *Naylor v. W.Va. Human Rights Comm'n*, 378 S.E.2d 843 (1989)." *Davisson v. Lewis County Bd. of Educ.*, Docket No. 05-21-112 (July 27, 2005). Stated differently, "[a]n employee who makes a good faith, diligent effort to resolve a grievable matter with school officials and relies upon the representations of those officials that the matter will be rectified will not be barred from pursuing the grievance . . . ." *Steele v. Wayne County Bd. of Educ.*, Docket No. 50-87-062-1 (Sept. 29, 1987). The statements and the instructions by Principal Grygiel unmistakably caused the Grievant to delay his filing.

did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health & Human Serv.*, 769 F.2d1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf & the Blind*, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. *See generally Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982).

First, Grievant claims that he was erroneously denied payment for two personal leave days he took on May 14, 2008, and May 15, 2008. WEST VIRGINIA CODE § 18A-4-10(a)(2) provides, in part, that:

> A regular full-time employee who is absent from assigned duties due to . . . *sickness* . . . *shall*[12] be paid the full salary from his or her regular budgeted salary appropriation during the period which the employee is absent, but not to exceed the total amount of leave to which the employee is entitled.

(Emphasis added). Hence, where an employee seeks to use sick leave for absences, he or she shall be paid the regular rate of pay so long as the employee does not surpass the permissible number of allotted days. *See Lyon v. Kanawha Co. Bd. of Educ.*, Docket No. 92-20-476 (Dec. 3, 1993); *Stover v. Mason Co. Bd. of Educ.*, Docket No. 94-26-638 (Mar. 10, 1995). When applying this statute, "county board may establish reasonable rules for

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[12] It is well established that the word "shall," in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation. *See* Syl. Pt. 1, *Nelson v. Public Employees Ins. Bd.*, 171 W. Va.445, 300 S.E.2d 86 (1982).

reporting and verification of absences for cause." W.VA. CODE § 18A-4-10(a)(5). Likewise, a county board may dock an employee's pay where he or she does not report to work and does not request sick leave. *Stover, supra*. *See Yevuta v. Wetzel County Bd. of Educ.*, Docket No. 94-52-191 (Oct. 12, 1994); *Farmer v. Logan County Bd. of Educ.*, Docket No. 89-23-142 (Oct. 30, 1989); *Davis v. Summers County Bd. of Educ.*, Docket No. 45-88-037-4 (Apr. 21, 1988). Nevertheless, such docking must be reasonable and not contrary to the general provision of WEST VIRGINIA CODE § 18A-4-10 requiring that employees be paid for absences when sick.

In this matter, the BOE established a policy, contained on the back of the "Green Sheet," to apply the statutory language of WEST VIRGINIA CODE § 18A-4-10(a)(2). The "Green Sheet" defines "personal illness" as "[a]ny illness that renders the employee physically or emotionally unable to perform assigned duties." It goes on to provide that:

> [p]ersonal leave privilege should not be abused, *nor should the Board of Education restrict its use except as stated hereafter*.
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> A. The first five (5) days or seven percent (7%) of the accumulated personal leave days recorded at the beginning of the school year (whichever is the greater) for which personal leave is claimed for personal illness will be verified by employee's signature only. Thereafter, each succeeding personal leave claim for personal illness or any illness in the immediate family must be verified by a doctor's statement.

(Emphasis added). The policy does not specify when the employee must produce a doctor's statement for verification. Nor does the actual policy language specifically require that the "Green Sheet" and/or doctor's statement be verified within within five days of the absence. When considering this policy and WEST VIRGINIA CODE § 18A-4-10(a)(2), it is important to recognize that where language is ambiguous, "[s]chool personnel regulations

and laws are to be strictly construed in favor of the employee." Syl. Pt. 1, *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979).

The Grievant was ill on May 14-15, 2008. He filled out the necessary "Green Sheet." He turned it in within five days of his absence. On his "Green Sheet," Grievant specifically attested that he was absent due to personal illness and was under a doctor's care.[13] Thereafter, he realized that he was docked pay for these absences. Principal Grygiel believed a "mistake" was made and reported the error to the main office. Principal Grygiel then instructed Grievant that he needed a doctor's statement. The Grievant provided a doctor's statement that indicated he was under a doctor's care on May 14-15, 2008. Thereafter, the BOE refused to pay.

Upon due consideration of the facts presented in this grievance, the BOE's refusal to pay Grievant for his absences on May 14-15, 2008, was arbitrary and capricious. WEST VIRGINIA CODE § 18A-4-10(a)(2) specifically mandates that an employee is to be paid for time off due to sickness. While the BOE has authority to make reasonable regulations governing sick leave, it cannot unreasonably deny an employee payment in a manner contrary to statute. BOE policy does not set a specific time limit for an employee to turn in his or her doctor's statement.[14] Accordingly, it is unreasonable and arbitrary for the BOE to read such a requirement into the policy, especially in recognition of WEST VIRGINIA CODE

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[13] At Level Three, the Superintendent of McDowell County Schools, Suzette Cook, testified that the Grievant had surpassed the permissible number of absences and needed to provide a doctor's statement. Level Three, Testimony of Suzette Cook.

[14] Further, WEST VIRGINIA CODE § 18A-2-12a(b)(7) provides that "[a]ll official and enforceable personnel policies of a county board must be written and made available to its employees."

§ 18A-4-10(a)(2). Grievant has established this claim by a preponderance of the evidence.

Additionally, Grievant claims that he was docked a ½ PLU day[15] pay during the month of May 2008, beyond his absences on May 14-15, 2008. The uncontroverted evidence establishes that the Grievant was docked a ½ PLU day for an absence he did not take in May, 2008. Though Grievant did not submit into evidence his actual pay stub for the time period in question, Grievant testified he was docked a ½ PLU day and did not take a ½ PLU day. *See* Level One, Testimony of Lawrence A. Barber, III; Level Three, Testimony of Lawrence A. Barber, III. Grievant's testimony is consistent with the BOE's summary of employee attendance[16] which indicates that Grievant did not take a ½ PLU

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[15] WEST VIRGINIA CODE § 18A-4-10(a)(3) discusses "personal leave unspecified" absences or "personal leave without cause" absences and provides that:

> Each employee is permitted to use three days of leave annually without regard to the cause for the absence. Personal leave without cause may not be used on consecutive work days unless authorized or approved by the employee's principal or immediate supervisor, as appropriate. The employee shall give notice of leave without cause to the principal or immediate supervisor at least twenty-four hours in advance, except that in the case of sudden and unexpected circumstances, notice shall be given as soon as reasonably practicable. The principal or immediate supervisor may deny use of the day if, at the time notice is given, either fifteen percent of the employees or three employees, whichever is greater, under the supervision of the principal or immediate supervisor, have previously given notice of their intention to use that day for leave. Personal leave may not be used in connection with a concerted work stoppage or strike. Where the cause for leave originated prior to the beginning of the employment term, the employee shall be paid for time lost after the start of the employment term. If an employee uses personal leave which the employee has not yet accumulated on a monthly basis and subsequently leaves the employment, the employee is required to reimburse the board for the salary or wages paid for the unaccumulated leave.

[16] This document tracked Grievant's attendance for each day in May, 2008.

day in May, 2008. Level One, Respondent's Exhibit 3. There is no evidence to suggest that the Grievant is mistaken or was somehow properly docked leave time. Grievant has met his burden of proving that it is "more likely true than not" that he was docked a ½ PLU day for time he did not take. *Leichliter, supra.* Grievant's claim for restoration of a ½ PLU day must be granted.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If a respondent meets its burden of proof, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timeliness. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

2. Grievances must be filed within fifteen days of the occurrence of the event giving rise to the substantive claim of the grievance. W. VA. CODE § 6C-2-3(a)(1); W. VA. CODE § 6C-2-4(a)(1). The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

3. Respondent BOE has established, by a preponderance of the evidence, that the

Grievant failed to timely file his claims regarding the conduct of Mrs. Cindy Smith because he did not file within fifteen days of a grievable event.

4. Respondent BOE has not established, by a preponderance of the evidence, that Grievant failed to timely file his claims regarding his pay and leave time in May, 2008, because Grievant was not "unequivocally notified of the decision being challenged" until September 15, 2008. *Harvey*, *supra*. This grievance was filed within fifteen working days of the BOE's notification.

5. In non-disciplinary matters, a grievant bears the burden of proving his claims by a preponderance of the evidence. 156 C.S.R. 1 § 3 (2008); *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Id*.

6. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. Pt. 3, *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

7. WEST VIRGINIA CODE § 18A-4-10(a)(2) provides, in part, that:

> A regular full-time employee who is absent from assigned duties due to . . . sickness . . . shall be paid the full salary from his or her regular budgeted salary appropriation during the period which the employee is absent, but not to exceed the total amount of leave to which the employee is entitled.

8. The BOE's policy provides, in pertinent part, that:

> [p]ersonal leave privilege should not be abused, *nor should the Board of Education restrict its use* except as stated hereafter.
>
> A. The first five (5) days or seven percent (7%) of the accumulated personal leave days recorded at the beginning of the school year (whichever is the greater) for which personal leave is claimed for personal illness will be verified by employee's signature only. Thereafter, each succeeding personal leave claim for personal illness or any illness in the immediate family must be verified by a doctor's statement.

(Emphasis added).

9. "School personnel regulations and laws are to be strictly construed in favor of the employee." Syl. Pt. 1, *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979).

10. Grievant has established, by a preponderance of the evidence, that he was arbitrarily and capriciously docked pay on May 14, 2008, and May 15, 2008, because Grievant was ill, Grievant attested he was ill on the "Green Sheet," Grievant provided necessary documentation for verification and BOE policy does not specifically require an employee to turn in a doctor's statement within five days of the absence.

11. Grievant has established, by a preponderance of the evidence, that he was arbitrarily and capriciously docked time for a ½ PLU day in May, 2008, when he did not utilize a ½ PLU day in May, 2008.

Accordingly, insofar as the Grievant seeks to challenge the conduct of Mrs. Cindy Smith, his claims were not timely and are hereby **DISMISSED**. Insofar as the Grievant seeks two-days back pay for his absences on May 14, 2008, and May 15, 2008, this grievance is **GRANTED**. Respondent BOE is hereby **ORDERED** to pay the Grievant two-days back pay equaling four hundred and six dollars and eight cents ($406.08), plus benefits and interest at the statutory rate. Insofar as the Grievant seeks to recover a ½

PLU day to his leave account for leave he did not use in May, 2008, this claim is likewise **GRANTED**. Respondent is **ORDERED** to credit Grievant's leave account balance with a ½ PLU day.

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 WEST VIRGINIA 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: November 4, 2009

Mark Barney
Administrative Law Judge