



WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD

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ROBERT L. TURNER  
v.  
MCDOWELL COUNTY BOARD OF EDUCATION

Docket No. 33-86-049

DECISION

Grievant, Robert L. Turner, had served as a principal and teacher at Big Creek High School in McDowell County for over thirty years at the time of his retirement on July 1, 1985. On April 18, 1985 he filed a grievance alleging that he was due twenty-one days pay annually for seventeen years and one and one half days personal leave annually from July 1, 1975 to August, 1983.<sup>1</sup> The grievance was filed pursuant to Department of Education Policy 5301.

On May 7, 1985 a hearing was conducted by the board of education at which the grievant presented evidence that since 1967 he had been working 261 days annually but received pay for only 240 days and received credit for only 18 days annual personal leave instead of 19½ days to which he was entitled. In 1966 the county board of education had placed the five high school principals and certain other employees under a 261 day employment schedule with 15 days paid vacation. These employees were known as twelve month or 261 day employees.

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<sup>1</sup> He also requested ten percent interest on his back pay, that his personal leave be added to his cumulative record and for attorney fees. He calculated that he was owed \$50,000.00 as back pay and personal leave time amounting to 80 months of free insurance. There are nine other employees in McDowell County in a similar situation to grievant.

Grievant contends that when the matter of the 261 day employees was brought to the attention of then Superintendent Drosick, now deceased, it was not pursued because Drosick informed grievant that he (Drosick) and the board of education would be impeached for operating at a deficit for two consecutive years; as a personal favor grievant acquiesced. Thereafter, on November 17, 1982 the issue was revived by a committee which met with then Superintendent Goosens and abandoned after Goosens threatened to cut the participants back to 220 days. However, as a result of these efforts, on May 31, 1983 Superintendent Goosens established a 240 work day year for principals, 200 day regular term and 40 days in the summer; their pay was unchanged.

In September, 1983 Superintendent Goosens instructed the payroll clerk to recalculate the personal leave for all 261 day service personnel employees and pick up the one and a half days contemplated by the amendment of Code, 18A-4-10, effective July 1, 1975. The 261 day professional employees such as grievant were not included in the recalculation.<sup>2</sup>

The position of the administration has been that Policy 5301 required that a grievance be timely filed and that grievant had not filed a grievance for almost two years from the time he knew of the change of his employment status as a 261 day employee to a 240 day employee, i.e., May 31, 1983 to April 18, 1985. Further, that the change of status actually amounted to a pay increase to grievant. Grievant's response is that he was classified illegally, that it is a continuing grievance and that the board had engaged in fraud. He testified that he filed

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<sup>2</sup> The 1975 amendment removed the limitation on the number of personal leave days which could be accumulated. The service personnel employees had apparently instituted a legal proceeding to enforce their rights under the amendment but the professional employees had not. (T.36). Grievant was not aware of the reason the professional employees had not pursued this point.

the grievance in April because he was retiring on July 1, 1985. (T.78).<sup>3</sup>

By unanimous vote the board of education held that Policy 5301 required the grievance to be timely filed and inasmuch as grievant was aware of the number of days of personal leave that he accrued each month and that his pay had been correct at least since September, 1983 he should have filed a grievance at that time.<sup>4</sup>

A level four hearing was conducted on March 14, 1986 and the parties submitted the grievance on the basis of the transcript of the evidence of the previous hearing and the additional testimony of grievant and five witnesses. This evidence was corroborative of the evidence given at the May hearing and the board of education relied solely upon the untimeliness of the filing of the grievance as a defense.<sup>5</sup>

<sup>3</sup> Grievant also relied on a decision by Superintendent Truby dated May 9, 1983 in response to a McDowell County inquiry that 261 day employees would earn and be entitled to 19½ days of personal leave per school year. He also introduced into evidence an article from the WVEA School Journal dated August 26, 1983 involving a 1977 grievance by James Taylor against Mason County Board of Education in which Superintendent Truby had ruled in 1979 that Taylor was entitled to back pay for 21 days per year over a ten year period. Thereafter, the Mason County Board of Education had voluntarily paid others in the same situation.(Grievant's exhibit N)

<sup>4</sup> The board of education did not make findings of fact and conclusions of law as required by Code, 18-29-6 and Burks v. McNeel, 264 S.E. 2d 651 (W.Va. 1980). CF. Golden v. Bd. of Educ. of Harrison Co., 285, S.E. 2d 665 (W.Va. 1980); Slade v. McDowell Co. Bd. of Educ., Grievance No. 33-86-050.

<sup>5</sup> Some of the witnesses had formed the committee that was involved in negotiations with the former Superintendent and were in the same situation as grievant except that none of them had filed a grievance and all understood that grievant was not purporting to represent them. The tenor of their testimony was that they had not filed a grievance because of possible retaliation notwithstanding that all were ostensibly aware that State Policy 5300 "...protects anyone from retaliation by the Board" (T.p9).

The back pay aspect of the grievance filed herein appears to be clearly barred by grievant's failure to file a timely grievance and no reliable authority has been cited to the contrary. Clearly, grievant was aware of the pay differential for several years and at least as of May 31, 1983 had an obligation to assert any claim he might have in accordance with Policy 5301. He offered no explanation for his failure to assert the claim after he became aware of a similar situation in Mason County in which Superintendent Truby in 1979 had ruled in favor of the grievant and none is apparent from the record other than that grievant waited until he was to retire. Accordingly, the claim for back pay is denied.<sup>6</sup>

Conversely, the county board of education knew or should have known of the amendment to Code, 18A-4-10, effective July 1, 1975 and the decision of Superintendent Truby in May, 1983 and had a duty to comply therewith. It is clear that in September, 1983 the 261 day service personnel employees were given credit for the additional one and one-half days personal leave by the board and no explanation was given for the difference in treatment of the professional employees. This was an arbitrary act on the part of the board and denied grievant and others similarly situated the benefit of a valuable right. Cf. Dillon v. Board of Education, 301 S.E. 2d 588 (W.Va. 1983).<sup>7</sup> Accordingly, grievant is entitled

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<sup>6</sup> Casto v. Kanawha Co. Bd. of Educ., Grievance No. 20-86-014, decided February 25, 1986 held that employees were required to assert any rights they might have obtained via a decision of the State Superintendent in a timely fashion.

<sup>7</sup> It is inconceivable that after requesting an opinion from Superintendent Truby and receiving a response on May 9, 1983 that 261 day employees were entitled to 19½ days of personal leave per year the board would elect to ignore the rights of the professional employees.

to have credited to his cumulative account one and one-half days personal leave annually from July, 1975 to August 1983.<sup>8</sup>

In addition to the foregoing the following specific findings of fact and conclusions of law are deemed appropriate.

#### FINDINGS OF FACT

1. In 1967 grievant was classified as a 261 day professional employee and remained in that classification until May, 1983 when he was classified as a 240 day professional employee.

2. Prior to and in November, 1982 grievant and others similarly situated attempted to resolve the dispute relating to the classification and pay of the 261 employees but abandoned their efforts.

3. On May 31, 1983 grievant and others were reclassified as 240 day employees without a change of pay.

4. In September, 1983 the 261 day service personnel employees were given credit for an additional one and a half days personal leave time but professional personnel were not.

5. Grievant is very knowledgeable of the grievance system and his rights thereunder but did not file a grievance until April 18, 1985; he retired on July 1, 1985.

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<sup>8</sup> It is also interesting to note that this additional time becomes important primarily at retirement because the retiree receives one month free insurance for each three days of accumulated leave. Thus, it would appear that grievant's claim in this regard was very timely. These types of statutes providing for enhanced economic benefits must be liberally construed in favor of the employee. Dillon v. Bd. of Educ., supra. See Code, 5-16-18

CONCLUSIONS OF LAW

1. Policy, 5301 required the filing of a grievance within 15 days of certain stated occurrences and grievant failed to file a timely grievance for the claimed twenty-one days back pay per year for seventeen years.

2. A board of education has a duty to treat all employees, service personnel or professional personnel, in a fair and uniform manner. It is arbitrary to afford benefits to one group of employees and knowingly deny the other group the same benefits.

3. The board of education is estopped to assert the untimeliness of a claim for benefits arbitrarily denied to certain employees and awarded to others.

It is therefore ordered that the part of the grievance seeking back pay for twenty-one days for seventeen years is denied and the part seeking credit for one and one half days personal leave annually from July, 1975 to August, 1983 is granted.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of McDowell County and such appeal must be filed within thirty (30) days of receipt of this decision. (Code, 18-29-7) Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.



LEO CATSONIS  
HEARING EXAMINER

Dated: April 14, 1986