



REPLY TO:
401 Davis Avenue
Suite 315
Elkins, WV 26241
Telephone: 636-1123

Members
James Paul Geary
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**
ARCH A. MOORE, JR.
Governor

Offices
240 Capitol Street
Suite 508
Charleston, WV 25301
Telephone: 348-3361

EUGENE GIDLEY

v.

DOCKET NO. 39-86-343-2

PRESTON COUNTY BOARD OF EDUCATION

DECISION

Grievant, Eugene Gidley, is employed by the Preston County Board of Education as a custodian assigned to the Preston County Educational Center. On November 26, 1986 Mr. Gidley appealed to level four a grievance in which he alleged that he was improperly denied overtime compensation in weeks during which he took personal leave time. The record reflects that Superintendent Elmer Pritt denied the grievance following a level two hearing and the grievant indicates that he was verbally notified that the board of education waived consideration of the matter to level four on November 25, 1986.

Both parties agreed that a level four decision could be rendered based upon the record to be supplemented by briefs which were received February 6, 1987 and February 2, 1987, respectively.

The grievant asserts that overtime pay must be awarded for time worked beyond the forty hour week and that time taken as personal leave may not be deducted from the forty hour week thereby depriving an employee of overtime compensation. Mr. Gidley states that this practice has occurred in the past and requests that he be awarded proper wages for earned overtime retroactive to the date of passage of the overtime compensation statute.

In support of his position the grievant argues that personal leave is similar to a holiday in that employees are compensated as though they had actually performed their duties. W.Va. Code, 18A-4-8a requires that service personnel required to work in excess of their normal working day in any week containing a paid holiday shall be paid for the additional hours at a rate of one and one-half times their usual hourly wage. Grievant additionally cites an opinion of the State Superintendent of Schools dated May 2, 1973 which states that when an employee is on personal leave he is to receive credit for any holiday occurring while on leave as though he had actually worked.

The board of education concedes that clerical errors occurred in the calculation of the grievant's salary for the weeks of July 28, 1986 and August 11, 1986 and that these errors have been rectified. During the week of August 25, 1986 the grievant

used personal leave time and then worked an additional three and three-fourth hours later in the week. The respondent argues that payment at the regular rate was correct as W.Va. Code, 18A-5-2 does not apply in this situation as a personal leave day is not a paid holiday. The respondent cites W.Va. Department of Labor Regulation 4, Section 400, which defines a workweek, work time and non-work time and an opinion of the State Superintendent of Schools which states that time and one-half wages are to be paid an employee for any hours of work in excess of forty performed in a workweek. The respondent asserts that personal leave is non-work time and therefore, even with the additional three and three-fourth hours, the grievant did not work in excess of forty hours and is not entitled to time and one-half compensation.

In addition to the foregoing it is appropriate to make the following specific findings of fact.

Findings of Fact

1. Grievant is employed by the Preston County Board of Education as a custodian assigned to the Preston County Educational Center.

2. When the grievant worked in excess of a normal working day during a week in which he had also used personal leave time he was paid at his regular rate for the additional hours worked, rather than one and one-half time the regular rate paid for overtime.

3. Personal leave is time away from the workplace which an employee may utilize at his discretion but is calculated as time worked for salary purposes and experience earned credit. It is therefore similar in nature to a paid holiday or vacation time.

4. The board of education computes only those hours actually worked per week in determining whether overtime compensation is warranted.

5. The grievant provided three timesheets supporting his allegation that he was improperly compensated. These timesheets are for the weeks of July 28, - August 10, 1986, August 11-August 24, 1986 and August 25 - September 7, 1986. Only the week of August 25, 1986 concerns the use of personal leave and overtime compensation. Superintendent Elmer Pritt concedes that errors were made for the weeks of July 28 and August 11 and that adjustments were made in the grievant's November, 1986 paychecks to correct these errors.

Conclusions of Law

1. W. Va. Code, 21-5C-3 requires that any employer who shall employ any of his employees for a workweek longer than forty hours must compensate the employee for the excess hours at a rate of not less than one and one-half time his regular salary.

2. W. Va. Code 18A-4-10 provides that all full-time employees of a county board of education are entitled annually to at least one and one-half days personal leave for each employment month or major fraction thereof. Three days of such leave may be taken annually without regard to the cause for the absence. An employee who is absent on approved personal leave shall be paid the full salary from his regular budgeted salary appropriation during the period which the employee is absent, not to exceed the total amount of leave to which he is entitled.

3. Personal leave time must be considered as "hours worked" for the purpose of determining overtime compensation.

4. It is incumbent upon the grievant seeking relief pursuant to W. Va. Code, 18-29-1 et seq. to prove all of the allegations constituting the grievance by a preponderance of the evidence. June Richards et al. v. Hancock County Board of Education, Docket No. 15-86-170-2; Kimberly Sell v. Wood County Board of Education,

Docket No. 54-86-311-2 and Mary Marling v. Marshall County Board of Education, Docket No. 25-86-368-3. Therefore, relief may be granted only for those dates which the grievant has shown he was improperly paid.

Accordingly, the grievance is **GRANTED** in part and **DENIED** in part.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Preston County and such appeal must be filed within thirty (30) days of receipt of this decision. (W. Va. 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.

DATED: March 24, 1987

Sue Keller

SUE KELLER
Hearing Examiner