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**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**
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CHARLES MEANS

v.

Docket No. 20-86-377-1

KANAWHA COUNTY BOARD OF EDUCATION

DECISION

Grievant, Charles Means, was employed by the Kanawha County Board of Education as a 261 day Custodian III at George Washington High School and was granted an unpaid leave of absence from May 6 until August 15, 1986. On October 8, 1986, he filed a grievance alleging that he had been denied insurance, vacation and other benefits for the period of his absence. A level two hearing was conducted on November 7, 1986, and the decision appealed to the Education Employees Grievance Board; a level four hearing was conducted on April 15, 1987.¹

¹ Counsel for grievant waived an evidentiary hearing at level four but requested an opportunity for oral argument, which was done on April 15, 1987. The grievance was then submitted to the hearing examiner on the transcript of evidence of the level two hearing (T.__) and oral argument of counsel for the respective parties.

The evidence does not appear to be in dispute in this grievance and reflects that prior to April, 1986, grievant talked with the principal of George Washington High School, Mr. Larry W. Lohan, and requested to be off the summer months to build a house (T. 9). Mr. Lohan contacted William Courtney, director of employee/employer relations of Kanawha County Schools, and an agreement was prepared setting forth the conditions of the leave; the agreement was signed by grievant on April 11, 1986, and the conditions were as follows:

1. Grievant would work at least through May 5 and return to work no later than August 15, 1986;
2. Grievant would not accrue sick leave, personal leave or vacation during this period; and
3. Another custodian from the school's staff would work in grievant's stead and grievant was to give Mr. Lohan at least two days notice of his intent to return to work if grievant elected to return to work prior to August 18. (Employer's Exhibit No. 1).²

Grievant did not return to work on August 15, 1986, and telephoned Mr. Lohan to inform him of a family problem which would prevent his return to work. Grievant testified that on August 19

² This agreement was actually in memorandum form, dated April 1, 1986, to Charles Means from Larry Lohan, re: absence without pay. It was prepared by Mr. Lohan with the advice of Mr. Courtney (T. 23).

he was involved in an automobile accident on his way to the hospital to visit his brother and was hospitalized for five days.³

On September 3, 1986, Mr. Lohan wrote Mr. Courtney, advising him of a series of incidents involving grievant since August 15, 1986, concluding with the recommendation that grievant be suspended immediately due to his failure to return to work as per the agreement. The recommendation was not acted upon because Mr. Courtney learned that grievant had been in an automobile accident and had been hospitalized (T. 24).⁴

Counsel for the grievant contends that grievant is entitled to personal leave for the period in question via W.Va. Code, 18A-4-10, holiday pay via W.Va. Code, 18A-5-2 and sick leave because neither provision indicates that holiday pay or accumulated sick leave is contingent upon the employee being physically present or engaged in work during that particular year (T. 5).⁵

³ At the time of the level two hearing grievant was still under a doctor's care and had not returned to work (T. 10).

⁴ Mr. Lohan was not aware of the hospitalization at the time of the September 3, 1986, letter and could not recall the telephone calls about which grievant testified (T. 27, 28).

The principal stated that this was a critical period for him with the opening of school but that he and grievant had experienced a very good relationship over the years; he was attempting to be compassionate in assisting grievant to build a home (T. 28).

⁵ At the level four hearing counsel for grievant abandoned the claim for disability insurance benefits against the school board.

Counsel for the school board contends that grievant had failed to return to work and had therefore not performed under his contract, a requisite to qualifying for benefits under the contract. It is further contended that under board policy IV-J-1 an employee who is not working and has no accrued sick leave or vacation leave is placed on a leave of absence status and that is the status of grievant. (T. 6).

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

FINDINGS OF FACT

1. Grievant was employed as a 261 day Custodian III at George Washington High School.

2. Sometime prior to April 1, 1986, grievant requested and was granted permission to take time off without pay to build a house during the summer months.

3. On April 11, 1986, grievant executed an agreement whereby grievant agreed that he:

1. work at least through May 5, 1986, and return to work no later than August 15, 1986;
2. forego accrual of sick leave, personal leave or vacation during the period of absence; and,
3. would give at least two days notice of his intent to return to work if prior to August 18, 1986.

4. Grievant failed to return to work on August 15, 1986, because of an illness and death in the family; another return date was established but grievant failed to report to work or report his absence.

5. Grievant was later involved in an automobile accident and was hospitalized. The principal of George Washington High School had recommended the suspension of grievant but no action was taken after school officials became aware of grievant's hospitalization.

6. Grievant exhausted all sick leave prior to May 5, 1986, including three days credit for May and June, for which credit had not yet been earned. Grievant seeks sick leave, vacation and holiday pay for the 1986-87 school year although he has not worked during that period.

CONCLUSIONS OF LAW

1. W.Va. Code, 18A-4-10 provides, in pertinent part, that at the beginning of the employment term a full-time employee of the county school board shall be entitled to one and one half days personal leave and sick leave; that where the cause for leave had its origin prior to the beginning of the employment term the employee shall be paid for time lost after the start of the employment term. Carl Moten v. Fayette County Board of Education, Docket No. 10-86-303-4.

2. Kanawha County Board of Education Policy IV-J-1 provides, in pertinent part, that an employee who uses all his personal leave (sick leave) and vacation leave and is not yet able to return to work will be placed on a leave of absence. When the employee is placed on leave of absence the employee no longer accrues vacation or sick leave days.

3. Grievant has failed to demonstrate entitlement to the benefits sought as a matter of law.

Accordingly, the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty 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.



LEO CATSONIS

Chief Hearing Examiner

Dated: May 29, 1987