

**Members**

James Paul Geary
Chairman
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

CLEATUS VARNEY

v.

Docket No. 23-86-374-1

LOGAN COUNTY BOARD OF EDUCATION

DECISION

Grievant, Cleatus Varney, is employed by the Logan County Board of Education as a plumber in the maintenance department and filed a grievance on October 16, 1986, alleging that he had been injured in July 1986 and unable to work until December 1986 but should have been paid for a holiday on September 1, 1986. On November 13, 1986, a level two hearing was conducted and the school board waived participation on December 12, 1986. Grievant appealed to the Education Employees Grievance Board and a de novo hearing was conducted on July 2, 1987.¹

¹ On April 13, 1987, counsel for the grievant advised the hearing examiner that the level two transcript would be forwarded to the Education Employees Grievance Board; however, the record was not received and a hearing was scheduled for June 23, 1987. On June 23, 1987, through inadvertance, there was no appearance by the school board and counsel for the parties agreed by telephone to continue the hearing until July 2, 1987.

Proposed findings of fact and conclusions of law were received from counsel for the school board on July 22 and from counsel for the grievant on August 3, 1987.

The evidence is uncontested that on July 26, 1986, grievant was accidentally injured while working at Logan Grade School. The accident caused nerve injury to the left arm and on August 4 his doctor ordered him to cease work. Grievant's initial application for workers' compensation benefits was rejected but was thereafter awarded on October 27, 1986 (Grievant's Exhibit A). Grievant testified that the financial office requested that he execute a request for medical leave but he refused; that although he had nine and one half days of sick leave at the time of the injury he did not elect to use the days until the latter part of September.² Grievant returned to work on December 8, 1986, and was denied holiday pay for Labor Day, September 1, 1986.

Alderson Hale III, chief financial officer for Logan County Schools, testified that at the beginning of the school term on July 1, 1986, grievant was given eighteen (18) days personal leave as required by law, which days grievant had available when the doctor advised him to quit work; that had he elected to use the days he would have exhausted them by September 1, the Labor Day

² The financial officer told grievant he would have to request the medical leave to keep his hospitalization in effect but grievant elected instead to take a doctor's slip to the office each month. This apparently satisfied the requirements of the Public Employees Insurance Board (Grievant's Exhibit C) as well as Logan County Board Policy.

There is no issue of negligence involved herein and grievant acknowledges that he received workers' compensation from August 4 until December 8, 1986, when he returned to work.

holiday for which grievant seeks pay. He stated that grievant voluntarily took himself out of active pay status because an employee is either working on active pay status or on personal leave or vacation and that grievant is attempting to establish a special pay status³; that the school board is attempting to follow two opinions of the State Superintendent of Schools holding that an employee on inactive pay status is not entitled to holiday pay.⁴

Counsel for the grievant contends that boards of education are not statutorily authorized to suspend an employee's contract for prolonged illness or withhold payment of holiday pay to an employee whose contract is in full force. Grievant, it is asserted, neither voluntarily suspended his contract by requesting a leave of absence nor was he guilty of an act which would allow involuntary suspension for the reasons listed in W.Va. Code, 18A-2-8.

³ In Norma Stutler v. Wood County Board of Education, Docket No. 54-86-333-3 it was noted that a regular employee who had been off work over twenty days was, in fact, on a leave of absence irrespective of a lack of formal approval for leave of absence.

⁴ The parties agree that grievant took leave on certain specified dates but differ in their characterization thereof, i.e., grievant calls it personal leave and leave without pay for personal leave and the board refers to it as personal leave and absence without personal leave.

One opinion is dated September 4, 1985, and the other opinion February 18, 1987.

Counsel for the school board contends that grievant was off work receiving workers' compensation benefits on September 1, 1986, and was out of pay status; that he was not restored to pay status by virtue of the receipt of the benefits. Reliance is placed upon the decision of the State Superintendent of Schools and it is concluded that an adverse decision of the hearing examiner would elevate every employee who is off work on workers' compensation to a special pay status entitling the employee to pay for snow days and holidays despite being out of pay status.

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

FINDINGS OF FACT

1. Grievant has been employed by the Logan County Board of Education for fifteen years and was injured on the job on July 26, 1986. On August 4 his doctor ordered him to cease work and grievant applied for and received workers' compensation benefits. There is no evidence that a substitute employee was employed to perform grievant's duties.

2. Grievant did not request a medical leave of absence for this period but took a doctor's slip to the board office monthly.

3. According to grievant's account he took personal leave August 4-8, 11-15, September 12, 15-19 and 22-25; he took leave without pay for personal leave August 18-22, 25-29, September 2-5, 8-11 and those days he was absent after September 25.

4. According to the school board's account grievant took personal leave for August 4-8, 11-15, September 12, 15-19, 22-25 and was absent without personal leave August 18-22, 25-29, September 2-5, 8-11 and was absent the days after September 25.

5. Grievant had not exhausted all of his personal leave as of September 1, 1986, but would have exhausted it had he not voluntarily taken time off without pay.

6. In an opinion of the State Superintendent of Schools dated February 18, 1987, it was opined that an employee in such situations cannot be required to take a leave of absence but their employment status is simply an unpaid status; that the employee is not entitled to receive any pay except a year's personal leave which, if not earned by subsequent work, would have to be repaid.

CONCLUSIONS OF LAW


1. W.Va. Code, 18A-5-2 provides, in pertinent part, that when a designated holiday falls within the employment term it shall be considered as a day of the employment term and the full-time school personnel shall receive pay for the holiday. The State Superintendent of Schools has construed this section to mean that employees off work without a leave of absence or on vacation or personal leave and on workers' compensation are not entitled to receive holiday pay.

2. An interpretation of the State Superintendent of Schools of school law is considered as persuasive authority and will be applied unless clearly erroneous. Smith v. Logan County Board of Education, 341 S.E.2d 685 (W.Va. 1985); Billy A. Moore v. Fayette County Board of Education, Docket No. 10-86-137-1.

3. An interpretation of the State Superintendent of Schools involving a claim of entitlement to compensation arising under school laws or policy will be applied unless clearly wrong. Truman L. Thompson v. Kanawha County Board of Education, Docket No. 20-86-366-1; Norma Stutler v. Wood County Board of Education, Docket No. 54-86-333-3. Grievant has failed to demonstrate and it is not apparent wherein the opinion is wrong as a matter of law.

Accordingly, the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County or Logan 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: August 26, 1987