



2/22/88

REPLY TO:
101 Harper Park Drive
Suite D
Beckley, WV 25801
Telephone: 255-6155

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

GENE DAVIS

v. Docket No. 45-88-037-4

SUMMERS COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Gene Davis, has been employed by the Summers County Board of Education for approximately twenty-four (24) years and has been Vocational Director for about fifteen (15) years. Mr. Davis filed a grievance in October 1987 alleging favoritism on the part of the Board when he was docked one day's wages after he had appeared at a hearing in Summers County Circuit Court. A Level II hearing was held on January 21, 1988 and the decision at that level was adverse to the grievant and the Board voted to uphold that decision. A Level IV evidentiary hearing was held on April 8, 1988.

There is basically no dispute over the facts giving rise to the grievance but the parties do offer opposing views on their

legal effect and the applicable law. Near the end of the 1986-87 school term, Mr. Davis had been assisting his wife, Wanda Davis, in a grievance concerning her transfer to Sandstone Junior High School. Mr. Davis appeared at several hearings in her behalf and also accompanied her to a Level IV hearing for which they had employed private counsel. A decision by the West Virginia Education Employees Grievance Board rendered on October 13, 1987 found in favor of Mrs. Davis. See, Wanda Davis v. Summers County Board of Education, Docket No. 45-87-119. Apparently the Summers County Board of Education was unwilling to appeal this decision to the Summers County Circuit Court but Superintendent of Schools, Demetrius Tassos, did cause an appeal to be made and a hearing on a request for a stay of the decision was scheduled for October 21, 1987. No one was subpoenaed for this hearing except members of the Summers County Board of Education but counsel for Mrs. Davis requested her presence and she, Mr. Davis, Mr. Bill Kessler, Business Manager/Treasurer, and Mr. Tassos all appeared on that date. No testimony was taken however and the petition for a stay and the appeal were dismissed.¹

¹ From the testimony at Level IV it appeared the Circuit Court was informed of the Board's decision not to appeal and after hearing legal arguments, determined Mr. Tassos had no authority to pursue the matter if the Board had made such a decision.

Mr. and Mrs. Davis subsequently reported this day as regularly worked and upon inquiry by Mr. Kessler, grievant stated this was a "court day" and they were entitled to take such time without loss of pay. Mr. Davis then received a letter from Mr. Kessler dated October 30, 1987 indicating he would dock his wages for October 21, 1987.² Grievant contends he was acting in the capacity of employee representative in a continuation of the grievance process on the date in question and as such was entitled to the benefits of county school policy which allow such absences without a deduction of pay. Mr. Davis also asserts that notwithstanding the nature of his Circuit Court appearance, the failure of the Board to similarly make deductions from the pay of Mr. Kessler and Mr. Tassos amounted to favoritism which is defined by W.Va. Code, 18-29-3(o) as:

...unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

The Board takes the position that the grievance process stopped upon the decision of the West Virginia Education Employees Grievance Board and Mr. Davis was not a representative of Mrs. Davis and thus not entitled to pay for attending the hearing. The Board further defends

²Grievant had originally received notice that his wife's pay would be similarly affected but in a conversation with Mr. Tassos, Mr. Kessler learned he had granted a request from counsel for Mrs. Davis that she be allowed to attend the hearing and her salary was not affected.

its actions by noting the provisions of its personnel policy which restrict pay for appearances in Circuit Court to those in which an employee is a witness in a criminal proceeding, said policy being consistent with W.Va. Code, 18A-5-3a which provides:

Any teacher, principal, supervisor, service personnel or other person employed by a board of education who is subpoenaed to appear as a witness but not as a defendant in any criminal proceeding in any court of law may make such appearance without any loss of pay. The board shall pay to such employee the difference between the witness fee, exclusive of travel allowances, payable for such appearance by the court and the amount of salary due to the person for the time such employee is absent from his employment by reason of answering such subpoena.

Mr. Tassos and Mr. Kessler testified at the Level IV hearing that they did not feel the personnel policy or this section of the West Virginia Code pertained to their appearances on October 21, 1987 since such responsibilities were an integral part of their jobs. (T. __)

It was Mr. Kessler's contention that he was at the hearing at the direction of Mr. Tassos and if he were required to take personal leave for the many such appearances he makes that leave would quickly be exhausted. (T. __)

It is clear Mr. Davis was not acting as his wife's representative after she had obtained legal counsel at the Level IV grievance proceedings and the Board is correct in its assertion that the appeal

of an administrative agency's decision is not a continuation of the grievance procedure but the grievant is still entitled to be treated like any other employee of the Summers County Board of Education. Conceivably a superintendent of schools may, by the express or implied terms of his contract, be exempt from the provisions of W.Va. Code, 18A-5-3a and the requirements of a personnel policy restricting pay to appearances in criminal proceedings. By its nature his job would require that he appear and represent the board in a great many legal proceedings but these demands are not so routinely placed upon Mr. Kessler that his appearances in Circuit Court should be treated any differently than those of the grievant. While the testimony at the Level IV proceeding did reveal that Mr. Tassos relied heavily on Mr. Kessler because of his knowledge of education law, the evidence as a whole did not support the Board's contention that court appearances were such an integral part of his job function as to qualify him for an exception to the personnel policy and the West Virginia Code. The demands placed on Mr. Kessler in certain legal matters might well justify a personnel policy with some personal leave provisions for designees of the superintendent in such circumstances but absent such a policy he must be held to the same requirements concerning the use of personal leave as the grievant.³ The failure of the

³A State Superintendent of Schools' opinion dated May 4, 1987 submitted at Level IV (Board's Exhibit No. 8) makes the suggestion that county boards of education develop "administrative leave" policies pursuant to their authority under W.Va. Code, 18A-4-10 for circumstances where personal leave would not be appropriate.

Board to do so amounts to preferential treatment or favoritism as defined by W.Va. Code, 18-29-3(o).

In addition to the foregoing, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Grievant, Gene Davis, has been employed by the Summers County Board of Education for approximately twenty-four (24) years and has served as Vocational Director for approximately fifteen (15) years.

2. Pursuant to an appeal of a decision issued on October 13, 1987 by the West Virginia Education Employees Grievance Board, a hearing was scheduled in the Summers County Circuit Court for October 21, 1987 in Lewisburg, West Virginia and although not subpoenaed, grievant, his wife, Mr. Bill Kessler, Business Manager/Treasurer, and Superintendent of Schools, Demetrius Tassos, were present at the hearing.

3. Subsequent to the hearing the Board deducted one day's pay from the grievant's regular salary.

4. No similar deductions were made by the Board from the salary of Mr. Bill Kessler or Mr. Demetrius Tassos.

CONCLUSIONS OF LAW

1. The personnel policy of the Summers County Board of Education provides that employees and any employee acting as representative involved in the grievance procedure contained in W.Va. Code, 18-29-1, et seq. will not be docked for time spent in those procedures but employees will be docked for time spent in civil matters in Circuit Court.

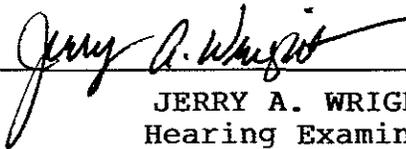
2. Said policy, by its terms, is in conformity with W.Va. Code, 18A-5-3a and applies to any and all employees of the Summers County Board of Education.

3. When school employees allege favoritism in a grievance they must prove by a preponderance of the evidence that the Board has demonstrated preferential treatment of another employee. Clara Thompson v. McDowell County Board of Education, Docket No. 33-87-088.

4. Grievant, Gene Davis, has proven by a preponderance of the evidence that the Summers County Board of Education gave preferential treatment to other employees when it docked grievant for one day's pay for his appearance at the hearing in the Summers County Circuit Court on October 21, 1987 and failed to similarly dock the pay of Mr. Bill Kessler and Mr. Demetrius Tassos for their appearance at the same hearing.

Accordingly, the grievance is **GRANTED** and the Summers County Board of Education is hereby **ORDERED** to reimburse the grievant, Gene Davis, for the wages that were improperly deducted from his salary for October 21, 1987.

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



JERRY A. WRIGHT
Hearing Examiner

DATED: April 21, 1988