



Members

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

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

ARCH A. MOORE, JR.
Governor

Offices

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

RAYMOND DUNLEAVY

v.

Docket No. 20-88-179

KANAWHA COUNTY BOARD OF EDUCATION

DECISION

Grievant, employed by Respondent Kanawha County Board of Education as a school psychologist, filed a grievance on June 7, 1988. It was denied at Level I on June 21, 1988, and at Level II on August 30. Respondent waived a Level III hearing on September 15, 1988, and appeal was filed at Level IV on September 18, 1988. A hearing was held October 20, 1988. The parties supplemented the record by proposed findings of fact and conclusions of law and legal memoranda.

Grievant protests denial of his request for professional leave to attend a meeting of the West Virginia School Psychologists Association on May 27, 1988. He contends that "Guidelines To Be Used in Granting Absence from Duty Without Loss of Pay (Professional Leave) for Pupil Support Staff" (hereinafter "the guidelines"), promulgated on December 5,

1985, by James E. Simmons, Associate Superintendent of Pupil Support Services, are invalid because they are contrary to Kanawha County Board of Education Policy IV-J-9 on professional leave and that implementation of the guidelines is discriminatory against pupil support services staff. See W.Va. Code §§18-29-2(a) and 3(m).¹ Respondent counters that the guidelines do not conflict with Policy IV-J-9 but instead were properly promulgated and are reasonable and are being flexibly applied.

The parties stipulated that the grievant was denied professional leave to attend the meeting solely due to the fact that, contrary to the guidelines' requirements,² he did not submit his request at least 25 days prior to the date of the meeting. Furthermore, the parties stipulated that the

¹ Grievant requests as relief "administrator's adherence to county policy on professional leave." Granting Grievant's request would not actually give relief for the denial of leave in May and therefore may render this case moot. See Dunleavy v. Kanawha County Board of Education, Docket No. 20-87-102-1 (June 30, 1987). Nevertheless, in that Grievant has been demonstrably adversely affected by adherence to the guidelines; the validity of the guidelines cannot readily be raised except under circumstances such as those of this case; and Respondent board of education, represented by counsel, made no contention that the grievant is asking for an advisory opinion, compare id., the issues raised by the grievance are here addressed.

² The guidelines provide in pertinent part, "Such requests are to be submitted to the department/office head 25 days before the date of the meeting or before registration fees are due. Such requests are to be submitted to the division head 20 days before the date of the meeting or before registration fees are due... ."

pupil support service staff are the only employees of respondent for whom the guidelines apply.

The stipulations of the parties are adopted as findings of fact. In addition, the following findings of fact and conclusions of law are appropriate.

Findings of Fact

1. On May 16, 1988, Grievant received notice of the annual spring meeting of the West Virginia School Psychologists Association, scheduled for May 27, 1988.

2. On May 17, 1988, Grievant submitted a written request to attend the May 27 meeting. He included an agenda for the meeting. He asked for no transportation expenses or registration fees as the former was negligible and he was willing to assume the latter himself.

3. Grievant's supervisor, Mr. Harold McMillian, Director of the Department of Psychological Services, was on vacation when the leave request was submitted, and when Grievant's inquiries to the department secretary about expediting the request in his absence proved fruitless, the request lay unanswered for the remainder of the week of May 16.

4. On May 23, 1988, Grievant spoke with Mr. McMillian about his leave request, explaining that he had turned it in the day after receiving notice of the meeting.

5. On May 25, 1988, Grievant's leave request was returned by Mr. McMillian marked "not approved" and accompanied by a handwritten note that read, "This request was out of timelines. I will be happy to discuss it with you."

6. Grievant did not accept Mr. McMillian's offer to discuss the refusal since he thought Mr. McMillian was well aware of the situation.

7. James E. Simmons, Associate Superintendent of Pupil Support Services, published the guidelines because he was receiving so many requests for professional leave that granting them was interrupting the services required to be provided by the Division of Pupil Support Services.

8. The guidelines require, inter alia, a 25-day advance notice requirement for attending a professional meeting.

9. Mr. Simmons provided a September 19, 1988, memo to members of the itinerant staff of the Division of Pupil Support Services which, in recognition that notification of a meeting was not always received in time to meet with the 25-day requirements of the guidelines, provided in pertinent part,

The question has come up as to what happens if notification about a meeting is not received in sufficient time to meet the guidelines. If such occasion does occur, the request is to be discussed with your immediate supervisor with documentation of the date the notification was received. Your supervisor will then discuss it with me and the request can be considered outside timeline.

10. As a member of the itinerant staff Grievant would have received a copy of the September 19, 1986, memo.

11. No documentation of when Grievant was notified of the May 27, 1988, meeting was provided Grievant's supervisors.

12. Mr. Simmons could not recall whether Mr. McMillian discussed with him Grievant's request for leave.

Conclusions of Law

1. It is incumbent upon a grievant to prove the allegations of his complaint by a preponderance of the evidence. Hanshaw v. McDowell County Board of Education, Docket No. 33-88-130 (August 19, 1988); Andrews v. Putnam County Board of Education, Docket No. 40-87-330-1 (June 7, 1988); Bulford v. Preston County Board of Education, Docket No. 39-87-203 (February 26, 1988).

2. West Virginia Board of Education Policy IV-J-9 provides in pertinent part to this grievance,

Permission [for professional leave] may be granted only in the following areas:...3. Personnel whose duties can be absorbed by the faculty of the school in which they teach, provided prior approval is secured from the principal of the school before a written request is made to the Division/Department head concerned.

3. West Virginia Board of Education Policy IV-J-9 does not disallow administrators from exercising their discretion in denying requests for professional leave.

4. In promulgating the guidelines, as amended by the memo of September 19, 1986, Mr. Simmons properly exercised his discretion.

5. By not discussing with Mr. McMillian the denial of his leave request and by not providing his supervisors documentation of when he received notice of the May 27 meeting, Grievant did not avail himself of the procedures provided by Mr. Simmons's memo of September 19, 1986, for granting professional leave requests submitted outside the timelines of the guidelines.

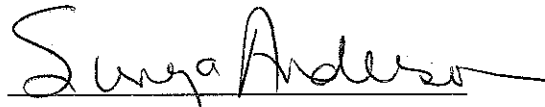
6. Grievant has failed to establish that, in denying his request for professional leave for May 27, 1988, Mr. McMillian acted arbitrarily or capriciously or contrary to any laws, regulations or policy.

7. Grievant established that no employees other than Pupil Support Services staff are subject to the guidelines. While there may be an implication that the other employees are not required to submit professional leave requests more than 25 days in advance, Grievant did not establish that the amount of absenteeism in other divisions created a need, like that of the Division of Pupil Support Services, for such a requirement. Accordingly, Grievant did not establish discrimination under W.Va. Code §§ 18-29-2(a) and 3(m).

The grievance is accordingly **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7 Neither the West Virginia Education and State

Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

A handwritten signature in cursive script, reading "Sunya Anderson", written over a horizontal line.

SUNYA ANDERSON
HEARING EXAMINER

Dated: November 28, 1988