



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

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**RICHARD D. MILAM**

**v.**

**Docket No. 20-88-153**

**KANAWHA COUNTY BOARD OF EDUCATION**

**DECISION**

Grievant, employed by Respondent Kanawha County Board of Education as a carpenter, filed a grievance on April 20, 1988. Denied at Level I on May 2, 1988, and appealed the next day to Level II, the grievance was again denied on June 23, 1988, and appealed to Level III.<sup>1</sup> On July 23, 1988, Grievant was notified by letter that Respondent waived participation at Level III. The Grievant appealed to Level IV on August 10, 1988, and a hearing was held October 17,

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<sup>1</sup> The record does not include information on what date the Grievant appealed to Level III.

1988.<sup>2</sup> Proposed findings of fact and conclusions of law were received from Grievant's counsel November 10, 1988.<sup>3</sup>

Grievant contends that he is entitled to reimbursement for the cost of testing for hepatitis.<sup>4</sup> Respondent argues for dismissal of the grievance on the procedural ground that Grievant failed to file his Level IV appeal in accordance with the requirement of W.Va. Code §18-29-4(d) that an appeal be filed within five days of the written decision at Level III. Respondent also argues that it is not required by law to pay for the testing.

Grievant maintains that the belated filing of the Level IV appeal was due to the fact that he did not receive the

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<sup>2</sup> Hearings scheduled for September 9 and 20, 1988, were continued at the request of the parties.

<sup>3</sup> At the hearing Respondent's counsel orally argued for dismissal of the grievance and also stated that Respondent was relying on the findings of fact and conclusions of law of the Level II evaluator.

<sup>4</sup> On the appeal form submitted at Level IV Grievant also requested restoration of sick leave for two days he was absent while awaiting the test results. Grievant's proposed findings of fact and conclusions of law do not address the issue as to why he should be found so entitled and therefore Grievant may have abandoned it. In any case, it is well-settled that it is Grievant's burden to prove the allegations of his grievance, see, e.g., Hanshaw v. McDowell Co. Bd. of Ed., Docket No. 33-88-130 (Aug. 19, 1988), and Grievant has provided no evidentiary or legal support for his contention that he is entitled to restoration of the sick leave.

July 22nd letter informing him of the Respondent's waiver at Level III.<sup>5</sup> Grievant's Counsel stated at the hearing,

I received a copy of that [July 22nd letter] and didn't hear anything from Richard for a couple of weeks, so we contacted [him] and asked him if he decided to appeal or not and he indicated at that time that he had not received a Level III waiver.

Counsel stated that at that time Grievant appealed to Level IV. Respondent argues that since Grievant's Counsel received a copy of the letter, there was no excuse for Grievant's failure to timely file his appeal.

Respondent's contention is well-founded in court procedures, where notice to an attorney is effective notice to the attorney's client. See, e.g., Brewster v. Hines, 155 W.Va. 302, 185 S.E.2d 513 (1971). Reliance of an attorney on his or her client to file an appeal is unjustifiable and irresponsible. Nevertheless, Grievant's Counsel will not be held in this instance to the standard a court would require<sup>6</sup> because such reliance has been accepted, though unwise, practice in administrative cases before the West Virginia Education and State Employees Grievance Board and such practice has not heretofore been disallowed by rule or

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<sup>5</sup> It is not known what happened to the letter sent Grievant. Grievant testified that he may have been gone when it was sent, for he was on vacation from August 1 through 5. Grievant's proper address was on the letter.

<sup>6</sup> Counsel are well-advised to take responsibility for the filings of their clients' papers, as they would before a court, in future cases before this West Virginia Education and State Employees Grievance Board.

caselaw. Indeed, in this instance, Respondent contributed to that practice by addressing the letter to Grievant, with only a carbon copy sent to Grievant's Counsel.<sup>7</sup> Respondent's motion for dismissal for untimely filing of the Level IV appeal is therefore denied.

Grievant contends that Respondent is required to pay for the tests for hepatitis by W.Va. Code §18A-2-10, which provides in pertinent part:

In case a medical or physical examination of any school board employee or qualified applicant who becomes an employee of the board for any school position is required by a board of education or by any administrator, department or agency of government which has authority to require such examination, the cost shall be paid in full by the employer.

Respondent urges that neither it nor any administrator or official required Grievant to be tested and therefore the provision is inapplicable to this matter.<sup>8</sup>

Grievant was the only witness at the hearing. He testified that on March 31, 1988, he was summoned to the office of Mr. Garth Bostic, Director of Maintenance. Ms. Jean Morris, who he thought was in charge of the nurses for Respondent, was on the phone. Mr. Bostic asked Grievant whether he had hepatitis and he replied that his doctor had

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<sup>7</sup> The letter does not actually even show that a carbon copy was sent Grievant's Counsel.

<sup>8</sup> Respondent concedes that if it had requested the testing the requirements of W.Va. Code §18A-2-10 would apply.

indicated that he did.<sup>9</sup> Grievant further stated that Ms. Morris told him by phone to contact his doctor and have his doctor contact the Respondent's doctor and let him know his status, whether he was contagious. He concluded,

My doctor's office is only a couple of miles away so I told Mr. Bostic if it were all right with them I would just go see the doctor instead of calling, which he indicated would be acceptable, so I went to the doctor and, upon arriving, told him the situation and he said, "I can't give you that information without running this hepatitis profile." So he went ahead and did the hepatitis profile....

Grievant was charged \$303, which Respondent has refused to pay.

In addition to the preceding narrative, the following findings of fact and conclusions of law are appropriate.

#### FINDINGS OF FACT

1. Grievant was asked by a representative of Respondent, Jean Morris, to have his doctor, Dr. David Ritchie, contact Respondent's doctor to advise Respondent's doctor of whether Grievant's hepatitis was contagious.

2. Grievant's doctor could not advise Respondent's doctor as to whether Grievant was contagious without conducting further testing. That testing was conducted.

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<sup>9</sup> Grievant testified that after donating blood he had received a letter from the American Red Cross that he had hepatitis. He further stated that he had already been to the doctor, who had released him to go back to work, and he had been back at work two days.

### CONCLUSIONS OF LAW

1. Because the information on whether Grievant's hepatitis was contagious which Respondent requested could not be provided by Grievant's doctor without further testing, the testing must be held to have been conducted at Respondent's request.


2. When an employer board of education requests that an employee submit to medical testing, the cost shall be paid by the board of education. W.Va. Code §18A-2-10.

3. School personnel laws are to be strictly construed in favor of the employees they are designed to protect. See Morgan v. Pizzino, 256 S.E.2d 592, 595 (W.Va. 1979).

The grievance is therefore **GRANTED** insofar as it requests that Respondent pay for the medical tests of March 31, 1988. Respondent accordingly is hereby **ORDERED** to pay Dr. David Ritchie \$303 therefor.

This decision may be appealed to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of its receipt. See 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.



SUNYA ANDERSON  
HEARING EXAMINER

Dated: December 2, 1988