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

v.

Docket No. 22-88-005-1

LINCOLN COUNTY BOARD OF EDUCATION

DECISION

Grievant, Rex Toney, is a bus operator employed by Respondent Lincoln County Board of Education. He contends that he was wrongfully denied salary for holidays, snow days and out-of-school-environment (OSE) days¹ during two periods he was off work and collecting benefits from the West Virginia Workers' Compensation Fund, per W.Va. Code §§23-1-1 et seq., in 1984, 1985 and 1986.

¹ "Holidays" for school employees in West Virginia are those specifically enumerated days recognized by the State as being paid off-duty days. "Snow days" are those days when the scheduled instruction of students must be cancelled due to inclement winter weather. "OSE days," also known as "OS days," are certain days, generally compensated, which are neither instructional days nor official holidays. See W.Va. Code §18A-5-2.

This matter was filed at Level I in either late May or early June, 1987.² Johnnie Adkins, Grievant's immediate supervisor, was apparently without authority to grant the relief requested;³ the case proceeded and was denied at each of Levels II and III. Thereafter, a Level IV hearing was conducted August 26, 1988, and Grievant's proposed findings of fact and conclusions of law were submitted October 27, 1988. Respondent has chosen to not make any post-hearing submission.

The basic facts herein are not in dispute. Grievant was injured on the job in February of 1984 and was disabled and collecting Workers' Compensation from then through February of 1985, when he returned to active duty with Respondent. He sustained another work-related injury in May of 1985 and was again off the job and receiving Workers' Compensation until August of 1986. Apparently sometime in May of 1987, Adkins advised Grievant that he, Grievant, should have been paid for all holidays, snow days and OSE days occurring while he was on Workers' Compensation. Shortly thereafter, Grievant requested that Respondent audit

² The timeliness of grievant's pursuit of this matter has not been raised as a defense, and so will not be considered herein. See Craig v. Kanawha Co. Bd. of Educ., Docket No. 20-88-064 (October 26, 1988).

³ Adkins' written response to grievant at Level I was: "I am in agreement with employee that when absent on Workmen's Compensation he should be paid for Snow Days, Holidays and OS Days."

his pay records for each of school years 1983-84, 1984-85 and 1985-86. That audit revealed that he was paid for a few holidays⁴ and no snow or OSE days during his off-work status. Grievant asked Respondent to pay him for 41 additional days;⁵ that request was denied by letter from Harold R. Smith, then Lincoln County Superintendent of Schools, dated May 29, 1987. That same letter advised Grievant that he owed Respondent \$1,473.45 plus benefits for 27 personal days for which he was paid but which he did not earn by subsequent work.⁶

At the Level IV hearing, Grievant presented evidence that two other of Respondent's employees, bus driver Vester Nelson and Transportation Director Johnnie Adkins, were each paid for two holidays⁷ while off work due to a compensable

⁴ Specifically, those holidays were Memorial Day 1984 and 1985 and Labor Day 1984 and 1985. No explanation was given as to why Grievant was paid for these as opposed to other holidays. At the Level IV hearing, Grievant asserted that if he were not entitled to payment for all holidays, snow days and OSE days during the time he was on compensation, Respondent would not have paid him for these four.

⁵ It is not at all clear from the record that each of these 41 was a holiday, snow day or OSE day.

⁶ Code §18A-4-10 provides that school personnel are entitled to their annual increment of personal leave days at the commencement of each school year. Smith's letter also advised that Toney would be "formally" asked, at some later time, to repay the \$1,473.45 allegedly owed. Apparently, Grievant has not, to date, been asked to do so.

⁷ Nelson was off work from July 9, 1984 through January 2, 1985 and was paid for Labor Day and Thanksgiving.
(Footnote Continued)

job-related injury.⁸ Grievant also stated that, during the audit, Conrad "Jody" Lucas, Respondent's Coordinator of Finance and representative at that hearing, commented that he had come to the following conclusions: one, that only those drivers who had asked to be paid for holidays, snow days and OSE days while on Workers' Compensation had been paid⁹ and two, that Grievant and his father, another of Respondent's bus drivers who had been off work and on Workers' Compensation for an extended period, were the only

(Footnote Continued)

Adkins did not work April 8-July 8, 1986 and received pay for Primary Election Day and West Virginia Day. Apparently, Nelson and Adkins were reimbursed for these holidays because certain personal leave request slips issued by Respondent were filled out and submitted, see Grievant's Exhibits 2 through 9, and not for others occurring during their respective absences from work because such slips were not forwarded to Respondent.

8 Grievant's Exhibit 10 is a letter "To Whom It May Concern" from Johnnie Adkins, dated July 6, 1988, wherein Adkins states that during the period he was off work and on Workers' Compensation, he did not claim "sick leave" for holidays or snow days. Grievant's Exhibits 6, 7 and 9 do reveal, however, that Adkins requested personal leave for the day before and the day after certain holidays.

9 It is recognized that in some contexts, employers quite reasonably require their employees to make written petition for the usage of accrued personal leave before being granted that usage. However, in the instant case, Respondent has not raised as a defense Grievant's lack of formal request for personal leave utilization, although Grievant's exhibits quite clearly demonstrate that an official leave request slip was available to and in use by Respondent's employees.

ones who had not been so paid, and therefore were apparently the only two who had not sought payment.¹⁰

Lucas did not comment, at Level IV, on whether or not he had made that statement or indeed come to the conclusions reported by Grievant. He did opine that "there have been inconsistencies" in the way Respondent's employees have been paid. He blamed this on limited staff and heavy workload, and stated that any drivers paid for holidays, snow days or OSE days while on Workers' Compensation and after the depletion of their personal leave had been mistakenly paid. Lucas also admitted at the hearing that he could not dispute that other employees off on Workers' Compensation were paid for days for which Grievant was not and that his complaint "may have some merit."¹¹

Respondent cited an Opin., State Supt. Schools, Feb. 18, 1987, which provides that its employees who are off work due to illness and have exhausted all accumulated personal

¹⁰ This is certainly a confusing and overbroad conclusion, since Grievant was paid without making a request for four holidays and Nelson and Adkins were not paid for certain holidays or any snow days or OSE days.

¹¹ It is noted that some county boards of education in West Virginia have at least stated intention to recoup monies mistakenly paid to an employee, presumably rather than to pay the same amount to all other similarly-situated staff. See Barnhart v. Kanawha Co. Bd. of Educ., Docket No. 20-87-201-1 (April 6, 1988), n. 1. Such an approach has been characterized by the West Virginia Education and State Employees Grievance Board as "fair and equitable" in one situation. Fisher v. Mercer Co. Bd. of Educ., Docket No. 27-86-112 (July 25, 1986).

days without requesting a leave of absence¹² should not receive pay for holidays and OS days.¹³ Respondent further presented a letter of December 30, 1987 from the State Superintendent, wherein he deferred to the West Virginia Education and State Employees Grievance Board a decision on whether this Opin. should be retroactive in application. Grievant argued that it was Respondent's policy to routinely pay employees off on Workers' Compensation for holidays, snow days and OSE days¹⁴ and that the Opin. cited, issued after the last date for which Grievant claims compensation, may not legally be applied retroactively in his case by Respondent.

In addition, it is appropriate to make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Grievant, Rex Toney, is a bus operator for Respondent Lincoln County Board of Education. He has been so employed for approximately the past ten years.

¹² Grievant never sought, nor was he placed upon, a leave of absence.

¹³ It is presumed that this Opin. is also applicable to snow days.

¹⁴ Grievant at no time contended that such was a written policy of Respondent.

2. Grievant was injured on-the-job on two occasions, and was accordingly unable to work from February, 1984-February, 1985 and May, 1985-August, 1986. During these periods, he collected Workers' Compensation benefits.

3. Except for the periods referenced in Finding #2, Grievant has never, at times pertinent to this grievance, been away from work due to illness.

4. While Grievant was off work and collecting Workers' Compensation, he was paid for four holidays, namely: Memorial Day 1984, Labor Day 1984, Memorial Day 1985 and Labor Day 1985. He was not paid for other holidays or for snow or OSE days. There is no evidence that Grievant ever made formal request for the utilization of his personal leave, even while he was off work and on Worker's Compensation.

5. Vester Nelson, another bus operator employed by Respondent, received Workers' Compensation benefits on one occasion from July, 1984 until January, 1985. During this time away from his job, Nelson was paid for Labor Day and Thanksgiving Day, but not for other holidays or for any snow or OSE days.

6. Dencil Cremeans, another bus operator employed by Respondent, was off the job and on Workers' Compensation for certain periods. It is unclear from the record whether he was paid for any holidays, snow days, or OSE days while in this status.

7. Johnnie Adkins, Respondent's Transportation Director, was absent from work and the recipient of Workers'

Compensation on one occasion from April-July, 1986. During this period, Adkins was paid for Election Day and West Virginia Day, but not for other holidays or OSE days. There were no snow days April-July, 1986.

8. Nelson and Adkins both made formal request for usage of accrued personal leave the day before and the day after each holiday for which they were paid.

9. On February 18, 1987, the West Virginia State Superintendent of Schools issued an Opinion that a county board of education's employees who are off work due to illness, have exhausted personal leave reserves and are not on leave of absence, should not be paid for holidays or OSE days.

10. At times relevant to this grievance, it has never been Respondent's official policy to pay bus operators or other employees who are off the job due to injury and collecting Workers' Compensation for holidays, snow days or OSE days unless those operators had accrued personal leave. There is no direct evidence that any drivers without personal leave were paid for such days.

CONCLUSIONS OF LAW

1. It is incumbent upon a grievant to prove the allegations of his complaint by a preponderance of the evidence. Black v. Cabell Co. Bd. of Educ., Docket No. 06-88-020-4 (May 6, 1988).

2. "[U]niformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county." W.Va. Code §18A-4-5b.

3. An Opinion rendered by the West Virginia State Superintendent of Schools is relevant for consideration by this Grievance Board. McClure v. Kanawha Co. Bd. of Educ., Docket No. 20-88-131 (Oct. 24, 1988).

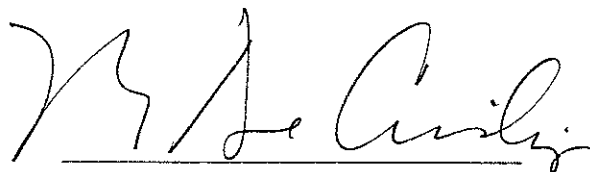
4. "A regular full-time employee who is absent from assigned duties due to...accident [or] sickness..shall be paid his full salary...during the period when he is absent, but not to exceed the total amount of leave to which he is entitled." Code §18A-4-10; Aftanas v. Brooke Co. Bd. of Educ., Docket No. 05-87-295-3 (January 29, 1988). Bus operators employed by a county board of education in West Virginia are entitled to fifteen days leave annually which may be used for vacation, illness or other personal reason, and unused leave "shall be accumulative without limitation." See Code §18A-4-10.

5. Employees absent because of an injury are not entitled to pay for those days enumerated in Code §18A-5-2 once they have been compensated for their personal leave days. Thomas v. Boone Co. Bd. of Educ., Docket No. 03-88-087 (Oct. 18, 1988).

Accordingly, this grievance is GRANTED insofar as Respondent is ORDERED to pay Grievant for all holidays, snow

days and OSE days heretofore unpaid and occurring during times he was off work due to injury and while he still had accrued personal leave to his credit. Further, this grievance is DENIED insofar as Grievant requests payment for holidays, snow days and OSE days occurring during any periods when he was without accrued personal leave.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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.



M. DREW CRISLIP
HEARING EXAMINER

Dated: November 29, 1988