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**ANNETTE AFTANAS**

**v.**

**Docket No. 05-87-295-3**

**BROOKE COUNTY BOARD OF EDUCATION**

**D E C I S I O N**

Annette Aftanas, grievant, is employed by the Brooke County Board of Education as a school bus operator. On or about November 30, 1987 she filed a level four grievance appeal alleging the board violated W.Va. Code, 18A-4-8, W.Va. Code, 18A-4-10 and W.Va. Code, 23-5A-1 when it did not credit her a year's seniority and withheld five days personal leave time for the 1987-88 school term following her extended work absence due to a work related injury. An evidentiary hearing at level four was conducted December 17, 1987.<sup>1</sup>

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<sup>1</sup>The record does not contain any of the lower level pleadings except for the transcript of a level two hearing held October 29, 1987. An untitled, unsigned two page document purporting to be the level two decision denying the grievance was submitted at level four. According to the school superintendent, the board waived consideration at level three. Neither of the parties submitted proposed findings or briefs and it is presumed the board stands on the level two decision.

The facts in this grievance are not in dispute. At the beginning of the 1986-87 school year grievant had no accumulated personal leave days. On February 23, 1987 she was injured while cleaning the windshield of her bus (a driver has to climb on the bumper to reach the windshield) and she slipped and fell. Grievant applied for and received workers' compensation benefits until released for work at the beginning of the 1987-88 school year. When she received her first paycheck of the new school term she discovered that she had not been granted a year's pay increment and she had been accorded only ten personal leave days for the school term.

The grievance raises two issues. Grievant claims that school law entitles her to both her year's seniority and the fifteen days personal leave accorded to all personnel at the onset of a new school year. To deny her those employee benefits, she claims, amounts to discrimination against a worker receiving workers' compensation benefits and is expressly forbidden by workers' compensation law.

The school board contends that its actions regarding the seniority/increment issue comply with State Board Policy 5610 and an interpretation thereof by the State Superintendent. Policy 5610 requires that an employee work a minimum of 133 days for a year's employment credit for pay purposes and the May 14, 1984 advisory of the State Superintendent excludes non-working employees receiving workers' compensation from accumulating days

of employment credit for calculating yearly pay increments.<sup>2</sup> The West Virginia Education Employees Grievance Board has previously upheld the interpretation of Policy 5610 by the State Superintendent of Schools. Thompson v. Kanawha County Board of Education, Docket No. 20-86-366-1.

However, grievant's second issue regarding personal leave days remains. W.Va. Code, 18A-4-10 provides in pertinent part:

At the beginning of the employment term, any full-time employee of a county board of education shall be entitled annually to at least one and one-half days personal leave for each employment month or major fraction thereof in the employee's employment term.

...  
A regular full-time employee who is absent from assigned duties due to accident, sickness...or other cause authorized or approved by the board, shall be paid the full salary from his regular budgeted salary appropriation during the period which such employee is absent, but not to exceed the total amount of leave to which such employee is entitled

...  
If an employee should use personal leave which the employee has not yet accumulated on a monthly basis and subsequently leave the employment, the employee shall be required to reimburse the board for the salary or wages paid to him for such unaccumulated leave.

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<sup>2</sup>The advisory makes it clear though, that "under these circumstances, an employee could continue to earn (statutory) seniority...." Thus, grievant would continue to be senior to an employee hired the year after she was hired.

At the level two hearing, the county school superintendent admitted that the guidelines were "a rather cloudy area" with respect to grievant's circumstances "which perhaps needs cleared up by some higher authority than I" (T.7). The superintendent advanced the theory that the employee must "earn" the personal leave days and analogized in reverse that if an employee was hired in September, used and was paid fifteen days sick leave and then quit, that employee had not "earned" the fifteen days and subsequently owed the board the back pay.

The board appears to correctly analyze the specific circumstances of when an employee resigns who has been paid for unearned personal leave days but grievant's situation is not analogous. Grievant remained a board employee under contract while receiving workers' compensation benefits and was duly compensated for holiday benefits such as Memorial Day during that period (T.9,10) and therefore also "earned" and was entitled to compensation for her fifteen (but no more) personal leave days as per the statutory requirements.

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

### FINDINGS OF FACT

1. Grievant is employed as a 200 day school bus operator by the respondent board of education and had attained approximately eight years statutory seniority at the onset of the current 1987-88 school year.

2. During the 1986-87 school term, on February 23, 1987, grievant was injured when she fell from a bus while cleaning the windshield. She applied for and was paid workers' compensation benefits and was not released to return to work until the beginning of the 1987-88 year.

3. Upon her return to work she was advised that she did not qualify for a year's credit for incremental pay purposes and was additionally granted only ten, instead of fifteen, personal leave days for the upcoming employment year.

4. With respect to the incremental pay, at level two the board determined that grievant could only be credited for a maximum of 129.50 work days and State Board Policy 5610 requires that an employee work 133 days in order to be credited a year's seniority for incremental pay purposes.

5. Brooke County School officials do not discriminate in the application of Policy 5610 as against workers' compensation claimants and the 133 rule is applied uniformly regardless of the reason for the failure to perform the 133 work day requirement.

6. With respect to the personal leave days the school board claims that in 1986-87 it paid grievant more personal leave days than she "earned" and thus it had a right to exclude five personal leave days from her 1987-88 term so that she could compensate the board for the unearned days.

7. The board determined at level two that grievant "actually worked and/or was paid, including holidays, 112.50 days prior to her injury. She had no carry-over personal leave from previous years, but was granted 15 days at the beginning of the 1986-87 school term. She was compensated for the 112.50 days worked prior to her injury, her 15 days personal leave, and 2 holidays for a total of 129.50 days." The board maintains that grievant "used" one and one-half days personal leave during the February 16 - February 26, 1987 pay period and another one and one-half days during the February 27 - March 10, 1987 pay period while she was receiving workers' compensation benefits. (Board exhibit No. 4, December 17, 1987.)

8. The evidence preponderates that grievant remained on contract with the board following her work related injury while recovering and receiving workers' compensation benefits and was given two holiday payments during that time, thus, was equally entitled to "earn" personal leave days up to the maximum allowable fifteen days.

9. Despite its characterization that grievant was paid more personal leave days than she earned in the 1986-87 school year, it appears the board nonetheless paid grievant several sick leave days following her absence from work due to a work related injury in February 1987 (the 1986-87 school year). The board has not established by case law, statute or policy that it was permissible to adjust grievant's 1987-88 allocation and withhold five days personal leave days from her fifteen day entitlement in order to repay the board for personal leave days properly paid in 1986-87.

#### CONCLUSIONS OF LAW

1. An interpretation by the State Superintendent of Schools of State Board of Education Policy 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); Moore v. Fayette County Board of Education, Docket No. 10-86-137-1. Grievant has failed to show that the opinion of the state superintendent is erroneous. Thompson v. Kanawha County Board of Education, Docket No. 20-86-366-1.

2. At the beginning of the employment term, any full-time employee of a county board of education shall be entitled annually to at least one and one-half days personal leave for each employment month or major fraction thereof in the employee's employment term. W.Va. Code, 18A-4-10.

3. During convalescence while absent from work due to a work related injury, grievant remained under contract with the board and earned holiday allowance pay and personal leave days as per W.Va. Code, 18A-4-10.

4. School personnel regulations and laws are to be strictly construed in favor of the employee. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979); Hedrick v. Pendleton County Board of Education, 332 S.E.2d 109 (W.Va. 1985); Warren v. Logan County Board of Education, Docket no. 23-86-375-1; Swain v. Berkeley County Board of Education, Docket No. 02-86-167-2.

Accordingly, the grievance is **DENIED** as to the incremental pay issue and **GRANTED** as to the personal leave days issue and the board is Ordered to accord grievant the full fifteen days personal leave days to which she is entitled for the 1987-88 school term.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Brooke County and such appeal must be filed within thirty (30) 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.

DATED: January 29, 1988

Nedra Koval

NEDRA KOVAL  
Hearing Examiner