



**REPLY TO:**  
401 Davis Avenue  
Suite 315  
Elkins, WV 26241  
Telephone: 636-1123

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

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

**GASTON CAPERTON**  
Governor

**Offices**  
240 Capitol Street  
Suite 515  
Charleston, WV 25301  
Telephone 348-3361

DAVID BURDETTE

v.

DOCKET NO. BOR-88-196

WEST VIRGINIA UNIVERSITY

DECISION

Grievant, David Burdette, is employed by West Virginia University (University) as a general maintenance worker assigned to the Physical Plant. Mr. Burdette filed a level one grievance on September 12, 1988 in which he alleged violations of W.Va. Code §§18-29-2(a),(m) and (o), and 18-29-3(f) and (o), equal protection provisions and that the University had acted in an arbitrary and capricious manner when it did not compensate him for time spent at a grievance hearing.<sup>1</sup> The matter was denied at levels one and two and was appealed to level four on October 17, 1988. An evidentiary hearing was conducted on March 6, 1989; proposed findings of fact and conclusions of law were submitted by March 22.

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<sup>1</sup>A second grievant, Ron Whipkey, withdrew from the grievance at level four.

The facts of this matter are undisputed. On August 9, 1988 the grievant, acting as a WVU,ACE-AFSCME representative for another employee, attended a level four hearing in Wheeling. The hearing was two hours in duration and four hours were spent traveling requiring a total investment of six hours time. The grievant returned to Morgantown at 2:00 p.m. and reported to work at 3:00 o'clock, as scheduled. After working one and one-half hours he notified his supervisor that he would be taking the remainder of his shift off and submitted a non-chargeable leave form for the six hours spent at the grievance hearing. Physical Plant Director Dorsey Jacobs disallowed the request for non-chargeable leave and the grievant later resubmitted the time as annual leave.

The grievant argues that any employee who files a grievance is entitled to the assistance of one or more fellow employees in the presentation of his case and therefore the representative must also be protected from loss of pay for work time lost; otherwise the grievant would be so impeded in proving the allegations of his complaint that the grievance procedure would be rendered meaningless.

The grievant asserts that the University's failure to allow his use of non-chargeable leave time during his shift scheduled on the day of the hearing posed a substantial detriment to or interference with his effective job performance, health and safety as his job duties require him to work with and around potentially dangerous equipment placing

him at risk to an accident. As grievances are usually processed during normal business hours (9 a.m. to 5 p.m.) failure to grant "flex time" to an employee scheduled to work another shift requires that they resolve their problems on their own time or that grievance matters be scheduled only during weeks they are scheduled to work day shift, both of which impede resolution.

The grievant presented testimony of an employee at Marshall University that he had been offered "comp" time to attend a grievance hearing which had been scheduled while he was on vacation. The grievant argues that the two schools have inconsistent and irrational personnel practices which result in favoritism being shown employees of some institutions. The grievant bases the charge of discrimination on the fact that all other employees in attendance at the August hearing were paid for that time and argues that his denial of the time to be an arbitrary and capricious decision as employees are compensated for other work related activities, such as educational seminars, held during their time off.

The University argues that W.Va. Code §18-29-3(o) requires only that employees who are scheduled to appear at a grievance hearing during their normal work day are not to suffer a reduction of pay for work time lost and does not grant pay or benefits as a result of participation. It asserts that as the grievant attended the hearing on his own

time, granting him the requested "comp" time would indirectly be subsidizing an employee organization and could possibly result in the loss of control over the normal operation of the institution.

Grievant's interpretation of W.Va. Code §18-29-3(o) to mean that his work schedule should be flexed so that he might attend grievance hearings during his work hours is overly broad and cannot be accepted. That section states that "[g]rievances may be processed at any reasonable time, but attempts shall be made to process the grievance in a manner which does not interfere with the normal operation of the institution or with the employee's normal working hours." This language clearly establishes that the grievant's request to have his work schedule adjusted to accommodate the grievance procedure should be avoided rather than granted. "Grievances processed on work time shall not result in any reduction in salary, wages, rate of pay or other benefits of the employee and shall be counted as time worked". Again the wording is clear and does not require that an employee's schedule be modified to accommodate a grievance hearing but assures that an employee will be paid for time spent at a grievance hearing held during his working hours. This protection would also apply to a representative who attended a hearing during his scheduled work time.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

#### Findings of Fact

1. Grievant is employed by West Virginia University as a general maintenance worker assigned to the Physical Plant.

2. On August 9, 1988 grievant spent six hours representing a member of WVU-ACE, AFSCME at a level four grievance hearing.

3. The grievant was scheduled to work the 3:00 to 11:00 shift and reported to work promptly. After one and one-half hours he left work and reported the remaining six hours of his shift to non-chargeable leave as compensation for the six hours spent in the grievance hearing.

4. The time was denied as non-chargeable leave and the grievant resubmitted it as annual leave.

5. No other employee who attended the hearing was forced to do so on their own time or without pay; however, the hearing was scheduled during their regular scheduled work hours.

6. Another institution governed by the Board of Regents has offered comp time to a grievant who attended his hearing scheduled while he was on vacation.

#### Conclusions of Law

1. Grievances may be processed at any reasonable time, but attempts shall be made to do so with the least possible interference with the normal operations of the institution

or the employee's normal working hours. If grievance hearings are held during the employee's work time it shall not result in any reduction of his salary, wages, rate of pay or other benefits and shall be counted as time worked. W.Va. Code §18-29-3(o).

2. W.Va. Code §18-29-3(o) does not require that an employee's, grievant or representative, work schedule be amended to include that time spent in a grievance hearing.

3. The grievant has failed to prove discrimination as defined by W.Va. Code §18-29-2(m).

Accordingly, the grievance is **DENIED**.

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

DATED: May 10, 1989

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER