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

GASTON CAPERTON
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ESSA R. HOWARD

v.

Docket No. 89-CID-187

**WEST VIRGINIA GOVERNOR'S OFFICE OF
COMMUNITY AND INDUSTRIAL DEVELOPMENT**

DECISION

Essa R. Howard has been an employee of Respondent West Virginia Governor's Office of Community and Industrial Development (GOCID) since 1980.¹ On March 20, 1989, he initiated the following grievance at Level I:

156 hours of accumulated annual [vacation] leave has been deducted from my accrual balance. I requested and received information verbally from the Administrative Assistant that administered the Time and Attendance Sheets that 5 years, 10 months teaching time with the Kanawha County Board of Education could be counted toward annual leave accrual. Monthly accrual claims then were based on that information. I am seeking reinstatement of the 156 hours to my total annual leave accrual.

¹ At the time of his initial employment, GOCID was known as the West Virginia Governor's Office of Economic and Community Development (GOECD). References to GOCID or GOECD in this Decision are to the same agency, Respondent herein.

After denials at Levels I, II and III², Grievant advanced his claim to Level IV on April 26, 1989, where it was heard May 16. The parties having declined to make post-hearing submissions, the matter is mature for resolution.

On July 16, 1980, Grievant joined GOCID's full-time staff. Resp. Ex. 4. Effective July 1, 1981, a publication titled "Governor's Office of Economic and Community Development Employee Handbook," Resp. Ex. 1, was applicable. Section 6-1 of the Handbook, titled "Annual Leave," provided as follows in pertinent part:

Full-time employees accrue the following annual leave:

PERIOD OF SERVICE	ANNUAL LEAVE EARNED
Less than 5 years	*10 hours per month or 15 days per year
5 years to less than 10 years	*12 hours per month or 18 days per year
10 years to less than 15 years	*14 hours per month or 21 days per year
15 years or more	*16 hours per month or 24 days per year

. . .

GOECD may accept the annual leave of employees transferring from other state agencies upon proper documentation. However, no leave will be accepted from individuals transferring from a city, county, or any local government entity.

² Neither the Level I nor the Level II evaluator had authority to grant the relief Mr. Howard seeks, although both apparently were somewhat sympathetic to his complaint. Although decisions rendered at Levels I, II and III are all part of the Level IV record, no lower level transcript appears, save a portion of that of the Level III hearing. See n. 4.

Patrick Quinlan, who has been Chief of GOCID's Personnel Office (Personnel) since April 1980, testified at Level IV that these methods have been used in the calculation of annual leave at all times from then to the present. He added that, although most GOCID employees were not covered by the West Virginia Civil Service System (CSS) until May 1983, the accrual rules were based on CSS regulations.³

Respondent's Exhibit 2, a memorandum of July 16, 1981, to all GOECD employees, is reproduced in major part below:

It is a pleasure to provide you with the new Employee Handbook for all GOECD employees which became effective July 1, 1981.

Please read this handbook carefully to familiarize yourself with the rules and regulations governing GOECD. I cannot emphasize enough the importance of reading this handbook for your own personal protection and benefit. Employees who fail to do this often cause themselves unnecessary problems and may jeopardize their benefits.

If you have any questions regarding this handbook, please contact your immediate supervisor.

I hereby acknowledge receipt of the GOECD Employee Handbook.

/s/Essa Howard
Employee's Name

July 16, 1981
Date

At the Level IV hearing, Mr. Howard admitted he had not read the Handbook "at that time." However, sometime on or around June 1, 1983, he did query Ms. Drema West, who was in charge of time and attendance records for the GOCID division

³ For the pertinent CSS rules, see this Decision, infra.

to which he was assigned, concerning whether his past service with the military and the Kanawha County, West Virginia Board of Education affected the rate at which annual leave would accrue. According to Grievant, Ms. West checked with Personnel and reported back to him that, while the answer was no for the military, it was yes for the Board of Education.⁴ At any rate, as of June 1983, Grievant commenced claiming a day and a half per month, believing his five years-plus as a teacher placed him in that category.⁵ These claims were made monthly on time and attendance records, e.g., Gr. Ex. 2, prepared by Grievant and/or Ms. West, which were purportedly reviewed and approved by Personnel.

In late 1988 and early 1989, GOCID transferred all its time and attendance records to computer database. Simultaneously, it performed an audit of those records, for which it required all personnel to complete a form-request, Resp.

⁴ Ms. West did not appear at Level IV; however, Grievant offered a transcript of her testimony at Level III into the record. Respondent objected to the admission of this evidence on the grounds that it was denied cross-examination opportunities and that Ms. West had not sworn or affirmed to be truthful at Level III.

Although the transcript was accepted, the undersigned shares Respondent's concerns and have taken them into account in assigning weight to Ms. West's testimony. However, even if that evidence were given great weight and credibility, it would not affect the outcome herein.

⁵ Grievant has made no claim herein that he should be retroactively awarded one-quarter day per month leave time for the period July 16, 1980-June 1, 1983.

Ex. 4, seeking information on "all employment with the State of West Virginia, showing name of state agency, date employment began, and date employment ended." Staff members were further instructed to "not include [on this form] municipal, regional, county or military service." Grievant's response listed only his GOCID employment and its starting date of July 16, 1980.

In February 1989, Grievant was advised by Quinlan that his teaching experience had inappropriately been considered in his leave accrual calculations and therefore his vacation balance would be decreased by 156 hours.⁶ Shortly thereafter, the 156-hour deduction was effected.⁷ At this point, Grievant's service with Kanawha County had been counted in the accumulation of his annual leave since June 1983; during that entire period, he had never been counseled that the practice was improper. Quinlan admitted that one of Personnel's duties was to verify the accuracy of time and attendance records, but understaffing forced reliance on individual employees to correctly report leave time accrued. He added that not until his division was computerized was it feasible to perform the audit.

⁶ At the Level IV hearing, the parties stipulated that 156 hours is the correct amount of annual leave time Grievant has been credited with since June 1, 1983, due to his employment with the Kanawha County Board of Education.

⁷ Grievant still had annual leave time to his credit after this deduction.

At Level IV, Grievant conceded that his time with the Kanawha County Schools should never have been considered in his accrual of annual leave. However, he argued that GOCID also erred in its advice to him through Ms. West⁸ and in its failure, for almost six years, to perform its duty of verifying the accuracy of time and attendance records as presented. He contended that equity demands that GOCID at least share the blame so that he is not forced to bear the entire penalty of their mutual error.⁹ GOCID countered that it is bound by CSS Regulations, see infra, and cited W.Va. Code §29-6-22, which provides, in the context of this case, that GOCID and/or its employees would be guilty of a misdemeanor if it/they willfully violated any of those Regulations, i.e., if it/they credited Grievant's account with more annual leave than he is due.

⁸ Quinlan opined at Level IV that sixty percent of personnel instructions is issued verbally and forty percent in writing. Accordingly, it is quite likely that Ms. West, a rather logical person for Grievant to pose a question concerning annual leave to, received an oral answer from someone in Personnel. The Level III evaluator's finding that "Mr. Howard was lax in accepting the word of someone else on such an important matter. . .[and] equally lax in not asking that it be in writing from the personnel office," p. 5, is thus inappropos; however, it is likewise of no moment due to the outcome herein.

⁹ Although Grievant made vague references to unfruitful settlement negotiations in this case, at Level IV he made it quite clear that he was seeking a return of the 156 hours' credit in its entirety.

Section 16.03, CSS Regulations, is styled "Annual Leave" and provides, in subsection (b), as follows:¹⁰

Service to Qualify

1. Qualifying service. . . is based on State employment in an agency covered by Civil Service.
2. Credit may also be given for other State employment not in a covered Civil Service agency if requested in writing by the appointing authority of the covered agency and the executive or administrative head who is the lawfully delegated authority in the non-Civil Service agency and approved by the Director of Personnel.

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant Essa R. Howard has been an employee of Respondent West Virginia Governor's Office of Community and Industrial Development (GOCID) since July 1980. Prior to this, he taught five years in the Kanawha County, West Virginia, school system.

2. In July 1981, Grievant received a newly-promulgated GOCID employee handbook, and, in writing, acknowledged this receipt and GOCID's Director's encouragement that he carefully review it. He did not read the handbook, which stated

¹⁰ According to unrefuted representations at Level IV, the language of Section 16.03 reproduced herein has been in effect at all times pertinent to this grievance.

"no leave will be accepted from individuals transferring from a . . . county. . . entity," at that time.

3. Relevant provisions of the handbook were based on regulations of the West Virginia Civil Service System (CSS) identifying only State employment as "qualifying service" for the accrual of annual leave.

4. Grievant, along with most GOCID employees, has been covered by CSS and its regulations since May 1983.

5. In or around June 1983, Grievant asked Ms. Drema West, a clerk charged with time and attendance recordkeeping for his GOCID division, if he could count his employment with Kanawha County Schools toward accrual of annual, or vacation, leave. Ms. West shortly thereafter reported to him that someone in GOCID's personnel office had advised the answer was yes. He began claiming credit for his teaching immediately on the designated forms, since it increased the number of hours of annual leave he earned per month.

6. In February 1989, immediately after GOCID personnel records were computerized and audited, Personnel Chief Patrick Quinlan advised Grievant that his teaching time never should have been considered in his annual leave calculations and, accordingly, that his leave balance would be lowered by 156 hours. This was the amount of time Grievant had accrued which he would not have had had his Kanawha County experience not been counted.

7. Shortly thereafter, Grievant's annual leave in reserve was decreased by 156 hours.

8. Due to understaffing, GOCID's Personnel Office had failed to adequately perform its duty of verifying the accuracy of annual leave balance reported by its employees on monthly time and attendance records from June 1983 until February 1989.

CONCLUSIONS OF LAW

1. Grievant's time-in-service with the Kanawha County Schools is not and has never been appropriate for consideration in calculating his annual leave balance with GOCID. Handbook, Section 6-1; CSS Regulation 16.03(b).

2. GOCID's action in reducing his leave account by 156 hours was appropriate and not arbitrary or capricious. Id.; see also W.Va. Code §29-6-22.

3. Grievant has failed to establish that he is entitled to the relief he seeks under any principle of equity or law.¹¹

Accordingly, this grievance is **DENIED**.

¹¹ This is not to say that Grievant's chagrin over certain aspects of this situation is not understandable.

Either party or the West Virginia Civil Service Commission 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 §29-6A-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 dark ink, appearing to read 'M. Drew Crislip', is written over a horizontal line.

M. DREW CRISLIP
HEARING EXAMINER

Dated: June 1, 1989