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

GASTON CAPERTON
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C. RONALD ROARK

v.

Docket No. 89-INS-85

WEST VIRGINIA INSURANCE COMMISSIONER

DECISION

Grievant, who has been a Supervising Insurance Company Examiner for Respondent West Virginia Insurance Commission for over seven years, filed a grievance at Level I on November 23, 1989, alleging he was improperly denied per diem compensation for living expenses. His grievance was denied at Levels I and II and at Level III after hearing of February 1, 1989. His appeal to Level IV was received March 3, 1989, and a hearing was held May 9, 1989.¹ Proposed findings of fact and conclusions of law, with supporting memoranda of law, were received on and before June 8, 1989.

Grievant complains of being disallowed compensation for living expenses of \$75 per day for eleven days, totalling

¹A hearing scheduled for April 6, 1989, was continued at Respondent's request.

At the May hearing the parties agreed that this decision should be based on the evidentiary records compiled at Levels III and IV.

\$825, while examining the Farmers Home Fire Insurance Company in Lewisburg during September and October 1988 and Farmers Mutual Fire Association in Fairmont in November. Two of the days for which Grievant was denied living expenses were October 10, Columbus Day, and November 11, Veterans Day, official holidays of the State of West Virginia. Eight of the days were weekend days, September 24, September 25, October 1, October 2, October 8, October 9, November 12 and November 13. Grievant was also denied expenses on November 14, when he was absent on compensatory leave that he had accumulated by working on the holiday of Election Day, November 8.² In short, Grievant was denied living expenses for two true weekends and two long weekends, the October weekend extended by the Monday holiday of Columbus Day, and the November weekend extended by the Friday holiday of Veterans Day and the Monday Grievant was on compensatory time.

Respondent contends that the denial of compensation for living expenses was in accordance with the following "Examiners' Compensation Qualification and Classification" rule:

4.4. Authorized days per week.--Authorized living expenses shall be charged to the company being examined on a basis of seven (7) days per week for the duration of the on-site examination unless the Examiner travels home or away from the vicinity of

²At the Level IV hearing Grievant at one point stated he was denied living expenses for November 8th. However, it is clear from the record that he was allowed expenses on that date (see Comm. Ex. 17) and Grievant's submissions do not contend otherwise.

the company being examined, or takes annual leave. Living expenses shall not be authorized if the examination takes place in a town within fifty (50)³ miles (one way) of an examiner's residence....

The parties agree that, if an examiner is entitled to living expenses for a day, he is entitled to \$75. Furthermore, since Grievant lives in West Chester, Ohio, indisputably he was stationed more than 50 miles from his residence when he worked in Lewisburg and Fairmont.

Grievant admitted at Level III that in each instance he was denied living expenses he was at home or otherwise not in the vicinity of the examination.⁴ He argues, however,

³Respondent also relies on the following rules:

4.5. Holidays.

(a) On any state or national holiday or any day that the company has optionally closed for business and the Examiner is available for work, examiner fees and living expenses shall be charged for that particular day.

(b) On any day declared a holiday by the State of West Virginia but not recognized by the company, living expenses shall be charged, except that if the Examiner chooses to work, examiner fees shall also be charged and extra leave time or compensation time shall be earned.

4.8 Annual leave.--On any day authorized for use by the Examiner for annual leave:

(A) The company shall not be charged and the Examiner shall not be reimbursed for travel or living expenses;....

114 CSR 15-4.5 and 4.8.

⁴Grievant's proposals object to the fact that John Collins, Director/Chief Examiner for Respondent, disallowed living expense compensation for November 11 through 14 on an assumption that Grievant traveled home that weekend. Mr. (Footnote Continued)

that throughout his employment with Respondent Rule 4.4 has been interpreted to allow payment of living expenses even when an examiner leaves the vicinity if he is available at all times the company is open and continues to have expenses at his base of operations with the company.⁵ Grievant did not provide any evidence that he actually continued to have expenses in Lewisburg and Fairmont while absent.⁶ Further, other than his own assertion as to past practice, he submitted no evidence that Respondent in the past has allowed expenses at such times.⁷ Nevertheless, Grievant contends

(Footnote Continued)

Collins wrote grievant on November 21, 1988, "If my assumption that you traveled home on the weekend of November 11, 1988, is incorrect, and you are able to provide documentation, please advise." Grievant never responded. In any case, it was Grievant's burden in this grievance proceeding to establish by a preponderance of the evidence his allegation that Respondent's denial of the expenses was improper and his testimony in no way indicated that Mr. Collins' assumption had been incorrect.

⁵Grievant also contended at hearing that similar regulations in Kentucky and Ohio have been applied to allow living expenses on weekends and holidays to an examiner when out of the vicinity of the examination, though no support for his statement was proffered and Grievant did not supply the text of any such regulations. In any case, the propriety of how those states apply their regulations is not at issue here.

⁶Grievant merely made a vague statement that an examiner has such ongoing expenses as mileage on his car. Respondent does not pay travel expenses incurred during an ongoing examination, only paying for travel between examination sites and for travel to and from the examiner's home base at the beginning and end of an examination.

⁷Grievant attempted to get corroboration from the testimony of James Surratt, Chief Examiner for Respondent
(Footnote Continued)

that past practice and interpretation of Rule 4.4 entitles him to the compensation for living expenses.⁸

Respondent is correct that Regulation 4.4 unambiguously disallows living expenses for each day the examiner "travels home or away from the vicinity of the company being examined," providing none of the exceptions offered by Grievant.⁹ While Grievant relies on Hechler v. McCuskey,

(Footnote Continued)

from approximately 1978 to 1985. Mr. Surratt's testimony was extremely vague. He first stated that, "literally translated," the rule was not followed when he worked for Respondent. Later he conceded that the problem is that often it cannot be known when an examiner who is stationed away from the office has gone home for the weekend or a holiday. Finally, he stated that he did not really remember what was the policy, and that he did not know if the question had come up.

⁸Grievant also argues,

Although only Rule 4.4 was ever asserted prior to the grievance, at the hearing Mr. Collins attempted to "bootstrap" his argument by now alleging that Rules 4.5 and 4.8 were applicable. To allow the Commissioner to attempt to build a case as he goes along is clearly unfair and prejudicial to the procedural due process of Mr. Roark and should not be condoned [condoned] by the Hearing Examiner, and the Commissioner's explanation for those disallowances should be disallowed.

Grievant's Memorandum 2. Insofar as Grievant is arguing that Respondent should be limited to the evidence or arguments made at Levels I through III, the argument is meritless. At a de novo hearing a Respondent is free to make any argument in opposition to the grievance and to submit any evidence relevant to the issues involved. In any case, the proper interpretation of Rule 4.4 remains the crux of this case.

⁹Grievant's Conclusion of Law 1 argues "That the Insurance Commissioner has inconsistently interpreted the rules and regulations, specifically Rule 4.4, so as to make the rule ambiguous." The argument is frivolous, as is
(Footnote Continued)

365 S.E.2d 793 (W.Va. 1987), in support of his contention that "custom must be used to arrive at a legitimate and fair resolution of this matter," Grievant's Memo 2, that decision states, "In the case of an ambiguous statute, custom and usage may be resorted to as an aid to construe the statute." [emphasis added] 365 S.E.2d at 796. Since the regulation is unambiguous, the rule of construction Grievant cites does not support his argument. Rather, the rule that must be followed in this matter is that a provision which is clear and unambiguous is not subject to interpretation and must be given full force and effect. Lavender v. McDowell Co. Bd. of Educ., 327 S.E.2d 691, 693 (W.Va. 1984); Davis v. Summers Co. Bd. of Educ., Docket No. 45-87-119 (Oct. 13, 1987). See also Liller v. W. Va. Human Rights Com'n., 376 S.E.2d 639, 644 (W.Va. 1988). Accordingly, the mandate of the regulation that an examiner is entitled to living expenses only when in the vicinity of the examination must be enforced.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate:

(Footnote Continued)

Grievant's Conclusion of Law 4 "That the Insurance Commissioner cannot change an interpretation of the rule without providing prior notice to the employees who[m] the new interpretation will affect."

Findings of Fact

1. Grievant, a Supervising Insurance Company Examiner for Respondent, conducted an examination of the Farmers Home Fire Insurance Company in Lewisburg, West Virginia, in September and October 1988 and an examination of the Farmers Mutual Fire Association in Fairmont, West Virginia, in November 1988.

2. Grievant was denied compensation for living expenses for September 24 and 25; October 1, 2, 8, 9 and 10; and November 11, 12, 13 and 14. In each instance Grievant was not in the vicinity of his ongoing examination.

Conclusions of Law

1. It is incumbent on a grievant to prove all the allegations constituting the grievance by a preponderance of the evidence. Payne v. West Virginia Department of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Rule 4.4 of Respondent's "Examiners' Compensation Qualification and Classification" regulations unambiguously provides that an Examiner is entitled to authorized living expenses "on a basis of seven (7) days per week for the duration of the on-site examination unless the Examiner travels home or away from the vicinity of the company being examined, or takes annual leave."


3. A provision which is clear and unambiguous is not subject to interpretation and must be given full force and

effect. Lavender v. McDowell Co Bd. of Educ., 327 S.E.2d 691, 693 (W.Va. 1984); Davis v. Summers Co. Bd. of Educ., Docket No. 45-87-119 (Oct. 13, 1987). See also Liller v. W.Va. Human Rights Com'n., 376 S.E.2d 639, 644 (W.Va. 1988).

4. Grievant was properly denied compensation for living expenses for the eleven days cited in Finding of Fact 2.

Accordingly, the grievance is **DENIED**.

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 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 your intent to appeal so that the record can be prepared and transmitted to the appropriate Court.


SUNYA ANDERSON
HEARING EXAMINER

Dated: June 27, 1989