



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

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Governor

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

**SCOTT SHOEMAKER, WILLIAM MCKENERY
and DOUGLAS MCKENERY**

v. DOCKET NO. 89-RMA-132,133, and 134
RAILROAD MAINTENANCE AUTHORITY

DECISION

Grievants, Scott Shoemaker, William McKenery and Douglas McKenery, are employed by the Railroad Maintenance Authority (Authority) in Moorefield, West Virginia. Level four grievance appeals were filed separately by the grievants on March 31, 1989 and they were consolidated for hearing held on May 12. The grievants allege discrimination because they were docked four hours pay on December 22, 1988 when they left work while those employees who attended an agency-sponsored dinner were paid for the entire afternoon even though they left work early. The grievances were denied at levels one through three on the basis that they were untimely filed.

At the level four hearing a great deal of contradictory testimony was offered regarding the facts in this matter. Douglas McKenery stated that he had been told that then

Governor Arch Moore had declared a holiday.¹ He in turn advised William McKenery and Scott Shoemaker of the holiday and all three left work at approximately 12:30 p.m. When they returned to work on December 27 Thomas Kuykendall, Track Supervisor, advised them that they would not be paid for the four hours of work they had missed on December 22. The four hours pay was deducted from the pay checks which they received on January 13, 1989.

Mr. Kuykendall testified that he had no reason to believe that the governor had declared the afternoon a holiday and would not have made such a statement to the employees. Jeannie Liller, Audit Clerk, stated that Authority employees were not given Friday afternoon off. Donald Baker, Executive Director of the Authority, explained that he arranges an annual dinner each year at Christmas for all employees. The dinner is partially paid for with profits from the soda machine and Mr. Baker assumes the remaining cost. He expressed strong feelings for this event, for which attendance was mandatory, as it is a rare occasion when all the Authority employees can get together

¹Christmas was on Sunday in 1988 and any gubernatorially-granted holiday would have been on Friday, December 23. The grievants work four ten hour days, Monday through Thursday, and Mr. McKenery seemed to interpret that they would have Thursday afternoon off. John Thomas, a supervisor, testified that when holidays are granted notice is posted and the work schedule changed. According to Mr. Thomas, a last minute granting of Friday afternoon off work would have been awarded to the Authority employees on the following Monday.

and share camaraderie. Mr. Baker stated that he and the fiscal officer clocked out the employees in attendance at 4:30 p.m. although most had departed by 3:00 or 3:15 p.m.

The grievants argue that no employee worked on the afternoon in question, yet those who stayed for the dinner were paid for four hours work and were allowed to leave an hour and a half early while those who did not stay for the dinner lost four hours pay. They assert this action is an attempt to force their attendance at a social event and because they chose to use their time otherwise they were treated differently resulting in discrimination. They request that they be paid for the four hours, that any reprimands placed in their personnel files be removed and that they be awarded costs (meals and mileage) incurred in their attendance at the level four hearing.

The Authority argues that the grievants were not docked for failure to attend the dinner but were paid for those hours which they worked on December 22. The Authority concedes that the dinner is social in nature but asserts that it is a work-related activity as its purpose is to boost employee morale, initiative and incentive and is a form of showing appreciation. The authority further argues that while the dinner was not part of the grievants' usual duties, its scheduling did not affect their obligation to be present during regularly scheduled work hours. Indeed had the dinner not been held work would have proceeded as usual.

The Authority requests that the matter be dismissed since the grievants were made aware on December 27 that they would not be paid for the four hours and a level one grievance was not filed until January 19, 1989.

W.Va. Code §29-6A-4(a) provides that a grievance shall be filed within ten days following the occurrence upon which the grievance is based or within ten days of the date on which the events became known to the grievant. Although the grievants were informed on December 27 that they would not be paid for the afternoon of December 22, the actual loss of money occurred when they received their paychecks on January 13. The grievances were timely filed six calendar days later.

The foundation of the grievants' argument appears to be that they left work at 12:30 due to a misunderstanding that the governor had declared a holiday, but even if he did not it should have been permissible to leave anyway since no one was actually working. Neither response relieves the grievants of their obligation to remain at work during their regularly scheduled hours. They should have confirmed with certainty any holiday. Disagreement with the propriety of the afternoon activities does not grant employees the right to simply leave work altogether. For either reason, the grievants improperly left work early on December 22.

However, Mr. Baker's testimony was that on his own accord he granted the employees an hour and a half paid

leave, from 3:00 to 4:30 p.m. If this time was granted to those employees at the dinner and if, as Mr. Baker also testified, the grievants were not docked pay or otherwise punished for having left work, but were not granted the same hour and a half leave, the result is discrimination as defined by W.Va. Code §29-6A-2(d).²

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. The grievants are employed by the Railroad Maintenance Authority at Moorefield, West Virginia where they work ten hours daily, Monday through Thursday.

2. On Thursday, December 22, 1988 the grievants clocked out and left the worksite at approximately 12:30 p.m. This action was based upon Douglas McKenery's misunderstanding that the governor had declared a holiday for state employees and that it was to be taken by the grievants on Thursday afternoon. Grievants William McKenery and Scott Shoemaker left work based upon the statements of Douglas McKenery that the afternoon was a holiday.

²Mr. Baker testified that the grievants were not reprimanded but only advised to be more careful in the future.

3. Although Thursday afternoon was not a holiday routine work was stopped and the employees were treated to a dinner/Christmas party from 1:00 to approximately 3:00 p.m.

4. Those employees who had attended the dinner were officially clocked out at 4:30 by Director Baker.

Conclusions of Law

1. Discrimination is defined as any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees. W.Va. Code §29-6A-2(d).

2. Failure to grant the grievants one and one-half hours pay awarded to other employees who were allowed to leave work for that period of time would amount to discrimination as defined by statute.

3. The grievants are not entitled to be paid for that time during which they had improperly left work.

4. Absent a showing by the Grievants that the Authority acted in bad faith, an award of costs is denied.

Accordingly the grievance is **GRANTED** to the extent that the Authority is Ordered to compensate the grievants for the hour and a half the remaining employees were allowed to leave work with pay but is **DENIED** as to the time during

which the grievants were absent without authorization and as to costs.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Hardy 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.

DATED

July 26, 1989

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER