



REPLY TO:
407 Neville Street, Suite 120
Beckley, WV 25801
Telephone: 256-6855
ON NET: 557-6855

Members
James Paul Geary
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

ERNEST (GENE) DAVIS

v.

Docket No. 89-45-60

SUMMERS COUNTY BOARD OF EDUCATION

DECISION

Grievant, Gene Davis, is employed by the Summers County Board of Education (Board) as the Director of the Summers County Career Center. He filed a grievance at Level I December 15, 1988 alleging:

I was docked a days [sic] pay for a hearing in Charleston. Others have attended hearings in Charleston and Beckley without subpoenas and were not docked. Can be resolved by paying me for the day. Have tried to resolve this without a long drawn out affair but to no avail.

Grievant's immediate supervisor, Superintendent of Schools Demetrius Tassos, denied the grievance at that level by decision dated December 27, 1988. The grievance was also denied at Level II following a hearing held January 11, 1989 and the Board, at Level III, voted February 9, 1989 to uphold the Level II evaluator's decision. Grievant appealed to Level IV February 17, 1989

where a hearing was held April 21, 1989.¹ The parties declined to submit proposed findings of fact and conclusions of law.²

The sequence of events which gave rise to the grievance are undisputed and the issue raised is the same as that in Davis v. Summers County Board of Education, Docket No. 45-88-037-4 (April 21, 1988) (Davis I). On October 21, 1988 grievant requested and was granted approval to attend a three-day Vocational Directors' Conference at Pipestem State Park, which was to begin October 24 and end October 26. He attended the conference on October 24 but on the morning of the 25th he accompanied his wife to a 10:00 a.m. hearing in Kanawha County Circuit Court in Charleston. The hearing had been called to afford counsel for grievant's wife and counsel for the Board the opportunity to make legal arguments concerning the Board's appeal of the decision in Davis v. Summers County Board of Education, Docket No. 45-88-133 (August 26, 1988).³ Also present during the proceedings were Mr. Tassos and Mr. Billy Joe Kessler, the Board's Business Manager/Treasurer. The proceedings concluded at approximately 11:30 a.m. and, after

¹A hearing scheduled for March 17, 1989 was continued on the joint motion of the parties.

²Grievant's representative did submit, on May 5, 1989, a "Statement of Facts" which are merely a partial recount of the events leading to the filing of the grievance. No legal argument was made therein.

³In this decision the placement of grievant's wife's on a proposed transfer list was found to be improper and the Board was ordered to remove her name therefrom. The decision was ultimately affirmed. Summers County Board of Education v. Davis, ___ W.Va. ___, Cir. Ct., April 26, 1989.

having lunched in Charleston, grievant returned to Pipestem, arriving at approximately 4:00 p.m., where he attended the remaining conference sessions. Mr. Kessler subsequently conferred with Mr. Tassos and docked grievant's pay for one day.

Grievant contends the deduction of the day's wages from his salary while no similar deductions were made from Mr. Kessler's constituted favoritism as defined in W.Va. Code §18-29-3(o). He also maintains his appearance was warranted since he was acting, as he had at lower levels, as his wife's representative at the hearing, presumably relying on W.Va. Code §18-29-3(f), which provides:

An employee may have the assistance of one or more fellow employees, an employee organization representative, legal counsel or any other person in the preparation of the grievance. At the request of the grievant, such person or persons may be present at any step of the procedure.

The Board contends the deduction of the day's wages was in no way discriminatory since Mr. Kessler appeared at the hearing pursuant to direct order by Mr. Tassos to do so. The Board refutes grievant's assertion that proceedings related to a circuit court appeal of an administrative decision are a continuation of the grievance procedure contained in W.Va. Code §18-29-1, et seq. The Board also maintains Mr. Kessler's appearance was warranted as he is responsible for the maintenance of files and other duties associated with employee grievances.⁴

⁴As the Board submitted no post-hearing proposals these assertions can only be derived from the Board's counsel's comments and closing remarks during the Level II hearing.

The grievant's assertion that he was acting as a representative for his wife in the circuit court proceedings is without basis as was noted in Davis I, supra. It is clear that his appearance at those proceedings was neither authorized by W.Va. Code §18-29-3(f), nor his immediate supervisor, Mr. Tassos. Had there been disciplinary action taken as a result of that appearance, the analysis herein might well be different and a comparison between grievant's and Mr. Kessler's roles at the hearing unwarranted. The deduction of pay was not, however, taken as a punitive measure. It was an action taken because the Board has a policy of not paying its employees for appearance in circuit court civil cases⁵ and those roles must be examined in light of the definition of favoritism contained in W.Va. Code §18-29-3(o).

According to the testimony of Mr. Tassos, Mr. Kessler's familiarity with the history of the particular grievance involved in the circuit court hearing, in addition to his knowledge of school law and the education employee grievance procedure, necessitated his appearance there. That Mr. Kessler possessed such knowledge and an understanding of the background of the case is not disputed. Similarly, it is not refuted that the grievant, while perhaps not having the same expertise in school law or the

⁵The policy was apparently an unwritten one at the time in question and can only be ascertained from the testimony of Mr. Kessler and Mr. Tassos. The Board does have a written policy in conformance with W.Va. Code §18A-5-3a, which permits payment for appearance in criminal court cases except when an employee is a defendant. See Davis I, Con. of Law #1.

grievance procedure,⁶ did have a thorough knowledge of the background of the case, derived from his service as representative for his wife during lower level hearings on her grievance. In this regard both attended the hearing with only an expectation that if called upon they could impart information which might be helpful to the Court. The salient fact is that neither was required to do so. Their roles were therefore the same and the Board's policy should have been applied uniformly to both.⁷

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

FINDINGS OF FACT

1. Grievant is employed by the Summers County Board of Education as Director of the Summers County Career Center, a position which he has held for approximately seventeen years.

⁶Grievant has served as either president or vice-president of the Summers County branch of the West Virginia Education Association for a number of years and most likely has an understanding of these matters which is at least comparable to that of Mr. Kessler.

⁷It is noted that the unpredictability of the course of legal proceedings might well cause Mr. Kessler's or other administrative personnel's attendance to be fruitless on occasions and a requirement that they use personnel leave on such occasions would be exhaustive of that leave. It was at least suggested in Davis I that, in accordance with an opinion of the State Superintendent of Schools, an administrative leave policy, which took into account the peculiar needs of administrators in those circumstances should be established. The circumstances giving rise to the grievance could have, in all likelihood, been avoided by the adoption of such a policy.

2. Pursuant to the Board's appeal of the decision in Davis v. Summers County Board of Education, Docket No. 45-88-133 (August 26, 1988), a hearing was scheduled before the Kanawha County Circuit Court on October 25, 1988. No persons were subpoenaed but grievant, his wife, Mr. Tassos and Mr. Kessler, at Mr. Tassos' direction, were present during the hearing.

3. No testimony was taken during the hearing and only legal argument was presented by counsel for the Board and counsel for grievant's wife.

4. At the conclusion of the hearing, grievant conferred briefly with his wife and counsel during lunch and then returned to Pipestem State Park where he attended several evening sessions of a Vocational Director's Conference.

5. Mr. Kessler subsequently deducted one day's wages from grievant's regular salary. No similar deductions were made from the salaries of Mr. Kessler, Mr. Tassos or grievant's wife, a teacher employed by the Board.

CONCLUSIONS OF LAW

1. Proceedings related to an appeal to circuit court of a final decision of the West Virginia Education and State Employees Grievance Board are not part of the grievance procedure contained in W.Va. Code §§18-29-1, et seq. Davis v. Summers County Board of Education, Docket No. 45-88-037-4 (April 21, 1988), and

grievant's appearance at the October 25, 1988 hearing was not in the capacity of his wife's representative.

2. Grievant's wife and Mr. Tassos, acting as representative of the Board, were parties to the proceedings which necessitated the hearing, and were therefore properly in attendance. Neither grievant's nor Mr. Kessler's appearance was necessary.


3. Favoritism is the unfair treatment of an employee as demonstrated by preferential treatment of another or other employees. W.Va. Code §18-29-3(o).

4. The deduction of a day's pay from grievant's wages and the lack of a similar deduction in Mr. Kessler's wages constituted favoritism on the part of the Summers County Board of Education.

Accordingly, the grievance is **GRANTED** and the Summers County Board of Education is hereby **ORDERED** to reimburse the grievant for the wages that were improperly deducted from his salary.

Either party may appeal this decision to the Circuit Court of Summers County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of said 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 inform this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.


JERRY A. WRIGHT
Chief Hearing Examiner

Dated: August 8, 1989