



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

PHYLLIS PARKER

v.

Docket No. 45-89-052

SUMMERS COUNTY BOARD OF EDUCATION

DECISION

Grievant, Phyllis Parker, is employed by the Summers County Board of Education (Board) as a secretary at the Summers County Career Center. She filed a grievance at Level I January 16, 1989 alleging:

On two occasions 60 personal leave days, which had previously been awarded me by the Summers County Board of Education, were taken from me without affording me due process. I am entitled to the 60 days based upon my number of years of employment (1965 to present) and to deny me the 60 days is a violation of 18A-4-10. I have been discriminated against in that the 60 days were awarded to my superior, who came to work in August 1967 and I was not awarded the 60 days. As a matter of fact my right to the 60 days has been denied by the Board as recent as January 12, 1989. My Supervisor is a male and I am a female which makes the discrimination more blatant. By my supervisor having been credited with the 60 days and my not being credited is favoritism.

The process that I have been put through over the past 5 board meetings of awarding me the 60 days twice and taking it away twice has been unnerving and harassing to me.

Grievant's supervisor, Mr. Gene Davis, found that he had no authority to grant the relief requested but did note that he had written a letter to the Board expressing an opinion that she was entitled to 60 days personal leave. A decision at Level II, following a hearing held January 20, 1989, was adverse to the grievant and the Board waived Level III proceedings.¹ A Level IV hearing was held March 23 and April 21, 1989. The parties submitted proposed findings of fact and conclusions of law by May 12, 1989. The Board also submitted an extensive brief in support of its position by that date and grievant submitted her reply thereto on May 16, 1989.

The sequence of events giving rise to the grievance is essentially undisputed. In 1965 grievant was assigned as Secretary to an Adult Basic Education (ABE) program which was headquartered at Lincoln High School in Summers County but served the additional counties of Mercer, Monroe and Greenbrier. She worked in that capacity until the beginning of the 1974-75 school term, when she received her present assignment at the Career Center. In September 1988 grievant engaged in a conversation with Mr. Davis, who informed her that he had been credited with sixty (60) days sick leave once he had been assigned to the Career Center.²

¹Grievant's Level IV appeal form indicated the Board did not hold a formal meeting to consider this waiver but members were polled concerning their desire to hold a hearing.

²Mr. Davis, who had been grievant's supervisor in the ABE program for approximately eight years, was assigned to
(Footnote Continued)

She then conducted a search of the Board's payroll records and established that she had not been similarly credited. After a discussion with Mr. James Kessler, the Board's Treasurer, in which he informed her that he had no authority to grant her the sick leave, she was advised by Mr. Demetrius Tassos, Superintendent of Schools, to take the matter to the Board. On October 13, 1988, grievant appeared before the Board with her concerns and was asked to return with documentation. She did so on October 27, 1988, and the Board voted on that date to grant her request for the sick leave. At a Board meeting held November 10, 1988, Mr. Kessler provided documentation which prompted members to reverse that decision. Three Board members were subsequently removed from office³ and on December 8, 1988 grievant once again asked for consideration of her request; by a vote of 3-2, the newly-constituted Board awarded her the leave. Shortly thereafter, grievant received a telephone call from Board President John Lilly, who informed her he had mistakenly believed he was voting on a request to allow her a sixty-day extension to provide

(Footnote Continued)

the Career Center at the beginning of the 1974-75 school term to supervise the installation of equipment in the final stages of its construction.

³This was the result of the decision of the West Virginia Supreme Court of Appeals in Summers County Citizens League, Inc. v. Tassos, 367 S.E.2d 209 (W.Va. 1988). Grievant's husband was one of the plaintiffs in that action and it was his participation therein that apparently led to her conclusion that the administration was engaging in harassment. There was no evidence presented to support that particular part of the grievance and it is not addressed further herein.

further documentation and he would change his vote at the next Board meeting. On January 12, 1989, the issue was raised and by a vote of 3-2, the Board rescinded its December 8 decision. This grievance was filed four days later.

Grievant advances three distinct legal arguments for reversal of the Board's decision. First, she contends she was entitled to the statutorily-mandated leave because she was an employee of the Board during her assignment to the ABE program. Secondly, she asserts that, even if she had no contract right to the leave, the Board, on October 27, 1988, bestowed a "vested property interest" upon her which it could not later revoke without affording her certain due process rights. Grievant's third argument is that the failure of the Board to grant her the same leave it awarded Mr. Davis constitutes discrimination and/or favoritism.⁴

The Board maintains it only acted as fiscal agent for the ABE program and grievant was not one of its employees until her appointment to the Career Center in 1974, at which time she was

⁴W.Va. Code §18-29-2 defines "discrimination" 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.

and "favoritism" as

unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

given the same amount of leave as other employees. The Board disputes grievant's claim that she had been granted any property interest and asserts it has the same authority to rescind previous decisions as other corporations, provided "vested" rights are not violated. The Board further contends consideration of grievant's claims is barred by her failure to file her grievance in accordance with timelines contained in W.Va. Code §18-29-4 and by the doctrine of laches. The Board makes no assertion regarding grievant's allegations concerning discrimination.⁵

While certain documents presented by the grievant tend to support her claim that she was an employee of the Board during her work with the ABE program, the record as a whole supports the Board's contention that she was not. Board minutes of August 19, 1965, (Grievant's Exhibit No.2) reveal the following:

PERSONNEL FOR ADULT BASIC EDUCATION

After brief discussion of the program of Adult Basic Education starting in Summers County last week, on motion of Mr. Keaton, seconded by Mr. Simmons and unanimously passed the following personnel on the recommendation of the Superintendent were approved: Mrs. Zelba Cantrell, Teacher; Mrs. Phyllis Parker, Secretary; Mr. Neil Smith, Janitor.

Mr. Karl Okes was recommended as director of the Adult Basic Education. A motion was made by Mr. Honaker, seconded by Mr. Graham, that Mr. Karl Okes be employed as director of the Adult Basic Education program. Mr. Simmons and Mr. Keaton

⁵During Level IV proceedings the nature of the questions posed to a number of witnesses, including Mr. Davis, by counsel for the Board, generally indicated the Board was taking the position that Mr. Davis had been improperly awarded the leave and therefore no discrimination had occurred.

voted "no". President Hartford declared the motion lost by a vote of 3 to 2.

Upon motion of Mr. Keaton, seconded by Mr. Simmons and unanimously passed, the Superintendent was directed to present the name of someone from Summers County as the supervisor of the Adult Basic Education program at the special meeting of the Board on August 30th.

The Board's July 27, 1967, meeting minutes (Board's Exhibit No.14) include the following:

AREA ADULT EDUCATION SUPERVISOR

On motion of Mr. Graham, seconded by Mr. Pack and unanimously passed, Mr. Ernest Eugene Davis was employed as area adult supervisor for Greenbrier, Monroe, Summers and Mercer Counties to replace Mr. Karl Okes who resigned.⁶

August 30, 1972, minutes (Board's Exhibit No.16) show that,

Upon motion by Mr. Morgan, seconded by Mr. Boyd, Mr. Gene Davis was appointed part-time director for vocational education programs for Summers County for 1972-73 to serve on release time from the State Vocational Department.

On February 13, 1973, Mr. Davis' appointment to the Career Center was made full-time and permanent effective July 1, 1973. Grievant's appointment there became effective July 1, 1974. Significantly, grievant's assignment was characterized in Board meeting minutes of June 11, 1974, as an original appointment and not as a transfer.

Grievant's payroll records for the period of time she worked for the ABE program reveal she was never credited with any type of leave although they do show that she was paid for days on

⁶It is assumed the Board retracted its earlier decision not to award Mr. Okes the position.

which she did not work due to illness or injury. Those records also show that the Summers County Board of Education was the payee on her paychecks.

In a letter dated October 14, 1976, to the Teachers' Retirement Board (Grievant's Exhibit No.9), Mr. Kessler noted that "[w]e have three employees in our county that worked on a full time basis for a number of years without paying into Teachers Retirement". Mr. Kessler provided salary and other information for the three employees which included grievant and requested that they be contacted as to how they could join the teachers' retirement fund. Grievant was allowed to join after her payment of three years' dividends.

Grievant testified that in 1965 the then-superintendent of schools, Ervin Maddy, called her and offered her the position as secretary for the ABE program and she accepted. She further stated the program was funded by the federal government and funds were channeled through the state to the counties. Grievant also testified that, to the best of her recollection, during the period in question she was only absent five days due to illness. She conceded she was not being paid from county funds during the period but still considered herself an employee of the Board.

Mr. Kessler testified his review of records indicated the Board was acting as fiscal agent for the ABE program at the request of the West Virginia Division of Vocational Education

(Division)⁷ which he considered to be grievant's employer until she was appointed to the Career Center position. Mr. Kessler further testified that his review of records revealed the Board would pay the salaries of persons connected with the ABE program and after those persons submitted affidavits to the Division, the Board would be reimbursed. He stated he could find no record of any provisions for sick leave in the program and concluded those persons were simply docked for any days missed due to illness. Mr. Kessler also expressed his opinion that extensive audits conducted by the Office of State Tax Commissioner during the years in question would have noted errors if the Board had been obligated to credit ABE employees with sick leave and had not done so.⁸ Regarding his October 14, 1976, letter to the Teacher's Retirement Board, Mr. Kessler stated he had not misinterpreted grievant's status at the time and felt she was entitled to join the retirement fund. He also stated that in retrospect he felt the Division should have made contributions to the fund

⁷This was apparently a division of the West Virginia Department of Education.

⁸Several such audits were admitted over objection by grievant's counsel. They contain entries and findings of accounting errors which indicate extensive review of Board records. One particular entry found that a substitute teacher had erroneously received payment for five days sick leave. Others reveal the auditor verified the existence of a Board sick leave policy but no mention is made of its applicability to ABE employees. It is most likely, as Mr. Kessler asserted, that a failure to provide sick leave to those employees, if required, would have been cited as error. Inasmuch as only three audits were submitted, it cannot be concluded that this was the case. The audits were, however, afforded some probative value.

equal to grievant's. Mr. Kessler noted that his examination of relevant records indicated both grievant and Mr. Davis were first credited with sick leave days by the Board upon the commencement of their duties at the Career Center, as was required by statute, but Mr. Davis had unexplicably been given sixty additional days shortly thereafter. He also represented that records revealed Mr. Davis had secured a continuing contract of employment after only his first year as director at the Career Center. Mr. Kessler expressed an opinion that neither benefit had been properly and/or legally bestowed upon Mr. Davis. Finally, he stated the Board's appointment of grievant and Mr. Davis to the ABE program was legally necessary if it was to serve as fiscal agent.

Copies of warrants for payment to the Board submitted to the Summers County Sheriff's Office by the Department of Education (Department) support the Board's assertions that it was merely acting as fiscal agent for the ABE program. Those documents clearly show that the employees assigned thereto ultimately had to make justification for their salaries and all other expenses incident to its operation to the Department.

Mr. Kessler's testimony that grievant and other persons assigned to ABE were not afforded other benefits, including insurance plans, by the Board was essentially unrefuted and is supportive of the Board's position. His testimony and copies of the Department's budgeting regulations also clearly show that monies for ABE were maintained in separate and distinct accounts which were inaccessible to the Board except for payment of ABE

salaries or expenses. Grievant's own testimony indicates she was aware of differences between the operation of ABE and programs administered solely by the Board. Furthermore, her testimony reveals she was aware of changes in school law pertaining to the accrual of sick leave during her assignment to ABE and, by virtue of receiving a paycheck which noted no such accrual, was aware the program was treated differently. It is unlikely that she considered herself an employee of the Board while assigned to a program which served not only Summers but Monroe, Greenbrier and Mercer Counties.

The only evidence presented which tends to support the argument that a contractual relationship with the Board existed is the Board's approval of grievant's and Mr. Davis' assignment to ABE. Mr. Kessler's assertion that the approval was required before the Board could act as agent for the program appeared to be based on some legal authority but none was cited. The contention was not rebutted and is supported by an Opinion of the State Superintendent of Schools dated October 9, 1987. In this Opinion he concluded that persons whose employment is approved by a county board of education solely for the purpose of acting as fiscal agent for a program do not attain seniority with that board of education for service in the program.⁹ Moreover, the Board minutes of August 30, 1972, show the approval was something less than hiring since Mr. Davis' services had to be "borrowed"

⁹The Opinion was considered relevant herein only to the extent that it addressed the issue of fiscal agency.

from the Department. Significantly, grievant presented no evidence that the Board could exercise any day-to-day control of the operation of ABE as the result of the approval or that it had ever exercised any such control. Absent any evidence to that effect, it can only be concluded that the Board's selection and approval of grievant's employments with ABE granted it no subsequent authority over the program.¹⁰ It must also be concluded that grievant was not an employee of the Board during the time in question and thus not entitled to the benefits of sick leave because of any contractual relationship. Inasmuch as the Board's laches argument is an assertion that the grievant failed to timely pursue any contractual rights she may have had to the leave, it need not be addressed further.

On the issue of the legal effect of the Board's decision to grant the leave, the parties' arguments are only generally relevant. Both focus on whether grievant relied on the decision and, if so, whether her reliance caused the leave to become a "vested" right. Neither seriously questions the Board's authority to grant the leave.

The right of school employees to personal leave is a statutory one and is found in W.Va. Code §18A-4-10 which, in pertinent part, provides:

¹⁰This is not to say that the Board did not receive some benefit by the appointment of local persons to the program. There is also some evidence that certain incidental advantages may have accrued to the Board by virtue of the location of the program's headquarters in Summers County.

At the beginning of the employment term, any full-time employee of a county board of education shall be entitled annually to at least one and one-half days personal leave for each employment month or major fraction thereof in the employee's employment term. Unused leave shall be accumulative without limitation and shall be transferable within the state. A change in job assignment during the school year shall in no way affect the employee's rights or benefits.

It is clear from these provisions that a person may only accrue personal leave with a county board of education through a contractual relationship with that board. It follows that a board has no authority to grant one of its employees personal leave for years in which it had no such relationship with that employee. The Board's actions on October 27, 1988, and December 8, 1988 were not authorized by law and therefore ultra vires. In Freeman v. Poling, 338 S.E.2d 415 (W.Va. 1985) the West Virginia Supreme Court of Appeals held such actions to be nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity. The Court also held an employee cannot acquire a property interest in his employment sufficient to invoke due process protection when state law withholds entitlement to that employment until certain conditions are met. Applied to the present case, where grievant claims a property interest in a benefit of employment, this holding would preclude a finding that she acquired such and was entitled to due process before either of the Board's decisions to rescind the award of leave.

The only remaining question is whether the award of leave to Mr. Davis constitutes favoritism and/or discrimination. Mr. Kessler testified that a thorough review of Board minutes

subsequent to the date Mr. Davis was credited with the leave revealed the Board had never taken official action on the matter. In the absence of evidence to the contrary, it must be assumed that no such action was taken and some administrative employee made the adjustment.¹¹ His conclusion that the award of leave was improper was, for the foregoing reasons, a correct one. If the Board was without authority to grant him accrued leave for his years with the ABE program, then its agents or officers were without the authority. The Court also noted in Freeman that a governmental entity is not bound by the legally unauthorized acts of its officers. Mr. Davis was obviously afforded a benefit by an officer of the Board without authority to do so. A holding that grievant be accorded the same treatment would, however, not only bind the Board to that unauthorized action but require it to take another such action. The definition of favoritism contained in W.Va. Code §18-29-2(m) does not contemplate such a result.

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

¹¹Mr. Davis testified he had a discussion with Mr. Wilton Cooper, the Superintendent at the time, and asked him "[S]houldn't I be entitled to additional sick leave?" to which Mr. Cooper responded, "I'll check with Dan Taylor, who's State Superintendent." Mr. Davis stated, "The sixty days showed up on my paystub at the beginning of the next year."

FINDINGS OF FACT

1. Grievant served as a secretary for a four-county adult basic education (ABE) program headquartered in Summers County from 1965 until 1975 when she was hired by the Board as secretary at the County Career Center, at which time she was credited with the statutorily-mandated eighteen days personal leave.

2. Although the Board approved grievant's and others' appointment to the ABE program, it acted only as fiscal agent for the program and did not exercise any authority over its operation or employees. Such authority was exercised by the West Virginia Department of Education.

3. Mr. Gene Davis was assigned to the ABE program from 1967 to 1974 when he was hired by the Board as Director of the Career Center, at which time he also was credited with eighteen days personal leave. Shortly thereafter he was credited with an additional sixty days leave, an action which was taken by one of the Board's administrative employees.

4. Grievant was not accorded the same sixty days leave.

5. The Board, on October 27, 1988, granted the grievant sixty days leave but rescinded that action on November 10, 1988. The Board again granted the leave on December 8, 1988 but rescinded that action on January 12, 1989.

CONCLUSIONS OF LAW

1. Grievant had no employee-employer relationship with the Board during the years she worked with the ABE program by virtue of either a contract or the Board's involvement with the program.

2. Neither a county board of education nor its agents have authority, under W.Va. Code §18A-4-10, to grant an employee personal leave for years in which it had no contractual relationship with said employee.


3. The unauthorized actions of the Board in granting the grievant sixty days personal leave bestowed upon her no property interest which required the application of procedural due process before such actions were rescinded. Freeman v. Poling, 338 S.E.2d 415 (W.Va. 1985).

4. The award of sixty days personal leave to Mr. Davis for time worked with the ABE program was similarly unauthorized and the failure and/or refusal of the Board to take similar action in regard to grievant did not constitute favoritism as defined in W.Va. Code §18-29-2(m).

Accordingly, the grievance is **DENIED**.

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 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.


JERRY A. WRIGHT
Chief Hearing Examiner

Dated: August 18, 1989