WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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RAYMOND A. DUNLEAVY

v. Docket No. 89-20-571

KANAWHA COUNTY
BOARD OF EDUCATION

D E C I S I O N

In this grievance Raymond A. Dunleavy alleges that Respondent violated W.Va. Code §§18-5-15, 18-29-2(a) and 18-29-2(p) in denying his request for work credit and pay for four days he attended university classes. The Level I evaluator ruled he had no authority to decide the grievance; it was denied at Level II; and consideration was waived at Level III.

The factual information for review is limited, consisting entirely of the following joint stipulations of fact:[1]

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[1]The Level IV appeal, asking that this decision be based on the record compiled below, was received September 28, 1989, and the undersigned requested that record. On December 14 Grievant wrote that the parties would submit joint stipulations, which were not received until February 7, 1990. Shortly thereafter Counsel for Respondent advised the undersigned that it would rely on the Level II decision as its submission of proposed findings and (Footnote Continued)

1. The grievant was employed as a 210-day school psychologist by Kanawha County Schools until his retirement on June 30, 1989.

2. The grievant asked Superintendent Richard Trumble that he be permitted to be absent with pay on his last four scheduled days of employment (June 13, 14, 15 and 16, 1989) pursuant to [W.Va. Code] §18-5-15 so that the grievant could pursue coursework at Indiana University of Pennsylvania toward a doctorate in school psychology.

3. James Simmons, Associate Superintendent, Division of Pupil Support Services, advised Dr. Trumble in a May 23, 1989, memorandum that he could not recommend approval of the request, citing that the grievant's leaving the Board's employ would not benefit the system by his further educational training and that a backlog of cases needed to be finished. ...[2]

4. Superintendent Trumble denied the grievant's "request for leave," citing "the backlog of work that needs to be addressed" as the sole reason for the denial.

5. The grievant was in fact absent from his job for the four days in question, taking his one remaining day of personal leave and being docked for the three other days.

6. The grievant's immediate supervisor was aware that grievant intended to be absent the four days in question whether or not his request pursuant to [W.Va. Code] §18-5-15 was granted.

7. The grievant was scheduled to perform testing of students during the days in question due to the backlog and would not be performing psychological services for the Board subsequent to his retirement due to the restrictions imposed by the incentive retirement program.

(Footnote Continued)
conclusions and on March 5, 1989, Grievant submitted a letter-brief as his proposals.

[2]The stipulation also provides, "This memorandum was shared with the grievant for the first time at the Level II hearing." That statement is irrelevant to any issue presented for consideration.

The statutory provisions referred to by the pleadings are Paragraph 6 of Code §18-5-15(a), which provides,

> Where the employment term overlaps a teacher's or service personnel's participation in a summer institute or institution of higher education for the purpose of advancement or professional growth, the teacher or service personnel may substitute, with the approval of the county superintendent, such participation for not more than five of the noninstructional days of the employment term[,]

and the definitions of "Grievance" and "Reprisal" in the statute on these grievance procedures.

Grievant submitted no proposals other than the following statements he presents for consideration here:

(1) Whether Grievant was absent on June 13, 14, 15 and 16, 1989, with or without pay would not affect the "backlog of work" cited by Respondent;

(2) Respondent made no effort to dissuade Grievant from being absent on June 13, 14, 15 and 16, 1989, and

(3) Respondent's reason for denial does not address the issue of payment or nonpayment for the days in question and therefore must be rejected as insufficient.

Grievant's allegations of violations of Code §§18-29-2(a) and (p) must be summarily dismissed. A mere reference to the definition of "grievance,"[3] without even a

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[3]The cited provision provides,

> "Grievance" means any claim by one or more affected employees of the board of regents, state board of education, county board of education, regional educational service agencies and multi-county vocational centers alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements
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> (Footnote Continued)

hint as to what part is referred to, is insufficient to raise an issue for consideration. In order to establish a prima facie showing of "Reprisal," defined by the statute in pertinent part as "the retaliation of an employer or agent toward a grievant...either for an alleged injury itself or any lawful attempt to redress it[,]" a grievant must establish by a preponderance of the evidence

> (1) a protected activity of causing an injury to Respondent or lawfully attempting to get redress from the employer [Respondent] for an injury to him or her, (2) that the employer was aware of the protected activity, (3) that the employer subsequently took adverse action against the employee and (4) retaliatory motivation or that the adverse action followed the employee's protected activity within such period of time that retaliatory motivation can be inferred.

Webb v. Mason Co. Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). Again, Grievant's submissions fail to even identify any protected activity, i.e., what action Grievant took that he contends motivated the alleged reprisal, and the stipulations of fact utterly fail to support the requirements of a prima facie showing.

(Footnote Continued)

> under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

Accordingly, the only substantive issue for consideration is whether Respondent violated Code §18-5-15(a).[4] Firstly, as Grievant's submissions apparently recognize, since an employee may not substitute "participation in a summer institute or institution of higher education" for noninstructional days without "approval of the county superintendent," the statute does not provide the employee any absolute right to such substitution [hereinafter referred to as "substitution"]. Rather, the superintendent has the discretionary right to disallow substitution. The issue that must be addressed therefore is whether the stipulations establish that Superintendent Trumble acted unreasonably and therefore abused that discretion in denying Grievant's request.

When substitution is granted, the employee is paid just as though he were carrying out his job-duties; if denied, he must either work or request use of his regular personal leave, if he has such leave available. Such request is also generally subject to being denied. See W.Va. Code §18A-4-10. Clearly, when substitution is disallowed and an employee is therefore faced, at best, with using his personal leave, he may then decide to work. Accordingly, even

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[4]The parties apparently agree that Grievant, as a psychologist, is considered a "teacher" for purposes of the provision. Whether the parties' interpretation is consistent with the definition of "teacher" of W.Va. Code §18-1-1(g) need not be addressed due to the outcome herein.

where an employee has an option not to work by using leave, it is not an abuse of discretion for the superintendent to deny substitution on the grounds that a backlog of work requires the employee's attention, as Superintendent Trumble did here.

In this case Grievant did not even have personal leave to cover the four days. Rather, he argues that, because his immediate supervisor knew that he was going to be absent, whether or not such absence was authorized, and therefore would not take care of the backlog, Superintendent Trumble's reliance on the backlog as the reason for denying the substitution was insufficient.

Firstly, just because Grievant's supervisor knew that Grievant was planning to be absent without leave does not mean Superintendent Trumble did. Secondly, even if that information had been relayed to Superintendent Trumble, Grievant's argument is specious. Grievant is essentially contending that, since the superintendent knew that Grievant would disobey his reasonable directive to appear for work, the directive is made unreasonable and Grievant is entitled to compensation for the days he was absent without leave. Hopefully, this statement of Grievant's contention is sufficient to establish its absurdity. In any case, a position that an administrator's directive is unreasonable just because an employee is planning to refuse to follow it will not be countenanced here.

Grievant's second statement for consideration, that Respondent allegedly made no effort to dissuade Grievant from being absent is patently wrong since in denying Grievant's request for substitution Superintendent Trumble made clear that he was unwilling to authorize Grievant's absence or to pay Grievant for the time he was in school if absent. There was certainly no additional duty on the part of the Kanawha County Board of Education itself to "dissuade" Grievant from missing work on those days.[5]

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

Findings of Fact

1. As part of an effort to reduce a backlog of cases, Grievant, a school psychologist, was scheduled to test students on June 13, 14, 15 and 16, the last four days of employment before his retirement.

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[5]Grievant makes no argument based on Stipulation 3. It is noted that the fact that Associate Superintendent Simmons had an additional reason for recommending disallowance of Grievant's request is irrelevant to the issue here since there is no indication on this record that Superintendent Trumble's denial was based even in part on that reason. It is further noted, however, that that reason may also have been a valid basis for denying Grievant's request.

2. He requested that he be allowed to be absent with pay on those four days in order to attend university classes.

3. Grievant's request was denied by the superintendent because of "the backlog of work that needs to be addressed."

4. Grievant was absent for all four days, using his one remaining day of personal leave and otherwise being absent without leave. He was therefore not paid for three of the days.

Conclusions of Law

1. It is incumbent upon a grievant to prove the allegations of his complaint by a preponderance of the evidence. Hanshaw v. McDowell Co. Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988); Andrews v. Putnam Co. Bd. of Educ., Docket No. 40-87-330-2 (June 7, 1988).

2. "Where the employment term overlaps a teacher's or service personnel's participation in a summer institute or institution of higher education for the purpose of advancement or professional growth, the teacher or service personnel may substitute, with the approval of the county superintendent, such participation for not more than five of the noninstructional days of the employment term." W.Va. Code §18-5-15(a).

3. A county superintendent may, in his discretion, disallow such substitution. However, that discretion must be exercised reasonably, i.e., it must not be abused.

4. It was reasonable for the superintendent to deny Grievant's request for such substitution on the grounds that the backlog of cases required Grievant's attention. That Grievant planned to be absent and was absent does not render that denial any less reasonable.

5. Grievant did not establish that denial of his request was an abuse of discretion.

Either party 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 §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.

SUNYA ANDERSON
HEARING EXAMINER

Date: March 26, 1990