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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
GASTON CAPERTON
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FREDERICK R. LYON

v.

Docket No. 89-20-221

**KANAWHA COUNTY
BOARD OF EDUCATION**

D E C I S I O N

Grievant Frederick R. Lyon, employed by Respondent as a mathematics teacher at St. Albans High School, filed a grievance on April 10, 1989, protesting Respondent's denying him professional leave. The grievance was denied at Levels I and II, consideration was waived at Level III, and Grievant advanced his claim to Level IV on May 22, 1989. Hearings scheduled in June and October were continued at the request of the parties, and hearing was held November 2, 1989, where the parties stated that the record of hearing at Level II would be the evidentiary record in this matter, supplemented at Level IV. Since Respondent relies on the Level II evaluator's decision as its proposed findings of fact and conclusions of law, with submission of Grievant's proposals on December 6, 1989, this matter may be decided.

Grievant contends that Respondent abused its discretion and discriminated against him¹ in denying him professional leave on March 9 and 10, 1989, to attend the American Federation of Teachers Presidents Conference in Washington, D.C., and on March 15, 16, and 17 to attend a "legislative convention" sponsored by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) for discussion of educational and labor issues with the West Virginia legislature in Charleston.² At that time Grievant was President of the Kanawha Federation of Educators and also President of the West Virginia Federation of Teachers. While it is not clear what was the result of the denial of the request of leave for March 9, the record establishes

¹Grievant initially alleged, "The action is unconstitutional, illegal; contrary to law, policy, rule, regulation, and practice; discriminatory; arbitrary and capricious and demonstrates unfair treatment of me both as a teacher and as a union official." Grievant's Counsel in his closing argument at the Level IV hearing specified that the only issue is whether Respondent abused its discretion, specifically waiving all other allegations. Nevertheless, Grievant's proposals reassert a charge of discrimination. While it is questionable whether such reassertion properly puts into issue such a charge, addressing it does not affect the outcome of this case.

²Grievant alleges that Respondent's denial of leave is a continuing practice and therefore he is entitled to litigate the propriety of denials of professional leave requests both predating and postdating the March denials. Even if such actions may be considered as part of this grievance, such grievance would be denied for the reasons provided infra.

that Grievant took personal leave on March 10 and did not attend the March 15-17 legislative convention.³

Respondent's Policy IV-J-9, "Leave - Professional Leave: Absence of Duty Without Loss of Pay," provides in pertinent part:⁴

Professional personnel may be absent from duty without loss of pay provided prior permission for absence is obtained from the Superintendent, through the immediate supervisor and the Division/Department concerned.

Written requests for Absence From Duty Without Loss of Pay will be routed as follows:

1. To the immediate supervisor, and if approved
2. To the Division/Department head concerned, or his designee, and if approved
3. To the Superintendent of Schools.

...[N]o teacher or principal may be excused for more than five days during any one school year except by direct action of the Board of Education.

³Although the grievance was filed in April, the relief requested thereby was "approval of my request" for leave and "protection from similar acts in the future." That requested relief has not been amended. It is questionable whether this Grievance Board could provide the injunctive relief Grievant requests and, since the requested relief for the March denials cannot be granted, it may not be necessary to address the merits of this matter. See Wilburn v. Kanawha Co. Bd. of Educ., Docket No. 20-88-089 (Aug. 29, 1988). Nevertheless, since Grievant has been damaged by the denial of the leave, the validity of Respondent's actions cannot readily be raised except under circumstances such as those of this case, and Respondent has not contended this matter is moot, the merits are here addressed. Compare Dunleavy v. Kanawha Co. Bd. of Educ., Docket No. 20-88-179, n.1 (Nov. 28, 1988).

⁴The parties apparently agree that an employee may properly be granted professional leave for union activities such as those involved here.

The record establishes, and Grievant concedes, that prior to being denied the professional leave at issue here, he had been granted 22 days of professional leave during the 1988-89 school year.⁵ There is also no dispute that Alvin A. Anderson, Principal of St. Albans High School and Grievant's supervisor, denied the requests because he was concerned that the amount of Grievant's absence was having an adverse effect on the education of his students. Richard D. Trumble, Superintendent of Kanawha County Schools, upheld Mr. Anderson's decision, notifying Grievant by letter,

In the last analysis, it is my concern for the students that forces me to deny your request for additional days this school year. Upon conferring with your principal about his concerns and the rising concern of parents, as well as the needs of your students to receive the benefits of your teaching skills, I feel there is no other decision to be made.

E.Ex.7. Grievant alleges therefore that, although he had been granted the maximum number of professional leave days allowable under the policy without direct action of Respondent and indeed had been granted 17 additional days of professional leave, it was an abuse of discretion for his leave to have been denied. In support of this assertion, he argues that Respondent failed to establish that his students

⁵Grievant testified that, although a request for professional leave in February was denied by his immediate supervisor, the Superintendent of Schools had approved it. There is nothing on this record whether, consistently with the policy, Grievant was excused by direct action of Respondent then and on the other sixteen days exceeding five.

were actually "suffering from any adverse effects from grievant's absences."⁶

It was reasonable for Principal Anderson and Superintendent Trumble to be concerned about whether the students' education⁷ was being adversely affected by Grievant's absences. That being so, it was no abuse of discretion to deny him leave.⁸ Grievant is in error in believing that, unless the students' learning actually was adversely

⁶There was also some indication from the record that Grievant believes that Respondent has some affirmative duty to support his union activities beyond that required by law and policy. Of course that is not so. Moreover, there was testimony that, when Grievant is absent on union business, the union reimburses Respondent for his salary. Such evidence is irrelevant to the inquiry here since Respondent did not deny the leave on fiscal grounds.

⁷The record does not provide all classes Grievant taught, although it does establish that he taught Calculus and Business and Consumer Math.

⁸In fact, since under the policy allowance of professional leave beyond five days is extraordinary, unless the policy itself were invalid, disallowance of any professional leave time beyond five days would not be an abuse of discretion.

affected,⁹ there was an abuse of discretion in denying him leave.¹⁰

Finally, there is also no support for Grievant's charge of discrimination. There was no evidence that any other employees of Respondent requested more than 22 days of professional leave during the school year 1988-89 and were granted it. Grievant accordingly failed even to support a prima facie showing of discrimination. See Steele v. Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

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

Findings of Fact

1. Grievant was granted 22 days of professional leave during the 1988-89 school year but was denied his requests

⁹This record actually supports a strong likelihood that Grievant's students are being denied as complete mathematical training as they would receive were Grievant not absent so much. Indeed, Grievant's own testimony supports that conclusion, for he conceded that the substitutes that take his place have for the most part not been certified in mathematics. He further stated that, since they are not expert in math, he usually relies on them only to reinforce what he has already taught. Finally, he conceded that the substitutes do need to introduce new material when he is absent more than one day.

¹⁰Even if such actual detriment were required, which it is not, it would have been Grievant's burden to establish that the students were not adversely affected.

for professional leave for March 9, 10, 15, 16 and 17, 1989, when he wished to pursue union activities.

2. Principal Alvin A. Anderson, Grievant's supervisor, and Superintendent Richard D. Trumble denied Grievant's requests because of concern that Grievant's students' education was being adversely affected by Grievant's absences. Such concerns were reasonable.

3. Grievant submitted no evidence that during the 1988-89 school year other employees of Respondent were granted more professional leave than he was.

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. 40-87-330-1 (June 7, 1988).

2. Grievant did not establish any abuse of discretion in being denied professional leave in March 1989 nor did he establish such denial was discrimination, as defined at W.Va. Code §18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibility of the employees or agreed to in writing by the employees," for he failed to make a prima facie showing that "he has, to his detriment, been treated by his employer in a manner that the other employee(s)

has/have not, in a significant particular," Steele v. Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

The grievance is accordingly **DENIED**.

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.

A handwritten signature in cursive script, reading "Sunya Anderson", written over a horizontal line.

SUNYA ANDERSON

HEARING EXAMINER

Date: January 10, 1990