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RAYMOND OLIVERIO

v.

DOCKET NO. 89-DHS-154

WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES and  
WEST VIRGINIA DEPARTMENT OF PERSONNEL

DECISION

Grievant, Raymond P. Oliverio, employed by the West Virginia Department of Human Services (Department), filed a level one grievance on January 6, 1989, in which he alleged "The policy of charging me military leave for non-business hours is not in compliance with the provisions of WV Code §15-1F-1. Relief Sought: WV Code §15-1F-1 be adhered to and I be reinstated all vacation days or lost time due to Department of Human Services and policy." The grievance was denied at levels one and two on the issue of timeliness, because the grievant had been advised of the policy on July 25, 1988, and on the merits, with both evaluators concluding that the agency interpretation relating to military leave was correct. Following an evidentiary hearing at level three the evaluator concluded that the timeliness issue was moot and to save further time and cost a decision would be issued. The evaluator also determined that Civil Service

Regulation 16.09 incorrectly interpreted W.Va. Code §15-1F-1 in reference to military leave, granted the grievance and ordered a revision of the regulation to bring it in compliance with Code §15-1F-1.

On April 11, 1989, the grievant filed an appeal to level four in which he alleged a violation of W.Va. Code §§29-6A-1 et seq due to the failure to the Department and/or Civil Service to implement the level three decision. He explicitly stated that the sole relief sought was "to require the respondent to abide by the Level III decision which the respondent has willfully refused to do, and not to relitigate the issues in the underlying grievance."

By letters dated April 27 and May 3, 1989, both parties agreed to submit the matter for decision based upon the record, supplemented by written statements. Delays were incurred in part due to two changes in counsel by the Department; however, in February 1990 the Department filed a motion for substitution of the real party in interest, the Division of Personnel (Personnel), with a statement that it would abide by any decision rendered at level four. No response to the motion was filed by Personnel or the grievant and by Order dated March 14, 1990, Personnel was joined as a respondent party-in-interest and the parties were directed to submit any written statements by April 6,

1990.<sup>1</sup> Having received submissions on behalf of the grievant and Personnel the matter is now ripe for decision.

The facts in this matter are brief, simply that the grievant was engaged in military reserve duty thirty-six days in 1988, twenty-eight weekdays and eight weekend days. The Department, at the direction of Personnel, refused to grant him leave for the period of July 18-22 and required the grievant to use annual leave or accept non-pay status for that period of time because, it claimed, he had exhausted his thirty days of annual military leave. Personnel's method of calculation includes all of the days the employee serves in fulfilling his military obligation, including Saturdays and Sundays, his regular days off.

The grievant argues that W.Va. Code §15-1F-1 provides for thirty working days of military leave in a calendar year as evidenced by the statutory wording granting the leave "on days during which they shall be engaged in drills, parades or other duty, during business hours..." (emphasis added). The grievant asserts that the designation of "during business hours" establishes a clear legislative intent that the leave be applied only to work days. He also argues that by including weekends in military leave Personnel is improperly

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<sup>1</sup>The grievant indicated on his level one grievance form that the Civil Service System, predecessor to the Division of Personnel, was a co-respondent; however, the level three transcript establishes that it did not appear or otherwise participate in the proceedings.

charging him leave for time over which it has no control, i.e., non-business hours. Finally, the grievant offered the testimony of two employees of the Department of Corrections that they are not charged military leave on their regular days off.

Personnel argues its interpretation that W.Va. Code §15-1F-1 grants thirty calendar days of military leave per calendar year is correct under the application of W.Va. Code §2-2-4, which states that the word "month" shall mean calendar month and the word "year" alone shall be equivalent to the expression "year of our Lord," and the holding in Horner v. Hoffman, 52 W.Va. 40, 43 S.E. 132 (1902), that time is not to be determined by counting from one hour of a certain day to a certain hour of another day, but by computing from day to day. Personnel also submitted documentation including opinions and interpretations which it issued from 1977 through 1989 to establish its consistency in allowing thirty calendar days of military leave.

Military leave for public employees is mandated by W.Va. Code §15-1F-1 which provides

All officers and employees of the State, or subdivision or municipalities thereof, who shall be members of the national guard or any military reserve unit of the United States armed services, shall be entitled to leave of absence from their respective offices or employments without loss of pay, status or efficiency rating on the days during which they shall be engaged in drills, parades or other duty, during business hours ordered by proper authority, or for field training or active service of the State for a maximum period of thirty days in any one calendar year. The term "without loss of pay" means that the officer or employee shall continue to receive his

normal salary or compensation, notwithstanding the fact that such officer or employee may have received other compensation from federal or state sources during the same period. Benefits of this section shall not accrue to individuals ordered or called to active duty by the president.

This statute was interpreted and implemented by the Civil Service Commission in Regulation 16.09 which states in pertinent part

(a) All employees who are members of the National Guard or of any of the Reserve Components of the Armed Forces of the Federal Government shall be entitled to leave of absence from duty without loss of pay, status, or efficiency rating, on all days during which they shall be engaged in drill or parades during business hours ordered by proper authority, or for field training or active service for a maximum period of thirty calendar days in any one calendar year ordered or authorized by proper authority. The term "without loss of pay" shall mean that the employee shall continue to receive his normal salary or compensation, notwithstanding the fact that such employee may have received other compensation during the same period. An employee need not exhaust all annual leave, sick leave, or compensatory time. Furthermore, such leave of absence shall be considered as time worked for the agency in computing seniority, eligibility for increase and experience with the agency.

The question to be resolved by this grievance is whether the regulation's inclusion of the word "calendar" to the provision awarding military leave was proper. The evidence presented in this case leads to the conclusion that it was not. Although Code §2-2-4 defines month and year it does not define day. While Horner defines day it does not address a difference between work days and calendar days. Personnel incorrectly transferred the statutory definition of month, to mean a calendar month, to the term day, defining it as a calendar day. A perfect example that such logic

does not apply can be found in the statutory provisions establishing this grievance procedure wherein "days" is defined as working days exclusive of Saturday, Sunday or official holidays. W.Va. Code §29-6A-2(c).

Neither is the Regulation consistent with other leave entitlements. Because an employee is on his own time on his days off, i.e., not on his employer's payroll, he is not required to use sick or annual leave when he is away from the job site. Application of the same reasoning would prohibit military leave being deducted from the grievant's thirty day entitlement for days on which he does not work. Code §15-1F-1 specifically refers to leave "during business hours" which is but another way of phrasing "workday." The subsequent reference in that provision to calendar year does not explicitly or implicitly control the interpretation of the term "days."

Of further guidance is the legislative intent for offering military leave. Protecting an individual's benefits on his civilian job offers incentive to continue his military affiliation, thereby supplementing the country's national defense. Requiring that employees use their annual leave or to suffer a loss of pay would have the reverse effect and make reserve work undesirable. Therefore, a finding may be made that Personnel's Regulation 16.09 is

contrary to statute insofar that it applies military leave to calendar rather than working days.<sup>2</sup>

While the issue of military leave is clearly ongoing in nature, the matter of timeliness must be considered as it relates to that part of the requested relief to restore the grievant's annual leave taken in April 1988. Personnel's argument on this issue is more persuasive. W.Va. Code §29-6A-4(a) provides

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

Grievant's Exhibit No. 3, consisting of two attendance reports completed for the period of July 18-22, 1988, the first claiming military leave and the second vacation, or annual leave, establishes that the grievant, who signed the second report, knew in July 1988 that he had been denied the leave, yet a grievance was not filed until January 1989. The grievant offered no explanation for the delay in filing;

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<sup>2</sup>It is noted for the record that Civil Service System Regulation 16.09 is now Division of Personnel Regulation 16.10.

therefore, the request that the annual leave used for April 18-22 be restored must be denied.

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 grievant is employed by the Department of Health and Human Services and as a member of the 459th Engineers' Company, must perform military duty throughout the year, sometimes on his regularly-scheduled work days.

2. In 1988 the grievant was engaged in military reserve duty for a total of thirty-six days, twenty-eight of which were working days while eight were on weekends, the grievant's usual scheduled time off.

3. Based on a practice of counting all days of reserve duty, including weekends, as military leave the Department denied the grievant's request for five days of military leave in April, 1988 and required that he use annual leave or go off the payroll for that period.

#### Conclusions of Law

1. "All officers and employees of the State, or subdivisions of municipalities thereof, who shall be members of the national guard or any military reserve unit of the



United States armed services shall be entitled to leave of absence from their respective offices or employments without loss of pay, status or efficiency rating on the days during which they shall be engaged in drill, parades or other duty, during business hours ordered by proper authority, or for field training or active service of the State for a maximum period of thirty days in any one calendar year. The term 'without loss of pay' means that the officer or employee shall continue to receive his normal salary or compensation, notwithstanding the fact that such officer or employee may have received other compensation from federal or state sources during the same period. Benefits of this section shall not accrue to individuals ordered or called to active duty by the president." W.Va. Code §15-1F-1.

2. The thirty days of military leave provided for by W.Va. Code §15-1F-1 shall be applied only to business hours or work days on which the employee is absent while fulfilling his military commitment.

3. Division of Personnel Regulation 16.10 is contrary to W.Va. Code §15-1F-1 and is therefore invalid to the extent that it applies military leave to all days of the employee's reserve duty, including his regularly-scheduled days off. Rowe v. West Virginia Department of Corrections, 292 S.E. 2d 650 (W.Va. 1982).

4. Although the grievance is of an on-going nature and is timely, the grievant's six-month delay in filing a grievance following a specific incident of which he was

fully aware, for which no explanation was offered, results in the specific claim for April, 1988 being time-barred and requiring that the relief requested for that incident be denied.

Accordingly, the grievance is **GRANTED** to the extent that military leave be applied only to working days and that this calculation be applied to the grievant effective fifteen working days prior to his instigation of the grievance process in January, 1989. The grievance is **DENIED** as to the reinstatement of the grievant's leave time in April, 1988.

Either party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Harrison 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 April 26, 1990

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER