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CHARLES OXLEY and LILA OXLEY

v.

Docket No. 89-45-277

SUMMERS COUNTY BOARD OF EDUCATION

DECISION

Grievants, Charles and Lila Oxley, are employed by the Summers County Board of Education (Board) as classroom teachers at Sandstone Elementary School (SES). They initiated a grievance at Level I on March 2, 1989, alleging the Board had improperly withheld a portion of their wages for the preceding pay period. Their principal, Mr. James Withrow, was without authority to grant relief and, upon appeal to Level II, the grievance was denied following hearing held May 3, 1989. The Board, at Level III, upheld the Level II decision and appeal to Level IV was made June 19, 1989, where hearing was held December 6, 1989.¹ Proposed findings of fact and conclusions of law were submitted by the parties by January 8, 1990.

¹Previously-scheduled hearings were continued at least six times mainly due to the health problems of Mr. Oxley.

There is essentially no dispute over the facts giving rise to the grievance. On May 19, 1987, Mr. Oxley sprained his knee during a school outing. Upon his application, the Workers' Compensation Fund (WCF) ruled the injury a compensable one and awarded him benefits through August 22, 1987, when the case was closed. By letter dated February 3, 1988, Larry V. Carson, M.D., Mr. Oxley's physician, requested of WCF authorization to perform "myelogram, post contrast CT and surgery if indicated" on Mr. Oxley and noted that he would await WCF approval. On February 9, 1988, Dr. Carson performed an operation upon his patient which entailed, among other things, the removal of an extruded disc from his spinal column. By letter dated March 28, 1988, WCF informed the Board that Dr. Carson's February 3 request was denied because the procedures he wished to perform were not related to Mr. Oxley's compensable injury. Mr. Oxley made a request that his claim be reopened but was denied. By letter dated May 17, 1988, the Board was notified by WCF that Mr. Oxley had appealed its March 28 ruling and that a hearing would be held. The Board was also notified June 6, 1988, that he had also appealed the denial of his request that his claim be reopened.

A WCF hearing for the purposes of taking the deposition of Dr. Carson was scheduled for February 6, 1989, in Princeton. Both Mr. and Mrs. Oxley were present for this hearing but, as Dr. Carson did not appear, Mr. Oxley's counsel moved for a continuance. Grievants returned to SES and worked approximately half a day. The Board's Business Manager/Treasurer, Mr. Billy Joe

Kessler, subsequently withheld half a day's wages from their salaries.

Grievants maintain they should have been compensated for the hearing as it was necessary and the direct result of the Board's actions. They also contend the Board has compensated others for their appearance at similar hearings and to deny them the same benefit constitutes favoritism.² The Board asserts its actions were in compliance with its policy on the use of personal leave. The Board concedes that it does compensate grievants and other employees when they participate in Level IV hearings but it has never established a practice whereby employees are paid for appearance in other civil proceedings.

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

FINDINGS OF FACT

1. Grievants Charles and Lila Oxley are employed by the Summers County Board of Education as classroom teachers at Sandstone Elementary School. As such, they are entitled to one-and-a-half day's personal leave for each employment month in their employment term. This leave may be used for absences due to accident, sickness, death in the immediate family or other

²W.Va. Code §18-29-2(o) defines favoritism as

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

causes authorized or approved by the Board. W.Va. Code §18A-4-10; Summers County Board of Education Personal Leave Policy.

2. The Board has an unwritten policy of compensating employees for their participation in the grievance proceedings under W.Va. Code §§18-29-1, et seq.

3. Pursuant to Mr. Oxley's appeal of a decision of the Workers' Compensation Fund not to reopen his May 19, 1987 compensable injury claim, a hearing was scheduled on the morning of February 6, 1989, in Princeton solely for the purpose of taking the deposition of Larry Carson, M.D. Grievants did not request personal leave to attend but did go along with their counsel. Counsel for the Board also attended and the hearing was continued due to the failure of Dr. Carson to appear.

4. Grievants returned to their school where they worked the remaining half-day. Both submitted their time sheets for the relevant pay period indicating they should not be docked for the morning because they attended a Workers' Compensation hearing which they contended was the result of a Board appeal.

CONCLUSIONS OF LAW

1. It is incumbent upon a grievant to prove the allegations of his grievance by a preponderance of the evidence. Bailey v. McDowell County Board of Education, Docket No. 33-88-236 (July 5,

1989); Hanshaw v. McDowell County Board of Education, Docket No. 33-88-130 (August 19, 1988); Andrews v. Putnam County Board of Education, Docket No. 40-87-330-1 (June 7, 1988).


2. Grievants have failed to establish the existence of any statute or Board policy, either written or unwritten, whereby employees are compensated, without taking personal leave, for appearance at Workers' Compensation hearings or civil proceedings other than those provided for in W.Va. Code §§18-29-1, et seq.

3. Grievants have also failed to establish that the Board has made exceptions for other employees appearing in such proceedings and thus engaged in favoritism as defined in W.Va. Code §18-29-2(o).

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 Hearings 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: March 30, 1960