TAUNIA HALE and KATRINA BROWN, .

Grievants, .

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v. . Docket Number: 95-29-315

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MINGO COUNTY BOARD OF EDUCATION, .

Employer. .

D E C I S I O N

Grievants, Tuania Hale and Katrina Brown, filed three grievances against their employer, the Mingo County Board of Education, pursuant to the provisions of West Virginia Code §§18-29-1, et seq., claiming that their pay was improperly "docked" for May 26, May 29, June 8 and June 9, 1995. Grievant Hale also filed a grievance contending her salary was "docked" for April 17 through April 21, 1995 (spring break). (See footnote 1) These claims were consolidated at level four and an evidentiary hearing was held on October 5, 1995, at the Grievance Board's Charleston, West Virginia office. The case became mature for decision on that date. (See footnote 2)

Employer has adopted a Sick Leave Donation Policy according to W. Va. Code §18A-4- 10. Under this policy, employees are allowed to donate two days of their leave, annually, to other employees. The leave bank may be used by all full-time, service or professional employees who are absent from work due to sickness, accident or a death in the immediate family. The policy states that an employee must have less than five days of leave of their own before they can request leave bank days. Also, the policy states that an employee may use more than ten donated days of leave until

further review of their case. However, Sue Maynard, Executive Secretary within the Payroll Department, testified that this condition has not been followed and no employee's case has ever been reviewed after ten days have been borrowed.

Grievants contend they should have been allowed to use the sick leave bank to receive payment for the days listed above. The Board makes three arguments. It contends that the grievances concerning May 26, 29, June 8 and 9, 1995 were not timely filed. It asserts that the days in question were non-instructional days and employees may not utilize the sick leave bank for non-instructional days or holidays. It also relies upon the language of the policy in averring that Grievants had never requested a review of their cases after having used more than ten days from the bank. Therefore, they are not entitled to the days under the policy. With regard to Grievant Hale's request for pay for spring break, it maintainsthat she did not have any donated days to take until after spring break. Grievants respond by asserting other employees are allowed to utilize their own sick days for non-instructional days and that it is discriminatory not to allow them to use donated days to be paid for non- instructional days.

W. Va. Code §18-29-4(a)(1) states:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

A timeliness defense is an affirmative defense that Employer must establish by a preponderance of the evidence. The grievance over payment for May 26, 1995, was filed on June 19, 1995. The evidence does not establish Grievants were made aware that they were not going to be paid for May 26 prior to receiving their paycheck. Therefore, the grievable event would be the date the Grievants were paid; however, the record does not establish when this was. Employer has not established this grievance was filed more than fifteen days from the date they became aware of the grievable event. Accord, Blankenship v. Summers Co. Bd. of Educ., Docket No. 92-45-133/134/135 (Nov. 30, 1992).

Regarding Grievant Hale's claim that she was not paid for April 17 through 21, 1995, she testified she was paid on May 15, 1995, and the grievance was filed on May 18, 1995. Therefore, this grievance was filed within the fifteen days allowed.

On the merits, it must be noted Employer does not contend that Grievants failed to request the

days from the leave bank as required. Questions were asked at the hearingabout when the respective leave days were donated and requested. The policy does not address the issue of when days must be donated in relation to being used; however, it only makes sense that an employee may not request and be granted a donated sick day if none have been donated. Further, the Board does not contest that either Grievant was ill on the dates in question. Also, consistent with the information provided in Ms. Maynard's affidavit, it is Employer's policy that an employee must work the day prior to a holiday to be paid for the holiday. This is why Grievant Brown was paid for spring break while Grievant Hale was not.

May 26, June 8 and June 9, 1995, were non-instructional days for employees. Students were not scheduled to attend school but both the professional and service staff were required to appear for work. Grievants were sick on these days and were not paid. They would have been paid if the days had been instructional days or if they had accrued personal leave days. Employer's argument that the policy does not allow employees to use donated sick leave for non-instructional days is not supported by the language of the policy.

W. Va. Code §18A-4-10 allows county boards of education to establish personal leave banks that operate under rules adopted by the boards. Employer has adopted rules governing the use of donated sick days within its policy and these rules do not limit the use of sick leave to non-instructional days. The policy requires that the employee must be a full- time, professional or service employee, who has a personal illness or is experiencing the illness of a spouse, child or other family member, and the employee must have less than five accrued days of leave. The only other limitation on the use of donated days relates to the ten-day limitation that has never been complied with. It was arbitrary and capricious forEmployer to have denied Grievants the use of donated sick days under a limitation that it has not established but could have done so when it adopted the policy in 1987.

The level two decision held that Grievants were properly denied use of the leave bank based upon this limitation and concluded that they (Grievants) were violating the policy because no review had been made. This position is incredible. Employer has the duty to assure this it conducts the review under this policy. If it fails to take this step, it is inappropriate to penalize Grievants for its failure. The sick leave bank and the Sick Leave Donation Policy are the creations of Employer and it is responsible for its implementation.

Not only is this argument absurd, it would be discriminatory for Employer to rely suddenly upon

this portion of the policy that it has evidently waived since 1987 to deny Grievants the benefit of days specifically donated to them. Employer's argument that it may review donated sick leave use when it believes the case requires it and not in other cases is inconsistent with any interpretation of the policy, especially when it has not reviewed a single case. (See footnote 3) Grievants are to be paid for May 26, June 8 and June 9, 1995, from days donated to them from the sick leave bank.

The parties stipulated that May 29, 1995 was Memorial Day. W. Va. Code §18A-5-2 establishes certain legal school holidays, Memorial Day being one of them. This Code section also states that "[w]hen any such holiday falls within the employment term, it shall be considered as a day of the employment term and the full-time school personnel shall receive his or her pay for same." It is curious that Grievants were not paid their regularsalary for this day, and why they believe they should have to resort to the use of sick days, donated or otherwise, to receive pay for a legal school holiday. This anomaly can only be explained by assuming that Employer denied paying them for this holiday because they did not work the day before, consistent with the practice referred to in Ms. Maynard's affidavit. If this is the case, Employer is violating Code §18A-5-2. This statutory provision does not allow boards of education to make exceptions to its requirement that school personnel are to be paid for holidays which fall during their employment term. Grievants shall be compensated for the salary they should have been paid on May 29, 1995. (See footnote 4) See, Aftanas v. Brooke Co. Bd. of Educ., Docket No. 05-87-295-3 (Jan. 29, 1988). Spring break, April 17 through April 21, 1995, is not a recognized legal school holiday. Therefore, Grievant Hale is not entitled to her salary for these days pursuant to Code §18A-5-2.

However, the inquiry does not end here. Employer does not deny that it recognizes spring break as a holiday for its employees. It is therefore assumed that it also pays its full- time employees for these five days as if they were legal school holidays. This is also supported by Ms. Maynard's affidavit. Therefore, a determination as to whether Grievant should have been paid for these days would properly have been based on her entitlement to holiday pay and not sick leave. Sick leave and donated sick leave days are reserved for use when an employee is scheduled to work but cannot due to illness; they are not to beused for holiday pay. If an employee is sick on a holiday, then she cannot enjoy her day off, but she is still to receive payment for that day.

Here, Employer has conditioned payment for holidays on the employee working the day immediately preceeding the holiday. While this restriction may not be relied upon to limit payment for

legal school holidays, boards of education have the discretionary authority to have such a restriction attached to the holidays they create. Therefore, Grievant has not shown entitlement to pay for April 17 through April 21, 1995. (See footnote 5)

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

Findings of Fact

1. Grievant Brown is a teacher for the Mingo County Board of Education. Grievant Hale is employed as a secretary.

2. Grievants did not work on May 26, 1995 or June 8 and 9, 1995, days that were scheduled, non-instructional days.

3. Grievants did not receive pay for the days referred to in Finding of Fact 2 as they were denied the use of donated, sick leave days.

4. Grievants were not paid for Memorial Day, May 29, 1995, because they had not worked the day before. 5. Grievant Hale was not paid for April 17 through April 21, 1995, spring break, because she did not work the day before.

6. Employer has adopted a Sick Leave Donation Policy for use by its full-time, professional and service personnel who are ill or have family members who are ill.

7. Employer's Sick Leave Donation Policy does not limit the use of donated sick leave days to instructional days.

8. Employer has never reviewed a case when an employee has requested and used more than ten donated sick days, even though the policy mandates such a review.

9. The grievance filed by Grievant Hale concerning her salary reflected within her May 15, 1995 pay check was filed on May 19, 1995.

10. Neither Grievant was on a leave of absence at all times pertinent hereto.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. Grievants bear the burden of proving their claims by a preponderance of the evidence. W.

Va. Code §18-29-6. Employer bears the burden of proving its affirmative defense by a preponderance of the evidence.

2. Grievants' claim filed May 19, 1995, was timely filed.

3. Employer has failed to establish by a preponderance of the evidence that Grievants' claim concerning the date of May 26, 1995, was untimely filed.

4. W. Va. Code §18A-5-2 requires that school personnel be paid for legal school holidays that occur during their employment term. This statutory provision does notprohibit a board of education from creating other county-wide holidays and conditions for the payment of wages to its employees for these holidays.

5. Employer violated W. Va. Code §18A-5-2 when it refused to pay Grievants for Memorial Day, May 29, 1995.

6. Spring Break is not a legally recognized, school holiday pursuant to W. Va. Code §18A-5-2.

7. Pursuant to W. Va. Code §18A-4-10, Employer adopted a Sick Leave Donation Policy that contains requirements for the donation of sick leave days and limitations upon their use.

8. Employer misapplied its policy on donated sick leave use when it refused to pay Grievants for May 26, June 8 and 9, 1995.

9. Grievant Hale has not established by a preponderance of the evidence that she was entitled to be paid for spring break, April 17 through April 21, 1995, under Employer's Sick Leave Donation Policy.

Therefore, this grievance is hereby **GRANTED IN PART and DENIED IN PART**. Employer is required to compensate Grievants Brown and Hale for the following days: May 26, 1995, May 29, 1995, June 8, 1995 and June 9, 1995. Grievant Hale is not entitled to be paid for April 17 through April 21, 1995.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

January 25, 1996

Footnote: 1

Grievant Brown was paid for these days.

Footnote: 2

The record consists of the lower level transcripts and exhibits, the testimony and exhibits offered at level four, plus an affidavit from the Employer's Executive Secretary in its Payroll Department.

Footnote: 3

It is fascinating that the Employer, after the policy has been in effect for over eight years, suddenly contends that it may selectively review some cases.

Footnote: 4

If Grievant had previously been placed on a leave of absence or had been off work due to a work-related injury, this holding may be different. See, Toney v. Lincoln Co. Bd. of Educ., Docket No. 22-88---5-1 (Nov. 29, 1988). However, the evidence is not sufficient to make such a finding.

Footnote: 5

The Employer contends that Grievant was on a medical leave of absence prior to spring break because she had exhausted all of her leave. The evidence does not establish the number of days Grievant worked during the 1994-1995 school year. It is not possible to make such a conclusion based on the number of sick days she used during the year. In any event, this issue need not be decided.