

PHYLLIS WHITE,

Grievant,

v.

DOCKET NO. 96-29-115

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Phyllis White, protests the action of Respondent Mingo County Board of Education as follows:

Denial of full personal leave and holiday pay benefits upon return from workers compensation injury violates 23-5a-1, 18A-4-8a and 18A-4-10. [\(See footnote 1\)](#)

Grievant seeks restoration of full leave benefits and holiday pay.

This matter was submitted by the parties on the record developed below, which consists of the Level II transcript and Level II decision by Assistant Superintendent John Fullen, denying the grievance in part and granting it in part. It must be noted that the record in the case is poorly developed and is, at best, only marginally sufficient for an inquiry into Grievant's claims. The only findings supported by the record are as follows:

Findings of Fact

1. Grievant was an Assistant Principal at Gilbert Grade School, when she was injured on the job.
2. Grievant was off on workers' compensation and approved leave of absence from December 18, 1989, through September 1994.
3. Upon her return to work in September 1994, Grievant was not credited with seniority for the

time she was off on workers' Compensation.

4. Respondent acknowledged Grievant was entitled to be credited with seniority during the time she was off on workers' compensation and agreed at Level II to correct the situation.

Discussion

Grievant contends Respondent violated W. Va. Code § 18A-4-10 when, upon her return to work, it did not credit her with personal leave days accrued, nor pay her for holidays during the period she was off on worker's compensation. Grievant is complaining that she should have continued, without limit, to accrue personal-leave days while absent from work due to a work-related injury.

W. Va. Code § 18A-4-10 provides, in pertinent part:

At the beginning of the employment term, any full-time employee of a county board of education shall be entitled annually to at least one and one-half days personal leave for each employment month or major fraction thereof in the employee's employment term. Unused leave shall be accumulative without limitation and shall be transferable within the state. . . .

A regular full-time employee who is absent from assigned duties due to accident, sickness, death in the immediate family, or life threatening illness of the employee's spouse, parents or child, or other cause authorized or approved by the board, shall be paid the full salary from his regular budgeted salary appropriation during the period which such employee is absent, but not to exceed the total amount of leave to which such employee is entitled: . . . If an employee should use personal leave which the employee has not yet accumulated on a monthly basis and subsequently leave the employment, the employee shall be required to reimburse the board for the salary or wages paid to him for such unaccumulated leave.

Prior to the first day of January, one thousand nine hundred eighty-nine, the state board shall establish rules, effective on said date, to restrict the payment of personal leave benefits and the charging of personal leave time used to an employee receiving a workers' compensation benefit from a claim filed against and billed to the employee's board. If an employee is awarded such benefit, such employee shall receive personal leave compensation only to the extent such compensation is required, when added to the workers' compensation benefit, to equal the amount of compensation regularly paid such employee. If personal leave compensation equal to the employee's regular pay is paid prior to the award of the worker's compensation benefit, such amount which, when added to the benefit, is in excess of the employee's regular pay shall be deducted from the employee's subsequent pay. The employee's accrued personal leave days shall be charged only for such days as equal the amount of personal leave compensation required to compensate the employee at the employee's regular rate of pay.

This Code provision has been promulgated as a regulation by the State Board of Education as 126 CSR 158, Use of Personal Leave Benefits With Workers' Compensation Benefits (5612).

It is well-settled that, pursuant to W. Va. Code § 18A-4-10, an employee who is off work due to a work-related injury and receiving workers' compensation benefits remains actively employed by the board of education and continues to accrue personal leave days. Sanders v. Monongalia County Bd. of Educ., Docket No. 92-30-368 (May 10, 1993); Beverly v. Wyoming County Bd. of Educ., Docket No. 91-55-408 (Jan. 23, 1992); Thomas v. Boone County Bd. of Educ., Docket No. 03-88-087 (Oct. 18, 1988); Aftanas v. Brooke County Bd. of Educ., Docket No. 05-87-295-3 (Jan. 29, 1988). Thus, Grievant was entitled to be credited with 15 days of personal leave at the beginning of each year she was off work and receiving workers' compensation benefits.

However, Code § 18A-4-10 also provides the manner in which an employee's personal leave may be charged while he or she is receiving workers' compensation benefits. An employee's personal leave may be charged by the board of education to the extent necessary to equal the amount of compensation regularly paid for such employee. For example, if workers' compensation benefits equal 60% of an employee's regular salary, the board of education is permitted to charge an employee's personal leave for the remaining 40% in order to compensate that employee in an amount equal to 100% of their regular salary.

It must be noted that no evidence was presented to show how Grievant's salary was paid during the time she was off on workers' compensation. There were some questions by Respondent's counsel of Grievant which indicated Respondent was complying with the above Code provision, and charging Grievant's personal leave to make up the difference between her workers' compensation benefits and her regular salary. However, it is less than clear exactly how, or if, this was done.

Given this lack of evidence, the undersigned is limited to holding that Grievant has failed to meet her burden of proving by a preponderance of evidence that she was entitled to the 45 days of personal leave. Further, if Respondent was charging Grievant's personal leave to make up the difference between her workers' compensation benefits and her regular salary, as set forth in Code § 18A-4-10, Grievant's allotted 15 days per year would have been used up in short order during each year within which they were credited. Thus, Grievant would not now be eligible, as she claims, to be credited with 15 days per the three years she was off, or 45 days, of personal leave. To allow Grievant to be credited with those days after Respondent had charged those days would in essence permit Grievant to "double-dip" when she used those personal leave days in the future. See Beverly v. Wyoming County Bd. of Educ., Docket No. 91-55-408 (Jan. 23, 1992).

If, on the other hand, Respondent had not charged any amount against Grievant's personal leave, she would be entitled to be credited with 45 days of personal leave at this time.

Grievant also alleges she was denied holiday pay pursuant to W. Va. Code § 18A-5-2, which provides:

Schools shall not be kept open on any Saturday nor on the following days which are designated as legal school holidays, . . . When 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.

Employees absent because of injury are not entitled to compensation for those days enumerated in W. Va. Code § 18A-5-2 once they have been compensated for all accrued personal leave days. Thomas v. Boone County Bd. of Educ., Docket No. 03-88-087 (Oct. 18, 1988). Thus, to the extent Grievant's personal leave days were being charged as described above, once those leave days were used up, Grievant would not be entitled to holiday pay for any holidays occurring after the leave was exhausted. If, on the other hand, Grievant's personal leave days were not charged at any time during the period she was off on workers' compensation, Grievant would be entitled to any holiday pay which occurred during the time of her convalescence. Again, no evidence was presented to demonstrate how, or if, Grievant was compensated for holidays while she was off on workers' compensation. Nevertheless, Grievant again has failed to prove by a preponderance of the evidence that she was entitled to those days.

Conclusions of Law

1. It is incumbent upon the Grievant in a non-disciplinary matter, to prove the charges in her grievance by a preponderance of the evidence.
2. Pursuant to the provisions of W. Va. Code § 18A-4-10, all regularly employed school employees are entitled to fifteen (15) personal leave days per school year, and any employee who is absent because of injury must accordingly be compensated for those days. Thomas v. Boone County Bd. of Educ., Docket No. 03-88-087 (Oct. 18, 1988).
3. Employees absent because of an injury are not entitled to compensation for those days enumerated in W. Va. Code § 18A-5-2 once they have been compensated for their personal leave days. McGinnis v. Logan County Bd. of Educ., Docket No. 23-86-077 (Dec. 11, 1986); Varney v.

Logan County Bd. of Educ., Docket No. 23-86-374-1 (Aug. 26, 1987); Thomas, supra.

4. Grievant has failed to prove by a preponderance of the evidence that she was entitled to any personal leave days or holiday and other days pursuant to Code § 18A-5-2.

Accordingly, this grievance is **DENIED**.

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.

MARY JO SWARTZ

Administrative Law Judge

Dated: June 4, 1996

[Footnote: 1](#)

It is clear Grievant's representative meant to cite W. Va. Code § 18A-4-7a, which applies to professional personnel, rather than Code § 18A-4-8a, which applies to service personnel. Grievant's representative also raised a violation of Code § 18A-4-8b during the Level II hearing. Again, the intention was clearly to cite Code § 18A-4-7b, which applies to professional personnel. Although technically, Grievant has failed to state a claim upon which relief can be granted on these claims, the undersigned, in the interests of equity, will address these claims under the correct statutes.