

MILDRED E. GUERIN and BARBARA TENNEY

v. Docket Nos. 92-28-422, 459

MINERAL COUNTY BOARD OF EDUCATION

DECISION

Grievants, Mildred E. Guerin and Barbara Tenney, employed by the Mineral County Board of Education as teachers assigned to the Keyser Primary-Middle School (KPMS), filed grievances in September and October 1992, respectively, in which they complained of building-related health problems. Specifically, Ms. Guerin claimed that a hearing loss was causing her difficulty in performing her teaching duties. She requested a room "without background noise in which I will be able to hear my students and with windows to enable me to lip read"

Ms. Tenney stated that she suffered recurring sinus and ear infections, incapacitating headaches, and lethargy, symptoms indicative of Sick Building Syndrome. She requested that CO2 levels, fluctuating temperatures, and humidity levels be stabilized and maintained within ASHRAE standards; an evacuation policy be established for inhabitants of rooms in which the internal environment exceeds those standards; and consideration be given to students and staff whose attendance is affected by the building conditions. [\(See footnote 1\)](#) For example, reinstatement of sick leave to affected staff members.

The grievances were not resolved at level one. Following hearings at level two, the matters were denied. The Board waived consideration at level three, and appeals were made to level four by Ms. Guerin on November 4, 1992, and by Ms. Tenney on December 3, 1992. The grievances were consolidated for hearing beginning April 12, 1993. The matter was continued following proceedings held on April 13-15, 1993. The hearing was delayed for various causes, including a mediation session, and was not reconvened until May 22, 1995. Proceedings continued through May and June,

concluding on June 12, 1995. Final written statements, and/or proposed findings of fact and conclusions of law were filed by both parties on August 29, 1995.

Background

Due to the nature of these complaints some background information will be useful in understanding the subsequent discussion. Keyser Primary-Middle School is part of an educational complex which includes separate structures housing the Board's central offices and the county vocational-technical center. KPMS serves approximately 1200 students, grades K-8, with 120 faculty and staff members. The building was opened in 1976 and is a single story building configured into two wings, one houses the primary grades, K-4, while grades 5-8 occupy the second wing. The wings are joined by a commons area in which the administrative offices, cafeteria and gymnasium are located. The building is constructed with what is commonly referred to as a "flat roof" upon which numerous heating, ventilation, and air-conditioning (HVAC) units are situated. The primary section of the building was designed with an "open" concept, *i.e.*, instructional areas flow together with few divisional walls. A playground area is located outside, immediately adjacent to the building. Physical education facilities located inside the building are near some instructional areas.

Over the years, changes have affected the structure and design of the building. Walls have been added to the primary section of the school. Flood damage was incurred in 1985. Building plans were modified during construction, a practice not uncommon in the construction industry. Perhaps most notably in this instance, fewer, heavier, HVAC units than were originally planned, were installed. Roof repairs were made as needed and a new roof was installed in 1992. A new HVAC system was installed in three phases with the third phase scheduled for completion in the summer of 1995.

Guerin grievance

Mildred Guerin, employed by the Board for approximately twenty-three years, testified that she first reported her hearing loss to KPMS principal David Albani in 1986. At or about this time she informally measured the sound level emanating from the fan of the HVAC unit located above her room at 115 decibels. Ms. Guerin described the constant noise as "interfering with her nervous system" and requested that she be allowed to relocate her third grade class.

Ms. Guerin was absent from April 8 through April 12, 1986, and returned to work on April 14 with a statement from Dr. P.G. Staggers that "[d]ue to a hearing loss, pt should not work in an area with a lot of noise." During this time Ms. Guerin was also evaluated by Dr. William H. Pifer of the Ear, Nose &

Throat Consultants of Winchester, Inc. On April 11, 1986, Dr. Pifer completed a prescription stating "this lady cannot tolerate loud noise because of a cochlear problem and should not be working in room with the fan."

Notwithstanding these evaluations, a formal relocation was not forthcoming; however, Mr. Albani allowed Ms. Guerin to temporarily move into the library. The very morning she began working in the library, Ms. Guerin had an encounter with Charles Kalbaugh, then- Assistant Superintendent. She claimed that he "upset" her to the point that she took a medical leave of absence for the remainder of the school year.

Beginning with the 1986-87 school year, Ms. Guerin transferred to a first grade position and was assigned to an area with no objectionable noise. The following two years, 1987-88 and 1988-89 were also uneventful. Noise again became a problem with the 1989-90 school year when a Building Wellness Committee was formed to address air quality problems. At this time, in response to Committee concerns, the HVAC system was adjusted in an effort to increase ventilation. This adjustment also resulted in the equipment producing a higher level of noise. Nonetheless, Ms. Guerin did not complain to the administration until September 1992. At this point she advised Mr. Albani that her hearing loss had worsened and she could not hear her students because of the noise. Ms. Guerin perceived Mr. Albani to be non-responsive and filed a written request with Superintendent Kalbaugh and the Board, dated September 15, 1992, for a room change.

By letter dated September 3, 1992, John Owen, M.A., CCC, of the ENT Consultants in Winchester advised that Ms. Guerin would be trying a Canal Aid with K-Amp to enhance her hearing. He noted that "the majority of hearing aid wearers state that background noise is a significant problem in communication. Therefore, it seems beneficial to Mrs. Guerin that she be provided a classroom as quiet as possible in conjunction with the hearing aid, to try and get some better success at communication."

Receiving no relief regarding a room change, Ms. Guerin filed a level one grievance on September 24, 1992, requesting that she be moved to a room which would accommodate her needs. Subsequently, Dr. James C. Bosley advised Superintendent Kalbaugh by letter dated September 28, 1992, that "[d]ue to severe hearing sensory loss Mrs. Guerin needs a classroom where noise levels must be 30 decibels or less."

On October 2, 1992, Dr. Carl Liebig advised Superintendent Kalbaugh that Grievant "has a

severe hearing loss secondary to classroom noise. This is apparently aggravated by her present classroom assignment. I Would suggest that she be re-assigned to another classroom until present school conditions can be evaluated and corrected."

Principal Albani notified Grievant by letter of October 7, 1992, that he had asked another teacher, Ms. Shaw, to consider switching rooms but that the teacher had declined the request at that time. Grievant was then offered, but rejected, a temporary transfer (six to eight weeks) to New Creek Primary School.

Ms. Guerin was evaluated on December 15, 1992, by Dr. Paul R. Lambert, Professor and Director of the Division of Otology & Neurotology Department at the University of Virginia Health Sciences Center. Dr. Lambert reported that "[s]he has a moderate severe sensorineural hearing loss on the left and a mild hearing loss on the right. As a result of this, she is at a disadvantage for hearing and particularly so if there is significant background noise. It would be my recommendation that the classroom in which she teaches be as quietas possible so that she could maximize the hearing that she does have."

Grievant stated that her condition continued to deteriorate until February 3, 1993, when at the direction of Dr. Bosley, she was forced to work only half-days. On February 5, 1993, Mr. Albani advised Grievant that Ms. Shaw had at that point agreed to switch rooms with her. Ms. Guerin found this room to be of inadequate size, triggering the claustrophobia which she had suffered since she had undergone a CAT scan as part of her medical diagnosis. She also claimed the lighting to be inadequate for the lipreading she used to supplement her hearing.

Dr. Bosley continued to limit Ms. Guerin to one-half day of work in an "attempt to decrease the progression of the disorder and alleviate emotional stresses associated with noise related environment." Learning of the change in Grievant's room assignment, Dr. Bosley wrote on March 23, 1993:

I understand Mrs. Guerin is being placed in a small room without windows. I am also informed that a room with nearly the same noise level and a window is available. I feel Mrs. Guerin would be better off medically in the room with the window as she has a significant degree of anxiety associated with her underlying noise induced hearing loss.

A small room without a window would create an environment that would adversely affect her underlying psychological overlay.

I would appreciate any help you could give to this matter

By letter of the same date, Mr. Albani advised Ms. Guerin that effective immediately she would be moved to the room previously occupied by Ms. Boffman and that "[y]ou must now work full time work." Grievant returned to work under protest, upon the advice of counsel. On May 22, 1995, Ms. Guerin testified that since 1993 she has been moved twice and presently is assigned to a room acceptable to her needs. She states that she no longer suffers from stress and anxiety and has missed no additional work related to this issue. She now amends her requested relief to reinstatement of the leave used as a result of her building-related illness.

Tenney grievance

Barbara Tenney, employed by the Board for twenty-five years, states that she has been assigned as a fifth grade teacher at KPMS since the 1976-77 school year. She recalled that from the very beginning she suffered from burning eyes, irritated nasal passages, and fatigue, although these symptoms were present only at school. Initially, the symptoms were attributed to "off-gassing" from the carpets and other new materials in the school. Ms. Tenney concluded that this was not the case when the symptoms suffered by herself and others did not abate, but rather became more severe, requiring a longer recovery time.

Ms. Tenney provided documentation establishing that she had undergone a septorhinoplasty in 1968. Testing in 1987 revealed some anatomic changes in the nose had created obstruction to the nasal airway and allergies to several varieties of grasses, common ragweed, English plantain, lambsquarter, maple and walnut trees, penicillium, cladosporium and mucor. Immunotherapy was administered and in 1987 the rhinoseptoplasty was redone. [\(See footnote 2\)](#)

In March 1993, Ms. Tenney suffered extended sinusitis and was treated with thirty days of antibiotics and nasal decongestant spray. Grievant returned to the ENT Consultants on April 2, 1993, reporting that after two weeks in her classroom she was suffering from mid- face headache and nasal obstruction. Dr. Peter A. Johnson found no evidence of acute or chronic sinusitis, but diagnosed "a marked degree of allergic rhinitis" and "demonstrable multiple inhalant allergies." Later in 1993, Ms. Tenney was diagnosed as having Hodgkins disease. [\(See footnote 3\)](#) Dr. Qamar Ul Zaman advised Superintendent Kalbaugh in June 1994 that "I feel that the patients health would benefit greatly if she were moved to a more healthy environment." Dr. Zaman reiterated this advice in letters of August 18,

and September 6, 1994.

In October 1994, The United States Equal Employment Opportunity Commission issued a Determination finding Ms. Tenney a qualified individual with a disability since she "suffers with multiple allergies and sensitivities which substantially affect the major life activity of breathing." It was further determined that the Board had denied her a reasonable accommodation in violation of the Americans with Disabilities Act.

Ms. Tenney submitted numerous letters she had written to Principal Albani addressing her health problems and possible room changes which she believed would alleviate her health problems. Her suggestions, including that she be allowed to move her class to the adjacent vocational-technical center were not approved. In April 1994, Grievant applied for a fourth grade position at New Creek Elementary School; however, another employee with equal seniority was given the assignment because he had once taught at the fourth grade level. The Board did offer Ms. Tenney other opportunities for reassignment; however, she explained that she was unable to accept any of the offers because they were located a significantly greater distance from her home or involved instruction of a grade level which would require a considerable amount of preparation time because she had no recent experience with the age group. She opined that the position at New Creek was feasible because it was a short drive and the instruction of fourth graders would not be dramatically different from her fifth grade assignment.

Ms. Tenney amended her complaint at level four to include harassment arising from Superintendent Kalbaugh's handling of her request for time from the personal leave bank. [\(See footnote 4\)](#) Specifically, the delay in ruling on her request, and his calling her physician to obtain information regarding her treatment were cited as evidence of harassment. Ms. Tenney's amended request for relief consists of reinstatement of the sick leave which she was required to use as a result of the building-related illnesses, reimbursement of deductions from her salary in the amount of \$465.63 for days she was absent from work in excess of the available sick leave used, cleaning of the duct work, plenum, and larger HVAC units, replacement of carpet with tile in her classroom, replacement of ceiling tiles, thorough and frequent cleaning of surfaces, including a daily mopping of the floor in her room.

In support of the allegation that their illnesses were building-related, Grievantssubmitted substantial documentary and testimonial evidence relating to numerous studies conducted of the

KPMS environment, as well as structural and maintenance information supportive of the claims regarding environmental deficiencies. Additionally, the record is replete with informal surveys and environmental observations conducted by KPMS staff. This information indicates that many individuals reported numerous physical complaints to varying degrees, and a wide disparity in room conditions.

Board's position

In response to Grievants' complaints, the Board asserts that it reasonably relied upon the advice and recommendations of its contractor, architect, and construction manager, relative to the construction of the facility. The Board notes that Grievants' request for air quality standards based upon current guidelines are inappropriate because, at the time of construction, ASHRAE standards were lower than those issued in the 1980 revisions. The Board acknowledges that it has received certain generalized complaints, mostly related to temperature fluctuations and similar matters, from the building occupants since its opening. These complaints were attributed to the newness of the building and were considered common for buildings of similar size.

The Board asserts that it has made an ongoing effort to resolve the complaints, beginning in 1976 when service personnel assigned as custodians, with their supervisory staff, were sent to Lennox training school to learn the mechanics and maintenance of the Lennox HVAC units. Efforts to reduce noise began in 1977; however, the identification of those matters was necessarily ongoing over a period of time, so that the units could be evaluated seasonally when differing aspects of the system were being utilized. The Board further asserts that it reasonably accepted the assurances of the contractor, architect and construction manager that the concerns had been addressed.

Also beginning in 1977, concerns regarding roof leaks were reported to the construction manager. In 1978, it was discovered that certain masonry units were substandard, and were repaired. Other efforts were made following the 1985 flood, when the carpet was disinfected and other surfaces were cleaned with bleach, eliminating direct and visible evidence of any molds. In 1986 or thereabouts, a reduction in HVAC noise was accomplished by the purchase of a noise attenuator. Carpets were replaced in or about July 1986. A portion of the roof was replaced in 1987 and was replaced entirely in 1992. In 1988, the Board entered into a service agreement with Johnson Controls to spend a specified number of hours reviewing HVAC systems in the county. This contract included the maintenance and repair of the systems as well as on-the-job continuing training for Board employees.

At the request of the Building Wellness Committee, the Board contracted with ERM-Midwest in 1991 to conduct an indoor air quality assessment at the school. In October 1991, the Board contracted with Johnson Controls to clean HVAC parts, coils, and the air plenum (the space between the ceiling and roof).

Also in October 1991, the Board approved a bond issue to be placed on a ballot to replace the HVAC units at Frankfort High School and KPMS. This bond issue failed. In January 1992, the Board awarded a contract for air balancing. In March 1992, a contract was awarded for roof repairs. During late 1992 through 1993, plans were implemented to effectuate the replacement of the HVAC system.

By spring 1993, the Board completed plans to schedule the HVAC replacement in phases, funded by a lease purchase agreement. In the summer of 1993, the project was delayed when counsel advised the Board that a recent decision by the Supreme Court of Appeals placed the lease purchase funding in question. At this time the Board and the contractor agreed to complete the replacement in stages which would accommodate the Board's budgetary considerations. The replacement was managed with completion of Phase I in summer 1993, Phase II in summer 1994, and Phase III in summer 1995. [\(See footnote 5\)](#)

In 1984-85, following the deaths of two faculty members from cancer, the Board responded to faculty concern that the building had contributed to the deaths by involving the West Virginia Department of Health, Industrial Hygiene Division, which conducted a variety of tests, interviews, inspections and samplings at the building. Speakers from the American Cancer Society were engaged to meet with the faculty.

In summary, the Board argues that it has acknowledged the faculty concerns and concedes that some problems have arisen over the years, but asserts that reasonable efforts were made to correct said problems. It notes that the 1981 ASHRAE standards are voluntary and not official or required standards of the Department of Health. The presence of molds to which Ms. Tenney is allergic was not denied; however, the Board reported that the HVAC system had been balanced, the ducts cleaned, and the replacement schedule for the air filters was revised to monthly. The system was completely replaced by 1995.

The Board argues that the building is not "sterile" or even the cleanest or best-maintained facility possible, but that is not a required, or reasonable, standard. Elevated levels of carbon dioxide readings, used to gauge ventilation, were present at times, but again, the Board argues that the

levels were not unhealthy, even using the 1981 standards, but rather, were well below OSHA standards. The Board claims that it credited Grievants with the correct amount of sick and personal leave and that their use of said leave was appropriate. It argues that they have failed to prove entitlement to additional days of sick leave because of building-related illness.

The Board also denies that Ms. Tenney was harassed regarding her application for leave bank time. Superintendent Kalbaugh admits contacting Ms. Tenney's treatment center, but claims that he did so only to inquire about the time of day certain types of treatment were rendered. He explained the purpose of this inquiry was to gain additional information for the sick leave bank committee and to confirm that it was necessary for the treatments to be administered during school hours. The Superintendent claims that if any impropriety occurred, it was by the medical personnel who voluntarily provided him with more information than he requested. Finally, the Board notes that Ms. Tenney was granted leave time from the bank for the treatments and suffered no harm from the inquiry.

The Board also disputes Ms. Tenney's claim that she was denied an opportunity for reassignment. The Board cites several offers made, but rejected, by Grievant. The Board asserts that the offers were within Grievant's area of certification and were made with the proviso that she could return to KPMS once the HVAC replacement was complete, and were, therefore, reasonable.

The Board also argues that Grievants have failed to file Workers' Compensation claims. This failure to seek payment of temporary total disability benefits for any periods they were medically unable to work, bars the present claim for reinstatement of leave and damages. The Board asserts Grievant's request for specified cleaning and replacement of carpet with tile is unreasonable and unsupported by the medical evidence of record. The Board notes that Grievant's medical history establishes that she has a history of allergies to common molds and other substances, found outdoors and elsewhere, which predates her building- related complaints.

The Board denies that KPMS is a "sick building" and denies that it owes Grievants leave time, money, or other specified relief. The Board maintains that Ms. Tenney's request for reassignment is moot given the completion of the HVAC replacement in the summer of 1995. Finally, the Board argues that Grievants have failed to allege, and establish, a violation of policy, statute, regulations, or written agreement, and, having failed to meet their burden of proof, the grievance must be denied.

Discussion

Notwithstanding the abundance of evidence admitted into the record for the purpose of establishing whether Grievants' suffered from building-related illness, it is not necessary to determine whether KPMS is a "sick building." In fact, this issue will be more appropriately addressed by a related action pending in another forum. [\(See footnote 6\)](#) However, Grievants have raised an issue which is properly before the Grievance Board in that they complain of "any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or health and safety of students or employees." W.Va. Code §18-29-2(a).

Both Grievants have proven by a preponderance of the evidence that their physical conditions were at least aggravated by conditions present in the rooms in which they worked. The evidence clearly establishes that the HVAC system was generally not working at an optimal level throughout the time period covered by Grievants' complaints. The Board appears to concede that excessive noise was generated when the HVAC system was accelerated to provide better ventilation. It is also apparent that roof leaks created conditions which were frequently, if not continually, conducive to the presence of molds and mildews. This is not to say that the building was "sick," but only that certain conditions in the building were having a negative effect on Grievants' health given their particular circumstances.

The evidence also establishes that the problems complained of by Grievants may be attributed to the normal aging process of the building and equipment, and that the Board has taken action over the years to address the concerns of Grievants and others. However, the fact remains that two long-term teachers were experiencing serious physical problems, and relatively minor accommodations which would allow them to continue working were denied.

Responses to Ms. Guerin's requests were that she could move her room if another teacher would agree, or she was moved to a room which offered equally negative accommodations. There is no assertion that the Board lacked the authority to simply move Ms. Guerin into a room which met her needs. Clearly, a room existed since she testified that she has now been moved to an acceptable area.

Ms. Tenney's request to move her class to the vocational-technical center until conditions were improved also does not appear unreasonable. Because she teaches a self-contained class, instruction could be provided in one of many locations. If her students were required to be in another area for activities or events, logistically their relocation from the vocational center would be a minimal

endeavor. Additionally, the Board could likely have granted Ms. Tenney's request for transfer to New Creek Elementary School. The Board's explanation that the applicant awarded the assignment had the same seniority as Ms. Tenney, but had taught fourth grade many years ago is not particularly persuasive in light of the other offers made to her which apparently were not contingent upon the qualifications of other employees who may have been interested in those assignments. Ms. Tenney's rejection of the Board's offer of other positions which required longer driving time and/or assignments for which she was certified, but which were significantly different than the fifth grade level which she had held since at least 1976, was not unreasonable given her weakened condition during treatment for Hodgkins disease.

The reasons given by the Board for not allowing Grievants to move to other areas are specious at best. It is difficult to understand the Board's failure to quickly and simply resolve these situations with minimal inconvenience and cost. To that extent, Grievants have proven by a preponderance of the evidence that the Board knowingly and intentionally engaged in acts which caused or compounded their physical distress, thereby impairing their ability to perform their instructional duties .

In addition to the foregoing narration, it is appropriate to make the following formal findings of fact and conclusion of law.

FINDINGS OF FACT

1. Grievants Mildred Guerin and Barbara Tenney are teachers assigned to Keyser Primary-Middle School at all times relevant herein.

2. Ms. Guerin suffers from a hearing loss documented since 1986. This condition was aggravated by noise generated from an HVAC system resting on the roof above her room. Grievant's continued exposure to the noise, and subsequent relocation to rooms which were subject to high noise levels, offered inadequate lighting to accommodate her lipreading, or were so small as to trigger claustrophobia, resulted in increased stress and anxiety levels leading to extended usage of sick leave prior to her reassignment to a room in which she may adequately function.

3. Ms. Tenney has suffered from respiratory distress, fatigue, headaches, and Hodgkins disease since she has worked at KPMS. Her request to move her classroom to another building was denied as was her request to transfer to New Creek Elementary School. Ms. Tenney's ongoing illnesses have resulted in her extended use of sick leave, plus additional time off without pay, resulting in the loss of \$465.63 in docked pay.

4. The Board failed to offer any persuasive reason why Grievants were not offered accommodations for their physical conditions at the time they were originally requested.

CONCLUSION OF LAW

Grievants have proven by a preponderance of the evidence that when the Board failed to provide them with readily available accommodations for their health problems, it engaged in acts which constituted a substantial detriment to, or interference with, their ability to attend work on a regular basis, thereby affecting their job performance and aggravating existing and/or ongoing health problems.

Accordingly, the grievances are **GRANTED** and the Board is Ordered to reinstate twenty nine and one-half days of sick leave to Ms. Guerin and sixty days of sick leave to Ms. Tenney. The Board is further ordered to reimburse Ms. Tenney in the amount of \$465.63 for leave taken without pay after she exhausted her available sick leave. Cleaning and maintenance of the HVAC system and Grievant Tenney's classroom should be scheduled consistent with industry standards.

DATED: January 31, 1996 _____

Sue Keller

Senior Administrative Law Judge

[Footnote: 1](#)

ASHRAE is the acronym for the American Society of Heating, Refrigeration and Air Conditioning Engineers.

[Footnote: 2](#)

It appears that the rhinoseptoplasty was essentially the same procedure as the septorhinoplasty.

[Footnote: 3](#)

Ms. Tenney does not claim the Hodgkins disease to be a result of the school environment.

[Footnote: 4](#)

W.Va. Code §18A-4-10 provides that a county board of education may establish a personal leave bank which employees may contribute no more than two days of personal leave per school year. The bank shall be operated pursuant to rules adopted by the board which shall require that leave bank days be used only by an active employee with less than five days accumulated personal leave who is absent due to accident or illness of such employee.

[Footnote: 5](#)

This is not a comprehensive listing of the efforts made by the Board during this period of time.

[Footnote: 6](#)

Barbara Tenney, et al. v. The Mineral County Board of Education; Gandee and Partners, Inc., Street Construction Company, Inc; and Johnson Controls, Inc., Civil Action No. 93-C-95 is currently pending in the Circuit Court of Mineral County.
