

**EDWARD L. DEEM,**

**Grievant,**

**v. DOCKET NO. 96-CLER-033**

**WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION,**

**Respondent.**

**DECISION**

Mr. Edward L. Deem, Grievant, is employed by the West Virginia Division of Environmental Protection (Respondent) as an Environmental Inspector. Grievant filed this grievance on July 10, 1995, alleging that:

WV DEP-OMR working Inspectors (Inspectors which Inspect) are granted twenty-four (24) days of annual leave and allowed to carry over forty (40) days of annual leave, making a total of sixty-four (64) days of annual leave per year, when they have over thirty (30) years of service, such as myself.

However, even when the eleven (11) days or more advance [notice] is given to request annual leave, the working inspectors are held responsible for doing their assigned workload for that time, when they are supposedly on leave from the agency. In the past I have voiced my opinion to the agency and stated figuratively to show the need for at least one (1) "swing" inspector for every ten (10) totwelve (12) working inspectors. The agency has chosen to ignore me and continues to hold me responsible for doing my regular workload even during periods (month or quarter) when I am on approved annual leave or they deny my leave because I cannot complete my workload (monthly or quarterly).

This discriminates against the working inspectors in the DEP-OMR as compared to the rest of the WV employees. Example: When a prison guard is on approved leave, he or she is not held responsible if a prisoner escapes during that period. However, Supervisor L. Brent Wiles explained that he lowered [m]y Annual Evaluation one year because I did not make frequency during the period that I was on approved leave. I explained to Supervisor Wiles that I should not have been held responsible for

frequency during that time that I was on vacation (annual leave). Supervisor Wiles explained that the agency did not agree with that position. This is discrimination against DEP-OMR working inspectors compared to other state employees.

As relief, Grievant desires "[t]o be granted annual leave without prejudice by the agency. (WV DEP - OMR)."

Grievant was denied relief at Levels I, II, and III. He appealed this matter to Level IV on January 24, 1996. At Level IV, an evidentiary hearing was held at the Grievance Board's Elkins office on March 6, 1996. The case became mature on April 2, 1996, upon receipt of Respondent's post-hearing submission. ([See footnote 1](#))

The following findings of fact are derived from the record.

### **FINDINGS OF FACT**

1. Grievant is an Environmental Inspector. His duties include the inspection of quarries, and active and inactive coal operations. 2. State and/or Federal law requires: (1) quarries to be inspected every fifteen days; (2) inactive coal operations to be inspected once every quarter; ([See footnote 2](#)) and (3) active coal operations to be completely inspected at least once every quarter, but a partial inspection may be performed by aerial view.

3. On June 14, 1995, Grievant requested annual leave for the period of July 1, 1995, through September 5, 1995, inclusive. Grievant had accrued in excess of ten weeks of annual leave.

4. L. B. Wiles, Grievant's supervisor, denied that request on June 15, 1995.

5. The Administrative Rule of the West Virginia Division of Personnel, 143 C.S.R. 15.03(c), provides, in pertinent part, that "[a]ccrued annual leave shall be granted at such times as will not materially affect the agency's efficient operation . . .".

### **DISCUSSION**

At first blush these issues might appear moot because the period of time Grievant desired to take annual leave has past. "In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." ([See footnote 3](#)) State ex rel. M.C.H. v. Kinder, et al., 317 S.E.2d 150, 152, (W. Va. 1984), citing Murphy v. Hunt, 455 U.S. 478, 481, 102 S.Ct. 1181, 1182-83, 71 L.Ed.2d 353, 356 (1982); Powell v. McCormack, 395 U.S. 486, 496, 89 S.Ct. 1944, 1950, 23 L.Ed.2d 491, 502 (1960).

However, there are exceptions to the mootness doctrine. In State ex rel. M.C.H. v. Kinder, 317 S.E.2d 150 (W. Va. 1984), the Supreme Court of Appeals of West Virginia favorably cited State v. Gleason, 404 A.2d 573 (Me. 1979). In Gleason, Maine's Supreme Court outlined the following three considerations in determining mootness:

First, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief. (Cites omitted).

Second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public. (Cites omitted).

Third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting or determinate nature, may appropriately be decided. (Cites omitted).

Id. at 578.

Therefore, since the first issue, the request of leave, is capable of repetition but would evade review because of the typical length of the grievance process, the Undersigned will entertain that particular issue. However, the second issue concerning one being held liable for tasks while on leave, contains too many variables and unknown factors to be addressed properly at this time without an actual situation to examine. Furthermore, issues concerning one being sanctioned while on leave, while capable of repetition, are not likely to evade review. For example, Grievant

could have grieved the occurrence which he mentions in the third, and last paragraph, of his grievance statement. Therefore, the second issue is moot, and only the first issue will be addressed. [\(See footnote 4\)](#) Grievant's first issue concerns a request for annual leave in excess of nine weeks. On June 14, 1995, Grievant requested annual leave for the period of July 1, 1995, through September 5, 1995, inclusive. L. B. Wiles, Grievant's Supervisor, denied that request on June 15, 1995. In denying Grievant's request, Supervisor Wiles cited Respondent's annual leave policy, problems in "covering" Grievant's inspections, the extensive amount of leave requested, and the timeliness of the request.

The applicable policy, W. Va. Division of Personnel Administrative Rule, 143 C.S.R. 15.03(c), provides, in pertinent part, that "[a]ccrued annual leave shall be granted at such times as will not materially affect the agency's efficient operation . . .".

Grievant's request, for in excess of nine weeks of annual leave, was made only twelve working days before it was to begin. Furthermore, Supervisor Wiles was scheduled to begin six days of leave the day after he received Grievant's request. Therefore, the time available for Supervisor Wiles to consider Grievant's request was substantially decreased. While testifying at the Level IV hearing, Supervisor Wiles seemed willing to work with the employees he supervises when leave is requested.

Grievant seems to be under the impression that as long as he complies with Respondent's policy that leave requests must be submitted eleven days prior to taking leave, that he is guaranteed the leave. However, Grievant failed to provide any policy, rule or regulation which supports such a position. Moreover, Grievant's theory that annual leave is part of one's compensation, and that the value of earned leave is diminished if one cannot take it when requested, does not provide a valid reason to grant his grievance.

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

#### **CONCLUSIONS OF LAW**

1. In nondisciplinary matters the grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Unrue v. W. Va. Dept. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Ward v. W. Va. Regional Jail and Correctional Facility Authority, Docket No. 95-RJA-410 (Feb. 20, 1996).

2. Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or property are not properly cognizable by a court. Harrison v. Cabell County Bd. of Educ., 351 S.E.2d 604 (W. Va. 1985). See also, Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-87-102-1 (June 30, 1987); State ex rel. M.C.H. v. Kinder, et al., 317 S.E.2d 150, 152, (W. Va. 1984); Murphy v. Hunt, 455 U.S. 478, 481 102 S.Ct. 1181, 1182-83, 71 L.Ed.2d 353, 356 (1982); Powell v. McCormack, 395 U.S. 486, 496, 89 S.Ct. 1944, 1950, 23 L.Ed.2d 491, 502 (1960).

3. The second issue concerning one being held liable for tasks while on leave is moot and advisory.

4. The Grievance Board does not issue advisory opinions. Wagner v. Hardy County Bd. of Educ., Docket No. 20-87-102-1 (Feb. 23, 1996); Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-

87-102-1 (June 30, 1987).

5. Granting Grievant's annual leave request would have "materially affect[ed] the agency's efficient operation".

6. Grievant failed to prove by a preponderance of the evidence that Respondent's denial of his leave request was arbitrary and capricious or an abuse of discretion.

7. Grievant failed to show a violation, misapplication or misinterpretation of any statute, policy, rule, or regulation.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," 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 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.

Dated: June 19, 1996 \_\_\_\_\_

JEFFREY N. WEATHERHOLT  
ADMINISTRATIVE LAW JUDGE

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[Footnote: 1](#)

*Grievant decided not to file proposed findings of fact and conclusions of law.*

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[Footnote: 2](#)

*A quarter is three months in length.*

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[Footnote: 3](#)

*To decide an issue which is no longer in controversy would be advisory, and the Grievance Board does not issue advisory opinions. See, Wagner v. Hardy County Bd. of Educ., Docket No. 20-87-102-1 (Feb. 23, 1996); Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-87-102-1 (June 30, 1987).*

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[Footnote: 4](#)

*Even if this issue is not moot, Grievant would not prevail on a discrimination claim in any event. One of the elements in*

*proving discrimination is that Grievant is "similarly situated, in a pertinent way, to one or more other employees," and he has failed to prove this element. See Kingsbury, v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-330 (Feb. 21, 1996).*