

**JUDITH TAYLOR,**

**Grievant,**

**v.**

**DOCKET NO. 96-29-131**

**MINGO COUNTY BOARD OF EDUCATION,**

**Respondent.**

### **DECISION**

This is a grievance by Judith Taylor (Grievant) alleging that Respondent Mingo County Board Of Education (MCBE) violated W. Va. Code § 18A-5-2 by failing to pay her for certain days when she was off work due to a compensable injury. This grievance was initiated on or about February 13, 1996. As her immediate supervisor had no authority to grant the relief requested, this grievance was elevated to Level II where an evidentiary hearing was conducted on March 6, 1996. The grievance was partially granted at Level II in a written decision issued by the Superintendent's designee, John Fullen, on March 19, 1996. Grievant waived Level III in accordance with W. Va. Code § 18-29-4(c), and appealed to Level IV on March 27, 1996. Thereafter, the parties agreed to supplement the Level II record with stipulations of fact and additional documentary evidence, submitting the matter for decision on the record as supplemented. [\(See footnote 1\)](#) This matter became mature for decision on June 18, 1996, upon receipt of Grievant's fact-law proposals. [\(See footnote 2\)](#)

The facts necessary to resolution of this dispute are not in controversy, with the only contested issues relating solely to matters of law. Accordingly, the following Findings of Fact are appropriately made from the stipulated record.

### **FINDINGS OF FACT**

1. Grievant is employed by MCBE as a full-time Cook III at Lenore Grade School, holding a 200-day employment contract. L II HT; SOF ¶ 1 & 3. [\(See footnote 3\)](#)

2. Grievant has been unable to work since September 6, 1995, due to a compensable, work-related injury that occurred on June 7, 1995. SOF ¶ 1.

3. Grievant was not compensated by MCBE for the 1995 Veteran's Day, Thanksgiving, and Christmas holidays, nor for the 1996 New Year's, Martin Luther King, Primary Election and Memorial Day holidays. SOF ¶ 2. [\(See footnote 4\)](#)

4. Grievant was not compensated for six "outside school environment" (OSE) days which occurred in March and April of 1996. Likewise, Grievant was not compensated for ten days in 1995 and 1996 when the schools were closed due to inclement weather involving snow or flooding. SOF ¶ 2.

5. MCBE's employees holding 200-day employment terms are not required to report to work on "snow days," and such employees receive their usual daily wages for these days. SOF ¶ 3.

6. As of March 6, 1996, Grievant had two days of personal leave remaining in her account. L II HT.

7. This grievance was filed on February 13, 1996. L II HT.

### **DISCUSSION**

Initially, MCBE alleges that this grievance was not timely filed in accordance with W. Va. Code § 18-29-4(a)(1), which provides:

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 which the moving party must establish by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). MCBE contends that this grievance should have been filed within 15 days of October 20, 1995, the date when Grievant first became aware that she was not being paid for holidays. The grievance was initiated on February 13, 1996. Grievant counters this argument by pointing to W. Va. Code § 18-29-3(a) which provides that "the specified time limits . . . shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten [18A-4-10], article four,

chapter eighteen-a of this code." W. Va. Code § 18A-4-10 makes provision for employees who are "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." Accordingly, the undersigned administrative law judge concludes that Grievant's absence due to an on-the-job injury entitling her to receive temporary total disability benefits under workers' compensation tolled the time limits for filing a grievance as provided in W. Va. Code §§ 18-29-4(a)(1), 18-29-3(a), and 18A-4-10. See Beverly v. Wyoming County Bd. of Educ., Docket No. 91-55-408 (Jan. 23, 1992). Therefore, the instant grievance was timely filed. See Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990).

Turning to the merits of this grievance, Grievant contends that she has been denied payment for certain legal school holidays, "outside school environment" (OSE) days, and for "snow days" and "flood days" resulting from inclement weather, contrary to the provisions of W. Va. Code §§ 18A-5-2 and 18-5-15.

Grievant 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.

W. Va. Code § 18A-5-2 further provides:

Any school or schools may be closed by proper authorities on account of the prevalence of contagious disease, conditions of weather or any other calamitous cause over which the board has no control. Under any or all of the above provisions, the time lost by the closing of schools is counted as days of employment . . . . Professional and service personnel shall receive pay the same as if school were in session.

This Grievance Board has previously interpreted §§ 18A-5-2 and 18A-4-10 ([See footnote 5](#)) to find that 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). However, when employees have not been compensated for all accrued personal leave days, they are entitled to compensation for all holidays and "snow days" which occur during the time they are off work due to injury. Toney v. Lincoln County Bd. of Educ., Docket No. 22-88-005-1 (Nov. 29, 1988); Thomas, supra. See White v. Mingo County Bd. of Educ., Docket No. 96-29-115 (June 4, 1996); Aftanas v.

Brooke County Bd. of Educ., Docket No. 05-87-295-3 (Jan. 29, 1988). In accordance with these precedents, as Grievant had not exhausted her accrued personal leave, [\(See footnote 6\)](#) she remained entitled to compensation for legal school holidays and days when schools were closed due to a "calamity." As MCBE treats "flood days" in the same manner as "snow days," Grievant is also entitled to compensation for the two days when MCBE closed the schools due to flooding. W. Va. Code § 18-5-15 provides that school boards "shall designate and schedule for teachers and service personnel six days to be used by the employee outside the school environment." These "OSE" days have been treated the same as holidays and snow days. See Toney, supra. Accordingly, Grievant has similarly established entitlement to compensation for those OSE days which occurred while she was absent due to injury.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

### **CONCLUSIONS OF LAW**

1. A Grievant is required to prove the allegations of his or her complaint by a preponderance of the evidence. Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. A timeliness defense is an affirmative defense which the moving party must establish by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. The time limits for filing a grievance set forth in W. Va. Code § 18-29-4(a)(1) "shall be extended whenever a grievant is not working" due to an on-the-job injury entitling her to receive temporary total disability benefits under workers' compensation. W. Va. Code §§ 18-29-3(a), and 18A-4-10. See Beverly v. Wyoming County Bd. of Educ., Docket No. 91-55-408 (Jan. 23, 1992). 4. As a result of the tolling of the time limits for initiating a grievance under W. Va. Code § 18-29-4(a)(1) as authorized by W. Va. Code §§ 18-29-3(a) and 18A-4-10, this grievance was timely filed on February 13, 1996.

5. W. Va. Code § 18A-5-2 provides that when designated school holidays fall "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." See Hale, supra.

6. W. Va. Code § 18A-5-2 further provides that "schools may be closed by proper authorities" due to "conditions of weather or any other calamitous cause over which the board has no control." On

such occasions, "[p]rofessional and service personnel shall receive pay the same as if school were in session." W. Va. Code § 18A-5-2.

7. Employees who are absent because of an injury who have not exhausted their personal leave days are entitled to pay for those days enumerated in W. Va. Code § 18A- 5-2. See Toney v. Lincoln County Bd. of Educ., Docket No. 22-88-005-1 (Nov. 29, 1988); Thomas v. Boone County Bd. of Educ., Docket No. 03-88-087 (Oct. 18, 1988). 8. Likewise, employees who are absent due to injury are entitled to compensation for those out of school environment days scheduled in accordance with W. Va. Code § 18-5-15 which occur while they still have accrued personal leave to their credit. See Toney, supra.

Accordingly, this Grievance is hereby **GRANTED** . Respondent is required to compensate Grievant, consistent with W. Va. Code § 18A-4-10, for the seven legal school holidays, six outside school environment days, and ten weather-related "snow" and "flood" days heretofore unpaid and occurring during times when she was off work due to injury and while she still had accrued personal leave to her credit.

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.

- **LEWIS G. BREWER**  
**ADMINISTRATIVE LAW JUDGE**

**Dated: August 19, 1996**

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[Footnote: 1](#)

*For administrative reasons, this matter was reassigned to the undersigned administrative law judge for decision.*

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[Footnote: 2](#)

*MCBE apparently elected to rely on the oral argument made by its counsel at the close of the Level II hearing.*

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[Footnote: 3](#)

*The Level II hearing transcript will be cited as "L II HT." As the transcript is not paginated, citation to a specific page is impractical. The Stipulation of Fact entered into between the parties will be cited as "SOF" with further reference to specific paragraph numbers.*

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[Footnote: 4](#)

*Although the Stipulation of Fact indicates that the New Year's Day holiday fell on "January 1, 1995," it is apparent from the context that this is a typographical error and the parties intended to refer to the 1996 holiday.*

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[Footnote: 5](#)

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*

*workers' 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 C.S.R. 158, Use of Personal Leave Benefits With Workers' Compensation Benefits (5612).*

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[Footnote: 6](#)

*The sparse record in this case does not indicate why Grievant had not yet exhausted her personal leave days. However, 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. White v. Mingo County Bd. of Educ., Docket No. 96-29-115 (June 4, 1996); Bumgarner v. Logan County Bd. of Educ., Docket No. 94-23-583 (May 9, 1995); Sanders v. Monongalia County Bd. of Educ., Docket No. 92-30-368 (May 10, 1993); Thomas v. Boone County Bd. of Educ., Docket No. 03-88-087 (Oct. 18, 1988).*