OTHELETTA M. ORR,

Grievant,

v. **Docket No. 96-10-400**

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

The grievant, Otheletta M. Orr, is employed as an elementary vocal music teacher at Page/Powellton Elementary School in Fayette County. On September 19, 1996, she filed this grievance stating “my request for professional leave for August 26-30, 1996, was approved, but I was not paid for the five days I was on leave. The relief I am seeking is payment for those five days.” A Level II hearing was conducted on November 13, 1996. After an adverse decision at that level, pursuant to W.Va. Code §18-29-4(c), the grievance was appealed to Level IV. A scheduled Level IV hearing was cancelled upon the agreement to submit the case for decision based upon the lower level record. The case became mature for decision with the receipt of the parties' proposed findings of fact and conclusions of law on January 16, 1997. (See footnote 1) During the 1995-96 school year, the grievant was appointed to become a delegate to the Democratic National Convention to be held in Chicago on August 26 through 30, 1996. Since the school year would have begun, the grievant would have to use leave days. She filled out a Professional Leave Request form, (See footnote 2) providing the following information:

A. Where: Chicago, IL

B. When: August 26 - August 30, 1996

C. Purpose: Delegate to the Democratic National Convention

Under the field of “Expenses”, i.e., registration, lodging, meals, etc., there were lines implying that no request of expenses were to be included. A box was checked that a substitute would be required during her absence.

On June 19, 1996, she had mailed the request form to the Fayette County Board of Education (Board). Upon the approval of Jack Crist, then Associate Superintendent of Curriculum and Instruction, the request was forwarded to Dr. William Capehart, then Superintendent, and then on to

Ron Wood, Director of Accounting at the Finance Office.

About two weeks before her payday, she was informed by Ron Wood that the Professional Leave request would not be approved. She was told that she could take three personal days and two days without pay, or in the alternative, she could take five days without pay. She refused the offer and at that point, filed this grievance.

At the Level II hearing, Jack Crist testified that approving the request was an error. He believed it to be a request to attend an education association meeting. He had knowledge that the grievant held an office in a particular education association anderroneously believed the meeting dealt with that. He further testified that had he recognized that it was a request to attend a political convention, he would have denied the request.

Kenneth Carson, Interim Superintendent, Finance Administration/Treasurer testified that after a discussion with Mr. Crist, they had realized that there had been an error in the approval. Mr. Crist admitted to only scanning the document, whereas Dr. Capehart approved it on the erroneous approval of Mr. Crist. In reversing the decision to grant the paid leave request, the respondent held that the approval violated applicable Fayette County policy and was contrary to State Board Education audit ruling. (See footnote 3) The statement reflecting this issue states:

Professional Leave

> ___During our audit, we noted that one professional and two service personnel received leave (with pay -- no reduction in personal leave) to attend the special legislative session held in Charleston on August 28, 29, 30, 31, 1990. This is in direct contrast to an Attorney General opinion which stated that personnel wishing to attend could do so, but at a reduction of leave.

Recommendation:

> It is recommended that greater control be exercised to ensure that employees not be granted professional leave with pay for lobbying activities.

The grievant contends that she did not lobby or promote any platforms while at the convention. She argues that under W.Va. Code §18A-5-4, the convention is covered as an educational meeting. Additionally, she was being a good role model for the children that she teaches.

W.Va. Code §18A-5-4 states that “a county board of education **may** approve theattendance of any or all teachers at educational conventions, conferences, or other professional meetings of teachers on school days when in the **judgement** of the superintendent, it is necessary or desirable....” (emphasis added). The term “may” indicates the action to be discretionary rather than mandatory in nature. The Board has broad discretion to deny such leave. Reynolds, et al. v. Mason County Bd. of Educ., Docket No. 26-87-204 (Mar. 28, 1988).

In the instant case, a mistake was apparently made by an Associate Superintendant and the Superintendant. The record notes that all parties acted in good faith, without deceit. The grievant may have relied upon the approval of the superintendent for her request, but final approval is not met until a request has been through all of the channels involved. Approval by a supervisor can only lead to the next level of authority to meet with their approval, and so on. The County Board of Education is by statute, the ultimate authority. It may or may not accept the judgement of its superintendent. “A state or one of its political subdivisions is not bound by the unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority.” Syllabus Point 2, Freeman v. Poling, 175 W.Va. 814, 338 S.E.2d 415 (1985).

The doctrine of estoppel was raised. It would be defined as follows: “The doctrine of estoppel can be applied when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another parties misrepresentation or concealment of material fact.” Ara v. Erie Ins. Co., 387 S.E. 2d 320, 324 (W.Va. 1989).

One of the essential elements of estoppel is that the conduct or statement must be relied and acted upon. In the instant case, the grievant has presented no testimony or other evidence to show such reliance. She has not indicated that her attendance at theconvention was conditioned upon her being granted professional leave. All indications are that she agreed to participate as a delegate without considering it as a factor. Without this important basic element, the doctrine cannot be applied.

Findings of Fact

1. The grievant is employed as an elementary vocal music teacher at Page/Powellton Elementary School in Fayette County.

2. The grievant was appointed to become a delegate to the Democratic National Convention to be held August 26 through 30, 1996.

3. On June 19, 1996, a Professional Request form was mailed to the Fayette County Board of Education for leave approval by the grievant.

4. The leave form was approved by Jack Crist, the then Associate Superintendent of Curriculum and Instruction, mistakenly believing that it dealt with a convention of an education association. Upon the strength of the approval of Mr. Crist, the then Superintendent Dr. Capehart also mistakenly approved the request.

5. Once the request had reached the finance office, the Director of Accounting, Ron Wood, notified the grievant that the request for Professional Leave would not be approved. He offered her either three personal days and two without pay, or five days without pay.

Conclusions of Law

1. W.Va. Code §18A-5-4 deals specifically with the attendance of teachers toeducational conventions, educational conferences or other professional meetings. 2. The Democratic National Convention is not an educational convention, conference or other professional meeting and does not meet the criteria of W.Va. Code §18A-5-4.

3. The county board of education has complete discretion to approve or disapprove professional leave. Reynolds, et al. v. Mason County Bd. of Educ., Docket No. 26-87-204 (Mar. 28, 1988).

Therefore, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette 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.

JAMES D. TERRY

Administrative Law Judge

DATE: May 7, 1997

CERTIFICATE OF SERVICE

I, **James D. Terry**, Administrative Law Judge for the West Virginia Education and State Employees Grievance Board, do hereby certify that I have this 7th day of May, 1997, served copies of the foregoing upon the following **DECISION** by Certified United States Mail to their addresses as follows:

Otheletta Orr
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_____

JAMES D. TERRY

Administrative Law Judge

Footnote: 1

Due to administrative reasons, on January 30, 1997, the grievance was transferred to the undersigned for disposition.

Footnote: 2

The professional leave form had been submitted as Grievant's Exhibit No. 1 at the Level II hearing.

Footnote: 3

Respondent's Exhibit No. 1, Level II hearing.