CHERYL BARNETT,

Grievant,

v. **Docket No. 02-40-122**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Cheryl Barnett ("Grievant") initiated this proceeding on January 17, 2002, challenging the experience credit given to her for the 1997-1998 school year by Respondent Putnam County Board of Education ("PCBOE"). She seeks to be credited for the correct number of years of experience by adjustment to her salary, with interest. Level one consideration was waived, and a level two hearing was held on April 4, 2002. The grievance was denied in a written level two decision dated April 23, 2002. Level three consideration was also waived, and Grievant appealed to level four on April 29, 2002. The parties elected to have a level four decision rendered based upon the evidence introduced at level two, supplemented by written proposals submitted by May 24, 2002, at which time this matter became mature for consideration. Grievant was represented by Susan E. Hubbard of the West Virginia Education Association, and Respondent was represented by counsel, Gregory W. Bailey.

The following findings of fact pertinent to resolution of this matter are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by PCBOE for 21 years, most recently as a music teacher at Winfield Middle School.

2. In 1996 Grievant began suffering from a serious illness, which caused her to be absent from work for an extensive period of time.

3. PCBOE operates a personal leave bank, whereby employees who have exhausted their own leave time, but are unable to work due to illness or disability, can remain on the payroll.

4. During the 1996-1997 school year, Grievant worked 151½ days and received 43½ days from the personal leave bank. Grievant has received credit from PCBOE for the 1996-1997 school year as part of her total years of experience for salary purposes.

5. During the 1997-1998 school year, Grievant worked only 13 days, but she received 120 days from the leave bank. Grievant was paid her salary for 133 days that school year.

6. Because Grievant did not actually work 133 days during the 1997-1998 school year, she did not receive credit for that year in her experience calculation.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Teachers' salaries are based, in part, upon their “years of experience” which is defined by W. Va. Code §18A-4-1(1) as “the number of years the teacher has beenemployed in the teaching profession.” The issue of whether or not a teacher should receive experience credit while off work, but in pay status by virtue of personal leave bank days, has not previously been addressed by this Grievance Board. However, it is well- established that “an employee must work 133 days in order to receive credit for a year of teacher's experience for pay increment purposes.” Harkins v. Ohio County Bd. of Educ., 179 W.Va. 373, 368 S.E.2d 224 (1988). The “133-day rule” is currently embodied in State Board of Education Policy 5610. Nevertheless, what is meant by “working” 133 days is somewhat unclear.

A similar issue, that of the entitlement to experience credit of teachers who are off work and receiving workers' compensation benefits, has, however, been addressed in numerous Grievance Board decisions. The Grievance Board has repeatedly upheld the State Superintendent of School's interpretation of Policy 5610 as excluding “non-working employees receiving workers' compensation benefits from accumulating days of employment credit for calculating yearly pay increments.” Blankenship v. Mingo County Bd. of Educ., Docket No. 97-29-386 (Feb. 6, 1998) (citing Aftanas v. Brooke County Bd. of Educ., Docket No. 05-87-295-3 (Jan. 9, 1988)); See also Wilson v. Monongalia

County Bd. of Educ., Docket No. 92-30-306 (Jan. 7, 1993); Seckman v. Brooke County Bd. of Educ., Docket No. 91-05-251 (Nov. 27, 1991), Thompson v. Kanawha County Bd. of Educ., Docket No. 20-86-366-1 (July 31, 1987). Unfortunately, these decisions shed little light upon the issue presented in the instant case.

A recent Superintendent's interpretation, while not addressing the issue of personal leave banks, does provide some possible guidance. In an interpretation dated November 30, 2001, State Superintendent David Stewart, responding to a question regardingexperience credit for teachers who are members of the state legislature, noted that, for purposes of calculating the 133 days which a teacher must work to be entitled to the increment, “[a] day of work is construed to mean a day for which the teacher is entitled to be paid, including actual days of work, holidays, vacation days, inclement weather days, personal leave days, and other such days.” Therefore, it would appear that, if one were to consider personal leave bank days as days for which a teacher is “entitled” to payment, they should be included when calculating his or her experience credit.

Personal leave banks may be established by county boards of education, pursuant to W. Va. Code § 18A-4-10, and are operated pursuant to rules set up by each county board. Respondent argues that no entitlement exists to personal leave bank days, the award of which is within the discretion of each individual leave bank committee. Accordingly, they should not be included in calculating a teacher's experience. The undersigned disagrees.

Although the individual rules for eligibility may vary from county to county, an employee who has established eligibility and has contributed to a personal leave bank is “entitled” to receive leave days from such a bank. In addition, it would appear that the distinguishing characteristic of times during which an employee is receiving worker's compensation benefits is that the employee would not be in “pay status” pursuant to any kind of personal leave, holiday pay, inclement weather periods, or any other type of days for which an employee is receiving pay from the county board. Conversely, an employee using days awarded to him or her by a personal leave bank is in pay status and is arguably using “personal leave days;” they just happen to have come from a leave bank as opposed to having been earned exclusively by that particular employee. "School personnel lawsand regulations are to be construed strictly in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). Accordingly, the undersigned finds that days for which an employee is paid pursuant to a personal leave bank award are included in the 133 days which an employee must work

to earn experience credit for salary purposes.

Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. Teachers must work 133 days in order to receive credit for a year of experience for pay increment purposes. State Board of Education Policy 5610; Harkins v. Ohio County Bd. of Educ., 179 W.Va. 373, 368 S.E.2d 224 (1988).

3. For purposes of calculating the 133 days which a teacher must work to be entitled to salary increment, "[a] day of work is construed to mean a day for which the teacher is entitled to be paid, including actual days of work, holidays, vacation days, inclement weather days, personal leave days, and other such days." November 30, 2001, State Superintendent Interpretation.

4. Days for which a teacher is paid pursuant to an award from a personal leave bank should be included as part of the 133 days teachers are required to work to earn experience credit for salary purposes. 5. Grievant was paid for 133 days during the 1997-1998 school year and is entitled to experience credit for that year.

Accordingly, this grievance is **GRANTED**. Respondent is directed to include the 1997-1998 school year in Grievant's total years of experience, adjust her salary accordingly, and compensate her back pay plus interest at the statutory rate as of the 1998-1999 school year.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Putnam 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit

court.

Date: June 21, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge