DAVID BAYS,

Grievant,

v. **DOCKET NO. 05-10-103**

FAYETTE COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant David Bays filed a grievance on February 1, 2005 (See footnote 1) , in which he claimed that Respondent, the Fayette County Board of Education, denied him pay for a personal day after it had been approved by his supervisor. As relief, he is seeking payment for the personal day.

Following the level two hearing, level three was waived and the matter was submitted to level four based on the record developed below. Grievant is represented by Anita L. Mitter of the West Virginia Education Association, and Respondent was represented by counsel, Erwin L. Conrad of Conrad & Conrad. The matter became mature for decision on May 11, 2005, the due date for the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant alleges a violation of W. Va. Code § 18A-4-10. He alleges that past practice in Fayette County allows an employee to take a personal day off from work as a“no excuse” or “NE” day (See footnote 2) , that “NE” days are an entitlement established by past practice, and that he took the proper steps to inform his employer that he was taking an “NE” day. Respondent contends that the grievance as filed makes no mention of “NE” days, and that Fayette County has in place a policy implementing the WC days provided for in W. Va. Code § 18A-4-10. It is Respondent's position that Grievant did not comply with the actual, relevant policy.

Based on a preponderance of the evidence adduced at the hearing, I find the following material facts have been proven:

Findings of Fact

1. Mr. Bays is employed by Respondent as a regular bus operator with 25 years' experience.

2. On December 1, 2004, Mr. Bays went to the Transportation Office and informed Secretary Beverly Bowling that he wanted to take the coming Friday, December 3, off, and that a substitute would be needed. He did not tell her why he wanted to take the day off, and she advised him that she would attempt to find a substitute.

3. Ms. Bowling never did find a substitute, and told Mr. Bays so. On December 2, 2004, Mr. Bays went back to the transportation office where he was told no substitute was available. He later contacted the transportation office by radio, and was told there was still no substitute available.

4. On Friday, December 3, Grievant, knowing no substitute had been found for his run, nevertheless took the day off. With no driver available, Grievant's bus stayed parked and the students who normally rode the bus had no way to get to school. 5. Respondent has enacted a Personal Leave Policy, Policy No. B-34, that provides for “Without Cause Days” consistent with the provisions of W. Va. Code § 18A-4- 10, and requiring an employee using a WC day to give his immediate supervisor 24 hours' notice.

6. Mr. Bays' immediate supervisor is Sam Snead, Principal of Midland Trail High School, because Mr. Bays is assigned to that school as his work location. Mr. Bays did not inform Mr. Snead that he wanted to take that Friday off, and the first time Mr. Snead was aware of the situation was on the 3rd when about 31 students did not show up for school. 7. “NE” days are in actuality an informal way of referring to sick days on which an employee is not required to present a doctor's excuse, because the employee will not be off for more than two days in a row. At no time did Grievant request an “NE” day, nor could he have, because he was taking the day off to go hunting, not because he was sick. Grievant did not want to use one of his WC days for December 3 because he wanted to reserve it for later.

8. As punishment for missing work on December 3, 2004, without following proper procedure for using a paid WC leave day, Grievant was docked one day of pay.

Discussion

Because the docking of Mr. Bays' pay was punishment for taking off work without proper authorization, Respondent bears the burden of establishing the charges by a preponderance of the

evidence. (See footnote 3) Respondent met this burden by proving that Grievantwas absent from work on December 3, 2004, without prior authorization and without following established policy for use of a WC day.

West Virginia Code § 18A-4-10 provides for so-called “WC” days as follows:

> 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: **Provided, That each such employee shall be permitted three days of such leave annually, which may be taken without regard to the cause for the absence**, except that personal leave without cause may not be taken on consecutive work days unless authorized or approved by the employee's principal or immediate supervisor, as the case may be: **Provided, however, That notice of such leave day shall be given to the employee's principal or immediate supervisor, as the case may be, at least twenty-four hours in advance**, except that in the case of sudden and unexpected circumstances, such notice shall be given as soon as reasonably practicable; however, the use of such day may be denied if, at the time notice is given, either fifteen percent of the employees or three employees, whichever is greater, under the supervision of the principal or immediate supervisor, as the case may be, have previously notified the principal or immediate supervisor of their intention to use that day for such leave[.]

(Emphasis added.) Respondent has implemented its own Personal Leave Policy that addresses WC days consistent with the Code provision. Like the Code provision, the Policy requires an employee to provide his immediate supervisor with at least 24 hours' notice before such leave is used, when practicable. “NE” days, on the other hand, are not established by policy, but are a colloquialism for sick leave days used by an employee and for which no doctor's excuse is required by the employer.

It is fairly obvious from the record that Grievant did not confuse “NE” days and WC days, but instead is grasping at the “NE” day straw as a belated and specious attempt to justify his actions. He knew he had a limited number of WC days, but did not want to useone to go hunting on December 3. He made no attempt to comply with policy B-34, yet his absence was planned two days in advance. Due to his absence, his bus stayed parked, and his students stayed home. Grievant is correct in stating that other employees use “NE” days without prior notice to their supervisors, and that on some occasions buses do not run because of an “NE” day absence. However, Grievant by his own admission failed to establish that the day he took off was an “NE” day. Grievant should have used one of his WC days instead, and chose not to.

“Considerable deference is afforded the employer's assessment of the seriousness of the

employee's conduct and the prospects for rehabilitation." *(See footnote 4)* Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute his judgement for that of the employer. (See footnote 5) In this case, although Mr. Bays is a long-time employee with a good work record, his actions warranted the fairly benign response of Respondent. Grievant was docked a day's pay for a day he did not work and for which he did not use authorized leave. Considering the practical consequences of his actions -- absence from school for approximately thirty students -- Grievant's punishment could have been much worse. Respondent has not only met its burden of showing Grievant warranted the disciplinary action it took, but that the level of discipline was appropriate, if not mild, for the infraction.

The following Conclusions of Law support this decision:

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

2. Respondent met its burden of proving the charges against Grievant.

3. An employee may use a paid day of leave without cause, providing that, in non-emergency situations, he provides his immediate supervisor with notice at least 24 hours in advance. W. Va. Code § 18A-4-10.

4. Grievant never notified his immediate supervisor that he wished to use a leave day without cause.

5. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute his judgement for that of the employer. J*ordan v. Mason County Bd. of Educ.*, Docket No. 99-26-8 (July 6, 1999); *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).

6. Grievant's conduct merited docking his pay for one day.

For the foregoing reasons, this grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette County. Any 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.

May 24, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

The grievance form is erroneously dated in 2004.

Footnote: 2

Not to be confused with a "without cause" or "WC" day.

Footnote: 3

W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

Footnote: 4

Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

Footnote: 5

Jordan v. Mason County Bd. of Educ., Docket No. 99-26-8 (July 6, 1999); Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).