JUDY HARDEN, et al.,

Grievants,

v. **Docket No. 98-32-031**

MORGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Judy Harden, Keith Ott, Horace Blankenship, William Jones, and Martha Hewitt, employed by the Morgan County Board of Education (Board) as teachers, filed level one grievances on September 19, 1998, alleging they had been denied the full amount of planning time to which they were entitled. (See footnote 1) After the grievances were denied at levels one and two; Grievants elected to by-pass consideration at level three, as is permitted by W. Va. Code §18-29-4(d), and advanced their claims to level four on February 9, 1998. The parties agreed that a decision could be made based upon the lower-level record, supplemented with proposed findings of fact and conclusions of law filed on or before April 1, 1998.

There is no significant dispute between the parties regarding the essential facts in this matter. Accordingly, the following findings of fact are made from a preponderance of all the evidence of record.

Findings of Fact

1. Grievants are employed as teachers by the Morgan County Board of Education. Grievants Harden and Blankenship teach physical education, Grievant Ott teaches keyboarding,Grievant Hewitt teaches home economics, and Grievant Jones teaches drivers education.

2. During the 1997-98 school year, Respondent has been in the process of constructing a new middle school. Although it was not certain when the new school would be open, Respondent proceeded to make the transition to the middle school format for grades seven and eight.

3. Also in 1997-98, Respondent changed the high school format to “block” scheduling, four, eighty-five minute classes per day. Seven class periods at the middle school range from forty- four to forty-eight minutes in length.

4. During the transition year, Grievants assignments included both high school and middle school classes. Their daily schedule included two block classes from 8:10 to 11:10 a.m., planning from 11:10 to 12:10, lunch from 12:10 to 12:40, and three middle school classes from 12:40 through 3:10.

5. With the exception of Grievant Harden, Grievants are assigned to the high school for purposes of supervision and record keeping.

6. Another teacher who is assigned to both schools, teaches one block, receives one block, or eighty-five minutes, planning time, and teaches three middle school classes.

Argument

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); 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. Grievants argue that they are entitled to an eighty-five minute planning period because they teach classes of that duration, and with the noted exception, they are assigned to the high school. Grievants assert that to deny them the longer planning period, while granting it to a similarly-situated employee constitutes discrimination.

Respondent argues that to provide Grievants the longer planning period would disrupt the schedules of hundreds of students, making the change not only impractical but unfair to the students. Respondent also asserts that the hybrid, sixty minute planning period provided Grievants was permissible as evidenced by the decisions of Gant v. Waggy, 180 W. Va. 481, 377 S.E.2d 473 (1988), and Tate v. Raleigh County Bd. of Educ., Docket No. 96-41-067 (Aug. 30, 1996). In Gant, the Supreme Court of Appeals held that longer planning periods for upper division teachers was allowable because those teachers taught for more lengthy periods than those in the lower division, and there is some correlation between the amount of planning required and the teaching time. In Tate the Grievance Board held that thirty minute planning periods were inadequate for teachers who taught in ninety minute block schedules, but that a sixty minute period was appropriate because a minute for minute calculation of planning time would yield an impractical result.

Discussion

W. Va.. Code §18A-4-14 provides in pertinent part:

Every teacher who is regularly employed for a period of time more than one-half the class periods of the regular school day shall be provided at least one planning period within each school instructional day to be used to complete necessary preparations for the instruction of pupils. Such planning period shall be the length of the usual class period in the school to which such teacher is assigned, and shall be not less than thirty minutes. No teacher shall be assigned anyresponsibilities during this period, and no county shall increase the number of hours to be worked by a teacher as a result of such teacher being granted a planning period subsequent to the adoption of this section (March 13, 1982).

A review of the applicable law is generally supportive of Respondent's claims that upper level teachers, particularly those teaching in a block system, may be granted longer planning periods than lower level teachers who teach for shorter periods of time. Further, a hybrid planning period, longer than thirty minutes but less than the full amount of block time, has been upheld by the Grievance Board.

Planning periods for teachers who were assigned both block classes and regular fifty minute classes were addressed in Miller, et al., v. Kanawha County Bd. of Educ., Docket No. 94-20-409 (Oct. 28, 1994). Grievants in Miller taught a regular schedule three days per week, and the remaining two days taught two ninety-five minute block classes, and one regular fifty minute class. Grievants were given one ninety-five minute planning period per week, and four, fifty minute planning periods. After determining that the usual class period was ninety-five minutes on two days per week, it was held that the longer planning period must be given on all days which contained a majority of ninety-five minute class periods. Applying the Miller decision to the present case, the shorter planning period would appear to be appropriate.

Based upon the foregoing, Respondent's action could have been upheld but for the fact that one, similarly-situated teacher was given the longer planning period. “[A]ny differences in the treatment of employees unless the differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees” constitutes discrimination, as defined by W. Va. Code §18-29-2(m). In order to establish a prima facie case of discrimination Grievants must demonstrate:

(a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded them; and,

(c) that such differences were unrelated to the actual job responsibilities of the grievants and/or the other employee(s), and were not agreed to in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once Grievants establish a prima facie case of discrimination, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, Grievants may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Grievants have established that a similarly-situated employee was given a longer planning period, a situation which they did not agree to in writing. Although Respondent claimed that Grievants' shorter planning periods were necessary to accommodate class scheduling, it offered no explanation why one teacher was granted the longer planning period. Therefore, it must be determined that Grievants have proven discrimination, and are entitled to relief. Grievants initially requested either the longer planning period or compensation. Because the school year is nearly completed, the only viable relief is monetary.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); 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. W. Va. Code §18-29-3(m) defines discrimination as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.”

3. In order to establish a prima facie case of discrimination Grievants must demonstrate:

(a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded them; and,

(c) that such differences were unrelated to the actual job responsibilities of the grievants and/or the other employee(s), and were not agreed to in writing.

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Accordingly, the grievance is **GRANTED**, and Respondent is hereby Ordered to compensate Grievants for the additional twenty-five minutes of planning time for the 1997-98 school year.

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

Date: April 30, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The grievances were filed as two complaints by Grievants Harden and Ott, represented by Harvey M. Bane of WVEA,

and Grievants Blankenship, Jones, and Hewitt, represented by Jennifer Shope of the W. Va. Federation of Teachers, AFL-CIO. Respondent was represented by Claudia W. Bentley, Esq. The grievances were processed separately at levels one and two, and were consolidated for decision at level four.