CAROL JUNE, et al.,

Grievants,

v. **Docket No. 00-05-370**

BROOKE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Carol June, Barbara Cottilli, Sandra M. Fennych, Elaine Hall, Mary Jeanne Hunt, Deborah Kaul, Jerry Rahr, and Gayle Reasner, employed by Brooke County Board of Education (BCBOE) as teachers assigned to Jefferson Primary School (JPS) filed a level one grievance on October 19, 2000, in which they stated,

[a]s a classroom teacher with no medical education, I believe giving fluoride treatments compromises the health and safety of my students and violates WV Code 18-29-2a. Giving fluoride treatments is a medical procedure and requiring classroom teachers to administer this procedure is a violation of WV Code 18-5-22 and 18-5-22a.

For relief, Grievants request that the fluoride be administered by a medical professional.

Michael L. Ferrell, Principal of JPS, advised Grievants at level one that he was responsible to administer the Fluoride Rinse Program, and in effect denied the complaint. The grievance was also denied at level two following an evidentiary hearing, and BCBOE waived participation at level three, as is permitted by W. Va. Code §18-29-4(c). The appeal was advanced to level four on December 4, 2000, at which time Grievants were represented by Owens Brown of WVEA, and BCBOE was represented by David F. Cross, Esq. During a conference call conducted on January 16, 2001, the parties agreed to submit the matter for decision based upon the lower-level record, supplemented by proposed findings of fact and conclusions of law. The matter became mature for decisionon February 20, 2001, with the receipt of Grievants' proposals. BCBOE declined the opportunity to submit proposals.

The essential facts of this matter are undisputed and may be set forth as the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievants are employed by Brooke County Board of Education as teachers at Jefferson Primary School.

2. Effective the beginning of the 2000-2001 school years, Grievants were directed to administer a weekly fluoride treatment to students in grades one through four. This program is complementary to professional dental programs and has been shown to reduce the number of new cavities by thirty-five percent when implemented regularly.

3. The 0.2 percent neutral sodium fluoride powder, which is procured by a prescription under the trade name NaFrinse, is provided in packets and mixed by the school nurse with an appropriate amount of water until dissolved. Ten milliliters (approximately two teaspoons) of the solution is handed to the students in a cup. The students are to rinse the solution around and between their teeth for sixty seconds and then expectorate, wipe their mouths, and throw the cup and paper towel in the garbage.

4. The sodium fluoride treatment is administered to the students pursuant to a "Fluoride Rinse Permission Form" signed by their parents.

5. Instructions attached to the fluoride packets indicate that it should be refrigerated between uses, and disposed of after three weeks.

6. Sodium fluoride may only be obtained by prescription. 7. The warning label on the fluoride states that "[l]arge dosages of sodium fluoride are considered to be toxic." However, if the dispensed amount of rinse is swallowed, "this amount should not hurt the child . . . in rare cases the child may feel slightly nauseous [and] may have a serving of milk or ice cream to relieve the nausea."

8. While water provided from treatment plants in Brooke County is fluoridated, students who drink well water, or have low water consumption, do not realize the benefit of fluoridated water.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving the grievance 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. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in

opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievants assert that fluoride is a medicine, that they fear adverse student reaction to the rinse, and that they should not be required to administer this procedure per W. Va. Code §§18-5-22 and 18-5-22a. BCBOE argues that fluoride is not a medicine, and that the program is for the benefit of the students' dental health. Two of the Grievants testified at level two. Grievant June expressed her fear in administering the rinse based upon her experience as a mother of a child who suffers from asthma and allergies, which makes her aware that a child can react to any substance. She recounted her experience with a child choking on the rinse, and with others who have gagged and/or spit on other children in the vicinity. Grievant Hall testified that she shared the concerns stated by Grievant June, and noted that the procedure involved the introduction of a chemical into the child's body.

Testifying on behalf of BCBOE, Executive Director of Student Services Mary K. DeGarmo, stated that the fluoride rinse program had been approved by the Board in the 1970's in conjunction with the West Virginia Department of Health which provides the supplies. She related that the program has been continued on the advice of BCBOE medical advisor, Dr. Pat Cippoletti. Ms. DeGarmo stated that the reasons the program was continued include the fact that not all students have access to fluoridated water at home, and lack of water consumption by students.

Grievants' testimony establishes that their alleged fears regarding the fluoride are unsupported by their experience. Ms. June has taught twenty-seven years, Ms. Hall thirty- one years, and the only incident cited by either of them was a student in Ms. June's class who was laughing and became choked. Their real motivation was indicated by Ms. Hall who stated that she administered the rinse for seven or eight years and then,

I went to the school nurse one day and I said, 'I just hate doing this. This is such a pain and I just _ the kids have fluoride in their water and I just don't see why we are still doing this.'

And I complained quite a few times to quite a few people and eventually I was told, 'Well, if you teachers would just quit doing this we wouldn't have to do it anymore.' And I said, 'Well, you don't have to tell me twice.'

(Level Two Transcript, pp. 49-50.)

Ms. June stated that the procedure required seven to eight minutes per week to perform, and interfered with instructional time. She also opined that the fluoride rinse program was unnecessary due to other sources of fluoride, and because the children were losing their first set of teeth anyway.

It is unfortunate that Grievants do not wish to participate in a program which requires so little time and effort, yet provides such a benefit to their students. Nevertheless, W. Va. Code §18-5-22 states in part:

No school employee shall be required to administer medications: Provided, That nothing herein shall prevent any school employee to elect to administer medication after receiving training as provided herein: Provided, however, That any school employee in the field of special education whose employment commenced on or after the first day of July, one thousand nine hundred eighty-nine, may be required to administer medications after receiving training as provided herein.

Although BCBOE argues that fluoride is not a medication, it is in fact available only by prescription, and is being used as a preventative treatment. Therefore, fluoride is a medicine, and Grievants are not required to administer the fluoride rinse program. Hopefully, BCBOE will be able to continue the program by having a school administrator or aide administer the rinse.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.219 (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. W. Va. Code §18-5-22a provides that no school employee shall be required to administer medications.

3. Because fluoride is obtained only through a prescription, and is used to prevent dental decay, it is a medication within the meaning of W. Va. Code 18-5-22a.

4. Grievants are not required to administer the fluoride rinse medication.

Accordingly, the grievance is **GRANTED**, and BCBOE is Ordered to no longer require Grievants

to administer the fluoride rinse medication.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Brooke 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 tosuch 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: March 12, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE