JEANIE PEAL, et al.,

Grievants,

v. **Docket No. 01-27-114**

MERCER COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievants, Jeanie Peal, Beth McKinney, Kay Barnett, Lyn Blevins, Loretta Hatcher, Carolyn Wilson, Connie Oxley, Gladys Richmond, and Rebecca Lilly, filed this grievance against their employer, the Mercer County Board of Education ("MCBOE") on December 21, 2000. Grievants are all teachers at Spanishburg School. They allege MCBOE engaged in discrimination in requiring them to come in at 8:45 a.m. on late/snow days instead of 9:20 a.m.

> Relief Sought: To move the arrival time two hours forward (sic) from the normal arrival time for those days Mercer County calls for a two hour delay county-wide. Grievants also seek payment for those days they have been required to show up fourty (sic) minutes early.

This grievance was denied at Level I and Level II, MCBOE waived Level III, and Grievants appealed to Level IV on March 29, 2001. A Level IV hearing was held on June26, 2001. This case became mature for decision on July 27, 2001, after receipt of the parties' proposed Findings of Fact and Conclusions of Law. (See footnote 1)

Issues and Arguments

Grievants argue that no other teachers in the county are required by their principal to

arrive early on late or snow days, and they believe this requirement is discriminatory. Grievants also believe this requirement violates past practice.

Respondent avers that the principal in each school is responsible for managing his school. It is up to the principal to decide the starting and ending times for teachers, as long as his or her requirements do not violate the West Virginia Code or Board Policies. Respondent maintains the decision of the principal was based on the needs of the children, and the principal had required this same early arrival time from the teachers in his prior principalship. Respondent asserts the principal took this action because of low test scores, and the need to provide supervision when parents dropped their children off early for school on these late days. Respondent notes teachers are paid for 7.5 hours, and on late days Grievants are required to work 6.75 hours, but are paid for the full 7.5 hours. Respondent asserts no Code Sections or policies were violated, and Grievants cannot receive additional monies for the late days, as they have already received compensation for a full day. Respondent notes that across the county there are a variety of starting and ending times on late days, and Grievants are not the only ones who arrive earlier than two hours after the normal school day starting time. During the course of the hearing, the parties agreed the amount of time Grievants believed they worked greater than other teachers was not forty minutes, but was fifteen minutes, as Grievants' principal, Steve Comer, allowed the teachers to leave early on these late days. Accordingly, the amount of time Grievants are seeking compensation for is two hours each.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants are employed as teachers at Spanishburg School.
2. Prior to the 2000 - 2001 school year, MCBOE changed its late/snow day policy.

During the 2000 - 2001 school year, when school started two hours late, the school day was extended by an hour, so the student would not miss so much instructional time.

3. On a normal school day, teachers are expected to report to Spanishburg School at 7:20 a.m. Teachers are allowed to leave at 2:50 p.m.

4. Prior to the principalship of Steve Comer and the change in the late/snow day policy, on late days, teachers, on late/snow days were expected to arrive at Spanishburg School at 9:20 a.m. They could leave at 2:50 p.m.

5. For the 2000 - 2001 school year, with the added hour in the afternoon, Principal Comer directed the teachers at Spanishburg School to arrive at 8:45 a.m., but allowed them to leave at 3:30 p.m., instead of requiring them to stay until 3:50 p.m.

6. At most other MCBOE schools on late days, the teachers arrive two hours later than their normally scheduled time and leave one hour after their normal closing time.

7. Most principals have made arrangements with some teachers and/or aides to come at the normal starting time to provide coverage for students who arrive early on late days.

8. Some principals have not set an arrival time for their teachers on late days because the teachers are usually there working one hour before their normal starting time, even on late days.

9. MCBOE has no policy or regulation on this issue and leaves the starting time to the principals of the schools, as long as these decisions do not conflict with statute and/or policy.

10. One of Principal Comer's reasons for setting the teachers' arrival time at 8:45 a.m. was to increase the amount of instructional time teachers could use for reinforcement activities, as the test scores of Spanishburg School students are quite low. Additionally, he wanted to make sure there were sufficient teachers for coverage if parents dropped their children off early. This was the same reason he followed this schedule at his prior school. Multiple other activities to increase the learning of basic

skills were utilized as well.

11. The scores of the students at his prior school increased, but Principal Comer would not and could not ascertain what portion of that increase was attributable to the extended instructional time on late days, if any.

12. On late days at Spanishburg School, many students do not arrive in the classroom until 9:15 a.m. (See footnote 2) By then, teachers with their 8:45 a.m. arrival, have had anopportunity to prepare for the day and organize a remedial activity. (See footnote 3) Principal Comer's change increases the potential instructional time for remedial activities by approximately twenty to twenty-five minutes.

13. MCBOE's Policy G-20 discusses a teacher's work schedule and states, "[t]he standard school day for teachers will be seven and one-half (7.5) hours. Teachers will arrive a minimum of fifteen (15) minutes before the instructional day is to begin. Specific times will be assigned by the immediate supervisor."

14. Deborah Akers, MCBOE's Superintendent, expects each principal to set the schedule for his or her school.

15. The amount of time actually at issue is fifteen minutes.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep'tof Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the

evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

W. Va. Code § 18A-2-9 states the school principal "shall supervise the management and the operation of the school or schools to which they are assigned. . . . [T]he principal shall assume administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total education program of the school or schools to which he is assigned." MCBOE expects principals to follow this Code Section including setting the daily schedule. Requiring a teacher to work 6.75 hours on a late day does not violate this statute.

MCBOE's Policy G-20 states, "[t]he standard school day for teachers will be seven and one-half (7.5) hours. Teachers will arrive a minimum of fifteen (15) minutes before the instructional day is to begin. Specific times will be assigned by the immediate supervisor." Principal Comer's requiring teachers to work 6.75 hours on a late day and to arrive at 8:45 a.m. does not violate this Policy.

Further, Grievants did not demonstrate there was an established past practice. Some principals have their teachers report earlier than two hours past the normal starting time on late/snow days, and Principal Comer had his teachers report earlier for the past two years at his prior school. Grievants have not demonstrated there was a past practice followed by all. (See footnote 4) Since Principal Comer's decision does not violate any policy or statute, it must be assessed under the arbitrary and capricious standard. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE- 081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93- HHR-322 (June 27, 1997). Arbitrary and

capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). " While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

Principal Comer's reasons for having the teachers report earlier in the morning were to increase time spent on remedial exercises because test scores were low, and to insurethere was sufficient coverage for early arrivals. While the Grievants may not agree with Principal Comer's decision, this disagreement does not make the decision arbitrary and capricious. Principal Comer's reasons are valid and reasonable.

Grievants have also alleged discrimination. Discrimination is defined in W. Va. Code §18-29-2(m) 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." This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 5) of discrimination under W. Va. Code §18-29-2(m), must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;
>
> and,

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

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). See Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show theoffered reasons are pretextual. Hickman, supra. See Tex. Dep't 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); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94- DOH-376 & 377 (Feb. 23, 1995).

Grievants have established a prima facie case of discrimination. They are required to come to school earlier than many other teachers and are allowed to leave earlier than many other teachers. They work fifteen minutes more than many other MCBOE teachers on late days. Grievants are not the only employees who work greater than 6.5 hours on late days.

However, the issue does not end there. Here, the employer has "offered legitimate reasons to substantiate its actions," as well as showing there has been no violation of statute or policy. Respondent has offered a legitimate reason for its actions based on the best interest of the students in the areas of safety and instructional time. Accordingly, the undersigned Administrative Law Judge does not find discrimination in this set of facts.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. ___As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd.of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. Principal Comer's requirement that teachers arrive at 8:45 a.m. and leave at 3:30 p.m., on a late day, does not violate any Code Section, MCBOE's Policy, or past practice.

3. Grievants have not established Principal Comer's requirement is arbitrary and capricious.

4. Discrimination is defined in W. Va. Code §18-29-2(m) 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."

5. This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code §18-29-2(m), must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner

that the other employee(s) has/have not, in a significant particular;

and,

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

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). See Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

6. Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't 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); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

7. Grievants established a prima facie case of discrimination, as they are required to arrive at their school earlier than many other teachers.

8. Respondent has demonstrated legitimate reasons to substantiate its actions.

Accordingly, this grievance is **DENIED**.

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

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 25, 2001

Footnote: 1

Grievants were represented by Ben Barkey from the West Virginia Education Association, and Respondent was represented by Attorney Kay Bayless.

Footnote: 2

The students who arrive early on late days are first offered breakfast and social time.

Footnote: 3

On a non-late day, students would arrive in the classroom at approximately 7:35 a.m. With a two hour delay, this time, without Principal Comer's change, would be approximately 9:35 a.m.

Footnote: 4

Grievants requested all the principals to complete a survey. Many principals stated there was no policy, and they were following their own past practice. Some indicated theyhad no established practice, as the teachers at their school reported only one hour later, and there was no need to establish any time frames.

Footnote: 5

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).