DONALD ANDERSON,

Grievant,

v. **Docket No. 01-41-070**

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievant, Donald Anderson, filed this grievance against his employer the Raleigh County Board of Education ("RCBOE") on December 8, 2000. His Statement of Grievance states:

> I have not missed a day of work in many years. I was forced to miss two days in November because of an injury I received while breaking up a fight between two students. If I had not intervened in this fight, I would not have been injured. Because of missing the two days, I have lost days that would be calculated in my retirement salary plus two days of incentive pay offered by the Board of Education for reporting to work everyday (sic).
>
> If I am docked for these days because of an injury I sustained while performing my duties, if another fight occurs and I am put in the position of having to intervene, I do not feel I will receive any help from other teachers because of their fear of injury and loosing (sic) their sick days.
>
> Relief Sought: Reinstatement of my two sick days and my two days of incentive pay.

This grievance was denied at Level I and Level II, Grievant by-passed Level III, and appealed to Level IV on March 1, 2001. A Level IV hearing was held on July 18, 2001. This case became mature for decision on August 1, 2001, after receipt of the parties' proposed Findings of Fact and Conclusions of Law. (See footnote 1) 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. Grievant has been a teacher for many years and plans to retire after the 2001 - 2002 school year. He is currently employed at Independence High School. He rarely misses work due to illness, and he has accumulated 374 sick days.

2. Because of his length of tenure with RCBOE, Grievant has the option of applying sick leave days to his retirement rather than his health insurance.

3. RCBOE has an incentive plan which pays employees $60.00 per day for any unused personal leave, up to fifteen days, for each school year. See W. Va. Code § 18A- 4-10a.

4. On Tuesday, October 31, 2000, Grievant and the school principal intervened in a fight between two female students.

5. While restraining one of the students, Grievant slipped and injured his hamstring.

6. One of the other teachers took Grievant home on that day, and he later went to the doctor.

7. Grievant was unable to return to work on Wednesday, November 1, 2000. He returned to work on Thursday, November 2, 2000, and worked the rest of the week and the following Monday, November 6, 2000.

8. November 7, 2000, was a school holiday, and Grievant made a second visit to his physician. The doctor was concerned about the possible formation of a blood clotand sent Grievant for an ultrasound. Additionally, the physician advised Grievant to rest for a few days.

9. Grievant did not work Wednesday or Thursday, November 8 and 9, 2000, and November 10, 2000, was another school holiday.

10. Grievant returned to work on Monday, November 13, 2000.

11. Although Grievant missed a total of three days, he was only charged for two days because other teachers covered his classes for him for one day and a substitute was not called.

12. Grievant received a check from Workers' Compensation for $210.24. Grievant's daily rate of pay is $204.52.

13. Grievant did not cash this check and instead returned it to the Payroll Department unendorsed. Grievant did not want to take the Workers' Compensation benefits, because he felt he would be financially harmed by this acceptance.

14. The check was returned to Grievant to endorse, he did so, and one day of sick leave was credited to his account after this payment or "buy back" was received. See W. Va. Code § 18A-4-10.

15. After this personal leave day was credited to his account, a day of incentive pay was also credited to Grievant.

16. Other RCBOE employees have been injured while on the job, albeit not in a student fight, and there have been several Workers' Compensation claims similar to Grievant's. If these employees elected to use sick leave, these employees were also charged for their sick leave time, as well as losing incentive pay.

Issues and Arguments

Grievant's basic argument is Respondent will foster an unsafe working environment if Grievant is not paid his sick leave and incentive pay, because other teachers will be less likely to risk injury and will not intervene in a fight if their compensation will be decreased. Grievant argues he should not be charged with a personal leave day as the injury was received in the performance of his duties. The same argument applies to not receiving the incentive pay.

Respondent asserts Grievant was treated the same as all other employees who

have received a work related injury, and although RCBOE sympathizes with Grievant, it believes it has followed both state law and board of education policy. To treat Grievant differently than it has treated all other employees, would be incorrect. (See footnote 2)

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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.

Grievant's basic argument is RCBOE will foster workplace conditions that constitute a substantial detriment to, or interference with, employees' health and safety, if it continues to charge Grievant one day of sick leave and one day of incentive pay. Grievant sees this act as a violation of W. Va. Code § 18-29-2 (a). (See footnote 3) This Code Section defines a grievance and states in pertinent part:

> "Grievance" means any claim by one or more affected employees of the . . . county board of educations . . . alleging . . . any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

Grievant asserts Respondent's policy of applying the sick leave, Workers'

Compensation, and incentive pay policies to teachers who break up fights and are injured, will cause other teachers not to assist in the breaking up of fights, and will create an unsafe workplace. That a unsafe workplace is currently in place is not alleged. While certainly a creative argument, it is speculative concerning the future impact of RCBOE's decision and practice. Accordingly, Grievant has not proved "a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees. . . ." Additionally, Grievant's argument requests this Grievance Board for an advisory opinion. Grievant is asking for a ruling on whether RCBOE's action, which follows statute and policy, will create an unsafe workplace in the future. "[T]his Grievance Board does not issue advisory opinions." Prickett v. Monogalia County Bd. of Educ., Docket No. 00-30- 280 (Nov. 16, 2000). See Priest v. Kanawha County Bd. of Educ., Docket No. 00-20-144 (Aug. 15, 2000); Dooley v. Dep't of Transp., Docket No. 94-DOH-255 (Nov. 30, 1994); Pascoli & Kriner v. Ohio County Bd. of Educ., Docket No. 91-35-229/239 (Nov. 27, 1991).

Further, Grievant's argument ignores the very reason why Workers' Compensation benefits were created in the first place, to protect and assist an employee who is injured in the workplace as Grievant was. Belcher v. Richardson, 317 F. Supp. 1294 (S.D.W. Va. 1970), rev'd on other grounds, 404 U.S. 78, 92 S. Ct. 254, 30 L. Ed. 2d 231 (1971). Certainly, it is understandable Grievant is upset about the decrease in his compensation, and the effect it will have on his retirement and incentive pay. Grievant has the right to elect between taking sick leave or taking Workers' Compensation benefits. It is understandable why Grievant made the decision he made, sick leave paid him more money, but that is the end of the incident.

While RCBOE could have decided to settle this grievance, and given Grievant the day of sick leave and the day of incentive pay, it chose not to do so, believing it would be unfair to other similarly situated employees. RCBOE followed its policies and the current statutes and met the requirements of each. Additionally, it has treated other

similarly situated employees in the same manner.

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, Grievant has the burden of proving his 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. RCBOE did not violate its policies or state statutes in its removal of Grievant's one day of sick leave and one day of incentive pay after Grievant made his election.

3. Grievant's argument concerning an unsafe workplace is speculative and would relate to the future impact of RCBOE's decision. Accordingly, Grievant has not proven "a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees. . . ."

4. Grievant is seeking a ruling on whether RCBOE's action will create an unsafe workplace in the future. Answering this question would require giving an advisory opinion. 5. "[T]his Grievance Board does not issue advisory opinions." Prickett v. Monogalia County Bd. of Educ., Docket No. 00-30-280 (Nov. 16, 2000). See Priest v. Kanawha County Bd. of Educ., Docket No. 00-20-144 (Aug. 15, 2000); Dooley v. Dep't of Transp., Docket No. 94-DOH-255 (Nov. 30, 1994); Pascoli & Kriner v. Ohio County

Bd. of Educ., Docket No. 91-35-229/239 (Nov. 27, 1991).

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 Raleigh 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

Grievant was represented by Attorney William Turner, and Respondent was represented by Attorney Erwin Conrad.

Footnote: 2

The argument about fostering an unsafe working environment was not clearly put forth at Level IV; thus, Respondent did not respond to this theory in its proposals.

Footnote: 3

Grievant has cited to Code Section 29-6A-2(i) which pertains to state employees. The Code Section applicable to education employees is W. Va. Code § 18-29-2 and the language is similar.