**JOSEPH PAGE ADAMS, et al.,**

**Grievants,**

**v. Docket No.03-17-025**

**HARRISON COUNTY BOARD OF EDUCATION,**

**Respondent.**

## D E C I S I O N

Grievants, thirty-one individuals employed as teachers by the Harrison County Board of Education (HCBE) and assigned to Big Elm Elementary School, filed a level one grievance on May 27, 1998, in which they alleged the poor air quality at the school has been the source of illnesses requiring their use of sick leave. (See footnote 1) For relief, Grievants requested at least ten days of sick leave and $500 for each of the years (up to four years) the situation has been ongoing. (See footnote 2) Grievants' immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied following a hearing at level two, and HCBE waived consideration of the matter at level three. Appeal to level four was made on January 17, 2003. A hearing to supplement the lower-level record was conducted on April 28, 2003. Grievants were represented by William White, West Virginia Education Association Consultant, and HCBE was represented by Basil R. Legg, Jr., Esq. The matterbecame mature for decision on June 23, 2003, the due date for filing proposed findings of fact and conclusions of law.

The following facts are derived from the record developed at levels two and four.

### Findings of Fact

1. Grievants were all employed as professional personnel assigned to Big Elm Elementary School (BEES) during the time period relevant to this grievance.
2. BEES was first opened in August 1993.
3. Grievants either developed respiratory problems, or noticed an increase in preexisting respiratory problems after they began working at BEES. Complaints included sinus infections, allergies, sore throats, bronchitis, and hoarseness.
4. During the summer months in 1994, the air-conditioning at BEES was turned off. Upon

**their return to school in August 1994, Grievants found significant dampness, mold, and mildew in their rooms.**

**5. The landscape at the back of the school allowed a significant amount of ground water to flow toward the school, and seep into the footer and floors of the building. Roof leaks were also reported.**

**6. BEES was cleaned and disinfected prior to the opening of school, and the air-conditioning has remained on continuously, every summer, since that time. Additionally, individual Grievants were provided dehumidifiers for their rooms, upon request, and the carpeting has systematically been removed and replaced with tile flooring throughout the school.**

**7. In 1997, HCBE contracted with MSES Consultants, Inc., Environmental and Engineering Consultants (MSES), to conduct an Indoor Environment Quality (IEQ)evaluation of the facility. A questionnaire was completed by the staff to provide information regarding health matters, and a collection of five air samples was taken for analysis. The results of the testing showed that particle counts of spores were slightly elevated, a condition attributed to high humidity levels in the building. The excess humidity was determined to be the result of water not being drained away from the building, allowing it to leach through the foundation walls and/or through small cracks in the building foundation. After learning that no foundation drains had been required in the initial design of the building, MSES recommended installation of a drain system around the perimeter of the structure. In June and July 1998 footer drains were installed along the up-gradient side of the school.**

**8. In October 1998, MSES began testing to determine whether groundwater might be contributing to the elevated moisture levels in the school. It was determined that groundwater was having no impact on the foundation at that time.**

**9. In December 1998, MSES conducted a second IEQ. This test revealed that carbon monoxide levels were close to the National Institute for Occupational Safety and Health (NIOSH) guidelines and that the humidity level had dropped from 64% in September, to 32%. The analysis of fungi and bacteria sampling suggested there was no interior source of fungal contamination.**

**10. In February 1999, MSES tested for Human Commensal Bacteria**

**(Streptococcus/Staphylococcus) and Thermophilic Bacteria. Both were found to be within acceptable levels of the U. S. Environmental Protection Agency and the AIHA "Field Guidefor the Determination of Biologic Contaminants in Environmental Samples."** **(See footnote 3)** **At that time, MSES recommended the excavation of a groundwater trench to supplement the drainage system previously installed, that air filters be replaced more frequently than the standard recommendations, operating the HVAC (heating, ventilation, air conditioning) system to allow for sufficient air exchange when the school was not occupied, and that a sealer be applied to the exterior masonry walls.**

**11. During Summer 1999, a groundwater interceptor trench was installed at the back side of the building to direct water away from the school and reinforce the drainage trench installed the previous summer. Filters were replaced more frequently, and the HVAC operating system was modified.**

**12. In June 1999, the West Virginia Education Association requested that the National Institute for Occupational Safety and Health (NIOSH) conduct a health hazard evaluation at BEES. An air sample provided by a building occupant indicated some noncompliance; however, when investigators inspected the building on July 15, 1999, they found the remediation efforts complete.**

**12. In August 2000, MSES conducted a wipe sample evaluation of the school. Three species of bacteria were identified, only one of which was possibly an opportunistic pathogen. MSES did not identify any conditions which would result in adverse health effects, and made no recommendations.**

**13. In May 2001, NIOSH investigators conducted a site audit of the facility, at which time sampling was conducted for carbon dioxide, carbon monoxide, temperature,and relative humidity. Questionnaires were sent to all school employees, and the HVAC system was checked for signs of water damage, biological contamination, and balance of flow. The results of the investigation indicated the temperature, humidity, and carbon monoxide levels were consistent with American Society of Heating, Refrigeration and Air- conditioning Engineers (ASHRAE) recommendations. Carbon dioxide levels were within recommended limits through most of the day, but peaked above the thresholds, indicating an inadequate supply of outside air. The school's asthma rates were within national averages. No increase of asthmatic**

**response or reported respiratory ailments was noted. Symptoms such as cough, stuffy, itchy, or runny noses, or sneezing, could be indicative of seasonal allergies, and while such symptoms could have arisen from exposure to the school environment, it was not possible to confirm that with certainty. The HVAC system units were clean and showed no signs of biological growth, or excessive dust and dirt. No evidence of recent water incursion was found.**

## Discussion

**As this is a non-disciplinary grievance, Grievants bear the burden of proving the grievance by a preponderance of the evidence. W. Va. Code § 18-29-6; 156 W. Va. C.S.R. 1 § 4.21. "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. Lake v. Cabell County Bd. of Educ., Docket No. 02-06-370 (Jan. 21, 2003).**

**Grievants argue that HCBE did not make efforts to remediate the excessive moisture as quickly as it should have, resulting in their developing respiratory problems,or experiencing a more serious degree of pre-existing respiratory problems. Because they had no control over the condition of the building environment, Grievants assert they are entitled to the 475 days of documented sick leave they would have accrued. In support of the requested relief, Grievants rely upon the decision in Guerin and Tenney v. Mineral County Board of Education, Docket No. 92-28-422 (Jan. 31, 1996).**

**HCBE argues that there is no objective medical evidence to support a finding that Grievants' medical claims were proximately caused by working at BEES, and the air quality tests performed establish that it is not a “sick building.” HCBE notes the long-term efforts to address the humidity problem at BEES, and argues that Grievants are not entitled to reinstatement of sick days absent any objective or scientific evidence of unsafe working conditions, and absent any fault on the part of the employer to remediate the condition.**

**It is unfortunate that a new facility was fraught with such conditions to be endured by faculty, staff, and students. However, Grievants have provided no medical or scientific evidence that the school environment was the cause of their health problems. On the**

contrary, while air quality tests found elevated levels of carbon dioxide on one occasion, and excess humidity on another, there was no determination that BEES was a "sick building." Respiratory complaints are common throughout north-central West Virginia, and it is simply impossible to determine whether Grievants would have used sick days, or how many, had there been no problem with their work environment. Unlike Grievants Guerin and Tenney, there is no evidence that any of the Grievants requested, but were refused a transfer to another room or school. Further, Grievants have made a conscious decision not to provide the testimony of any expert witness to support their claim, not wanting tohave a battle of the experts. Based upon the evidence of record, Grievants failed to prove their claim by a preponderance of the evidence.

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

## Conclusions of Law

1. As this is a non-disciplinary grievance, Grievants bear the burden of proving the grievance by a preponderance of the evidence. W. Va. Code § 18-29-6; 156 W. Va. C.S.R. 1 § 4.21. "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. Lake v. Cabell County Bd. of Educ., Docket No. 02-06-370 (Jan. 21, 2003).

2. Grievants have failed to prove by a preponderance of the evidence that their use of sick leave during the period of time in question was directly related to the school environment.

Accordingly, the grievance is DENIED.

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

**DATE: JULY 21, 2003**

**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**

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***Footnote: 1***

***.In addition to Mr. Adams, Grievants are Patricia Dorfner, Karen Vandergrift, John DeMarco, Susan B. Ferrell, June Kimberlin, Dorothy A. Fidler, Marie Marchio, Mary Osbourn, Vicki Huffman-Morgan, Garry G. King, Tammy G. Swaim, Joyce A. Myers, Sally Butler, Marsha Hrabak, Susan DeBlossio, Kimberly C. Nuzum, Carolyn Sue Carr, Sharon S. Hammond, Virginia Livingston, Mary Lou Lantz, Nancy J. Summers, Judy Knoble, Janet Dotson, Alice Maxwell, Nancy Cool, Susan Marra, Lisa A. Reese, Roberta Duckworth Sinsel, Mary Maley, and Tina Vernon.***

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***Footnote: 2***

***²Grievants amended their requested relief in their level four post-hearing submission, stating they were not seeking financial compensation, but reinstatement of their 475 collective days of sick leave, incentive pay for not using sick leave when applicable, and that the findings of the W. Va. Department of Education, Office of School Facilities Investigation Team be immediately implemented.***

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***Footnote: 3 AIHA is not identified in the record.***