THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PHILLIP HUDOK,
Grievant,

v. **Docket No. 2008-0790-RanED**

RANDOLPH COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant Phillip Hudok filed this grievance on November 26, 2007, in which he claims that:

> On November 5, 2007, the Randolph County Superintendent of Schools, Sue Hinzman, enacted retribution in the form of an abrupt change in the master schedule of Pickens School. The action, unbeknownst to the Board of Education, was taken against the students, faculty and staff as a direct result of a LSIC (Local School Improvement Committee) request for a certified music teacher.

As relief, Grievant is requesting that "the master schedule of an exemplary school be returned to what it was at the beginning of the 2007-2008 school year."

This grievance was denied at level one on December 20, 2007. An unsuccessful level two mediation session was conducted on May 7, 2008. A level three hearing was conducted before the undersigned Administrative Law Judge on October 15, 2008, in Elkins, West Virginia. Grievant appeared *pro se.* The Randolph County Board of Education appeared by its counsel, Kimberly S. Croyle, Bowles Rice McDavid Graff & Love. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on November 18, 2008.

Synopsis

Grievant is employed by the Randolph County Board of Education ("BOE") as a part-time science teacher at Pickens High School. At the beginning of the 2007-2008 school year, Pickens High School operated on a seven period daily schedule. On October 10, 2007, Superintendent Sue Hinzman received a letter from Pickens High School teacher Donna Knotts. Ms. Knotts communicated that she was not receiving her planning period as required. Consequently, the Pickens High School faculty was informed that effective November 2, 2007, with the start of the new grading period, the school would commence with an eight period day. This scheduling change allowed for Ms. Knotts to receive a planning period. Grievant alleges that this scheduling change was the result of reprisal following a request by the faculty for a full-time music teacher. In addition, Grievant argues that the actions of Superintendent Hinzman were arbitrary and capricious. Grievant has failed to prove that the BOE engaged in reprisal, or that the change in the schedule was arbitrary or capricious or otherwise illegal.

After thorough review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact:

Findings of Fact

1. Grievant is employed by the BOE as a part-time science teacher at Pickens High School. Pickens School is somewhat unique in that it is a K-12 school. The events of this grievance concern the high school program; accordingly, the school will be referred to as Pickens High School.

2. At the beginning of the 2007-2008 school year, Pickens High School operated on a seven period daily schedule. On October 10, 2007, Randolph County Schools'

Superintendent Sue Hinzman received a letter from Pickens High School teacher Donna Knotts. Ms. Knotts complained that she was not receiving a planning period. Ms. Knotts further explained that she had not received a planning period during the 2006-2007 school year.

3. Upon receipt of this letter, Superintendent Hinzman directed Assistant Superintendent Terry George to investigate the matter. Mr. George confirmed that Ms. Knotts had not and was not receiving a planning period.

4. Superintendent Hinzman and Mr. George met with Pickens High School Principal Diane Betler, and instructed her to create a schedule that placed the teachers on an eight-hour day for full-time, and a four-hour day for part-time personnel.

5. Principal Betler indicated that the school was experiencing problems in making certain that some of the part-time teachers were working the required four hours. The schedule change would correct the required work hour problem, and would allow Ms. Knotts to have a planning period.

6. The change from the seven period day to the eight period day allowed for the addition of two technology classes for 21st century learning, and a career guidance and counseling class.

7. There is a difference in an eight-hour day and an eight period day. Under the seven period day, students can receive a maximum of 28 credits. Under the eight period day, students can achieve a maximum of 32 credits.

8. On October 31, 2007, Principal Betler informed the Pickens High School faculty that effective November 2, 2007, the school would commence with an eight period day, so that all teachers would be working an eight-hour day or its half-time equivalent.

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. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant contends that Superintendent Hinzman sought reprisal against him and other faculty members by changing the master schedule at Pickens High School from a seven period day to an eight period day. Grievant alleges that this reprisal occurred following a request for a full-time music teacher. In addition, Grievant argues that the actions of Superintendent Hinzman were arbitrary and capricious. The BOE asserts that the schedule change placing a teacher on an eight-hour day for full-time personnel, and a four-hour day for part-time personnel was done to correct a schedule deficiency, provide for the full implementation of State Board Policy 2510[1], and allow Ms. Knotts a planning period. For reasons more fully set out below, Grievant has failed to prove that the BOE

[1]This legislative rule establishes the regulations for all education programs that are designed to prepare students for the 21st century by improving the quality of teaching and learning in the public schools and ensuring that equal education opportunities exist for all students, including, but not limited to: rigorous high quality 21st century curriculum, engaging instructional strategies, experiential learning programs, support programs, personnel, instructional materials, supplies, equipment, technology integration, and facilities.

engaged in reprisal, or that the change in the schedule was arbitrary or capricious or otherwise illegal.

WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant *in the grievance procedure* either for an alleged injury itself or any lawful attempt to redress it." (Emphasis added). To demonstrate a prima facie case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
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> (2) that he was subsequently treated in an adverse manner by the BOE or an agent;
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> (3) that the BOE official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
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> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ. Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

There has been no evidence presented that the change in the schedule at Pickens High School occurred in response to an action taken by the Grievant. The evidence established that the driving force behind the adjustment to the daily schedule was based upon an eight-hour day job requirement; the need to provide a balanced and equitable work load among the faculty of Pickens High School; and to provide a planning period to Ms.

Knotts.[2] Grievant makes the reprisal assertion in his initial statement of grievance. Grievant makes mention during his opening statement at level one that the scheduling change occurred after the Local School Improvement Team made a recommendation to the BOE for the future hiring of a certified music teacher; however, evidence in support of this claim was neither offered at level one nor level three.

The evidence presented to the undersigned established that all full-time teachers are required to work an eight-hour day and part-time teachers are required to work a four-hour day. The record also reflects that Superintendent Hinzman had legitimate concerns that the full-time staff at Pickens High School were not completing an eight-hour day nor were the part-time instructors at Pickens High School completing the required four-hour day. The failure to work an eight-hour day or its part-time equivalent resulted in students having less credit opportunities than those available at other high schools in the county. In addition, anything short of an eight-hour day would result in the inability to provide the necessary planning period to Ms. Knotts. The BOE took the appropriate corrective actions.

Grievant's second and stronger argument is that Superintendent Hinzman's action in changing the schedule was arbitrary and capricious. In short, Superintendent Hinzman

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[2] W. VA. CODE § 18A-4-14 provides as follows with regard to planning periods:

(2) 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 any responsibilities 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).

made her decision without any discussion with the BOE, and chose not to meet with the concerned Pickens High School faculty and staff as she promised. It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ*., 177 W. Va. 145, 351, S.E. 2d 58 (1986).

The arbitrary and capricious standard is deferential in nature. "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." *Trimboli v. Dep't of Health and Human Res.*, 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*, 198 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)).

Grievant asserts that despite the Superintendent's claim that a change from seven to eight periods was needed to give Ms. Knotts a planning period, this was not the case. In fact, Ms. Knotts requested just compensation for her lack of a planning period.[3] While

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[3]W. VA. CODE § 18A-4-14(3) provides:

(3) Nothing in this section shall be construed to prevent any teacher from exchanging his lunch recess or a planning period or any service personnel from exchanging his

this issue was not fully developed at level three, Grievant maintains compensation to Ms. Knotts would have been a simple remedy. However, the curriculum, and routine for an entire K-12 school was disrupted in "mid-stream." Grievant asserts the most grievous aspect of the actions of the administration was the total lack of professionalism in regard to how the master schedule change was instituted. Instead of addressing the concerns with the school staff, and governing bodies, the Superintendent chose to force Principal Betler to establish a new curriculum and master schedule to meet her dictates.

The undersigned appreciates the feeling of frustration from the Pickens High School faculty in not being consulted; however, the implementation of an eight period schedule was not arbitrary and capricious. The scheduling change was driven by the need to provide all full-time teachers with a mandated planning period. The record established by both parties reflects a difference of opinion as to how the schedules could have or should have been adjusted to accomplish the result of providing Ms. Knotts with a duty free planning period. Nevertheless, the evidence presented to the undersigned establishes there was a rational basis for the decision to make the scheduling change. Grievant failed to establish

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lunch recess for any compensation or benefit mutually agreed upon by the employee and the county superintendent of schools or his agent: Provided, That a teacher and the superintendent or his agent may not agree to terms which are different from those available to any other teacher granted rights under this section within the individual school or to terms which in any way discriminate among such teachers within the individual school, and that service personnel granted rights under this section and the superintendent or his agent may not agree to terms which are different from those available to any other service personnel within the same classification category granted rights under this section within the individual school or to terms which in any way discriminate among such service personnel within the same classification category within the individual school.

that Ms. Knotts sought compensation in lieu of the scheduling change to correct the lack of a planning period or the BOE mutually agreed to this arrangement. Under the applicable standard of review, the record establishes that the decision to make the scheduling change was supported by substantial evidence, was not contrary to law, and was not arbitrary or capricious.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In non-disciplinary matters, a grievant bears the burden of proving his allegations by a preponderance of the evidence. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Id.*

2. "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." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

3. Grievant failed to prove by a preponderance of the evidence that the action of Superintendent Hinzman changing the schedule from a seven period day to an eight period day at Pickens High School was arbitrary or capricious.

4. Grievant failed to prove by a preponderance of the evidence that the BOE retaliated against him.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 WEST VIRGINIA CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: January 13, 2009

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Ronald L. Reece
Administrative Law Judge