THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARGARET BAKER,
Grievant,

v. **Docket No. 2009-0457-PocED**

POCAHONTAS COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Margaret Baker, Grievant, appealed this grievance to level three on March 18, 2009, after denial at level one and a mediation session at level two. She asserts she is "not receiving a duty free lunch or planning time as required by WV Code 18A-4-14." Grievant seeks relief by way of "full back pay and benefits due, the addition of duty free lunch and planning time, and any further compensation deemed appropriate." A level three hearing was conducted on June 26, 2009, at the Grievance Board's Westover office before the undersigned Administrative Law Judge. Grievant appeared in person and by John Estep, AFT-West Virginia/AFL-CIO. Respondent was represented by Gregory W. Bailey, Esquire, Bowles Rice McDavid Graff & Love. This case became mature upon receipt of the parties' proposals on August 3, 2009.

Synopsis

Grievant argued that Respondent acted in an arbitrary and capricious manner when it denied her a planning period when her class periods were increased to more than one-half the class periods of the regular school day. Respondent counters that Grievant has failed to meet the threshold requirement of teaching more than one-half of the class periods. The plain meaning of W. VA. CODE § 18A-4-14(2) mandates that every teacher who is regularly employed for a period of time more than one-half the class periods of the

regular school day must be provided a planning period. The record demonstrates that Grievant does work more than one-half the class periods of the regular school day, and, therefore, should have been provided a planning period. While Grievant is not entitled to all the relief requested, she is to be compensated for that time period she was deprived of her planning period at her prorated daily rate of pay.

The following Findings of Fact are based upon the evidence presented at level three. (Which are basically undisputed.)

Findings of Fact

1. Grievant is employed as a half time teacher by the Pocahontas County Board of Education at the Marlinton Middle School.

2. During the 2007-2008 school year, Grievant taught four class periods at Marlinton Middle School, and during the 2008-2009 school year, her assigned class periods were increased to five class periods. These class periods represent three forty-minute class periods and two forty-five minute class periods.

3. During the 2008-2009 school year, Marlinton Middle School scheduled teachers for nine class periods of forty and forty five-minute durations, for which credit is given, as well as a period of time of twenty minutes for an advisory class that consists of instruction for which credit is not received.

4. Grievant did not waive her planning period nor was she compensated for forfeiting the planning period when she was assigned an additional class period.

5. Grievant teaches more than one-half of the class periods of the regular school day.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

The analysis of the merits of this grievance is relatively straightforward. Planning periods for classroom teachers are regulated by W. VA. CODE § 18A-4-14, which states, in part:

> (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 in 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).

Grievant argues that no other professional educator at Grievant's school teaches more than eight classes during the regular school day, excluding their planning period. In any event, if one includes the other educators' planning periods, then no teacher at Grievant's school has more than nine class periods and Grievant's five class periods are more than one-half of the class periods of the regular school day. In short, Grievant asserts that Respondent acted in an arbitrary and capricious manner in not providing Grievant a planning period.

Respondent counters that "[W]hile lunch periods and planning periods represent time that individual teachers may not be teaching, lunch periods and planning periods are not relevant at arriving at the number of class periods in a regular school day. Teachers do not teach every class period. That does not mean that classes are not being taught during periods that individual teachers may be eating lunch or planning."[1] Notwithstanding this somewhat rickety argument, Respondent does seem to concede that the twenty minute advisory period should not be included in determining the total number of class periods in the regular school day.[2]

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[1]Respondent's Level III Proposed Findings of Fact and Conclusions of Law, page 2, paragraph 6.

[2]The undersigned agrees with this analysis. The Grievance Board has previously characterized class periods for the purpose of determining the length of the planning period in the categories of math, science, languages, social studies, arts, physical education, and music. *Stalnaker, et al. v. Lewis County Bd. of Educ.*, Docket No. 06-21-063 (June 29, 2006).

In addition, in *Miller v. Kanawha County Board of Education*, Docket No. 94-20-409 (Oct. 28, 1994), the Administrative Law Judge provided some context of class period in stating, the "usual class period for determining the length of the planning period pursuant to W. VA. CODE § 18A-4-14(2) is the class period that most frequently occurs on any given day of a weekly class schedule."

"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 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)).

Under a plain reading of the statute, Respondent was clearly in error and acted in an arbitrary and capricious manner when it failed to provide Grievant a planning period after adding an additional class period to Grievant's teaching assignment during the 2008-2009 school year. Joseph W. Riley, Principal of Marlinton Middle School, made it evident at level three that the actual number of class periods available to teachers at Marlinton Middle School for that school year was nine. This does not include advisory periods or lunch periods as no credit or grade is issued for either of those periods. The undersigned agrees with Grievant that those blocks of time in the schedule should not be viewed as class periods when using any reasonable interpretations of those terms.[3] The limited

[3]It should be noted that West Virginia School Law, voluminous and possessed of numerous definitions, does not provide a definition of class period.

record of this grievance clearly demonstrates that no teacher at Grievant's school had more than nine class periods and Grievant's five class periods were indeed more than one-half of nine.

While somewhat unusual for grievance relief, monetary recompense has been awarded in cases where a teacher has not been given a planning period. This Grievance Board has repeatedly held that, if a teacher is forced to relinquish her planning period in violation of W. VA. CODE § 18A-4-14, she is to be compensated for that time period at her prorated daily rate of pay. *Craig v. Upshur County Bd. of Educ.*, Docket No. 00-49-034 (Aug. 11, 2000); *Collins v. Wayne County Bd. of Educ.*, Docket No. 99-50-535 (Feb. 23, 2000); *Hardman v. Kanawha County Bd. of Educ.*, Docket No. 95-20-249 (Oct. 19, 1995). Under the unique circumstances of this case, Grievant is entitled to be compensated for the time period she was wrongly denied a planning period at her prorated daily rate of pay.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

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

2. W. VA. CODE § 18A-4-14 requires that a teacher who is employed for a period of time more than one-half the class periods of the regular school day be provided a

planning period within each school instructional day which is the length of the usual class period in the school.

3. Grievant has met her burden of proving that she was deprived of her planning period for the 2008-2009 school year in violation of W. VA. CODE § 18A-4-14.

5. If a teacher is forced to relinquish her planning period in violation of W. VA. CODE § 18A-4-14, she is to be compensated for that time period at her prorated daily rate of pay. *Craig v. Upshur County Bd. of Educ.*, Docket No. 00-49-034 (Aug. 11, 2000); *Collins v. Wayne County Bd. of Educ.*, Docket No. 99-50-535 (Feb. 23, 2000); *Hardman v. Kanawha County Bd. of Educ.*, Docket No. 95-20-249 (Oct. 19, 1995).

Accordingly, this grievance is **GRANTED IN PART**, and Respondent is directed to compensate Grievant as discussed in this Decision in regard to back pay, and with all benefits due.

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 W. VA. 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 (eff. July 7, 2008).

Date: December 8, 2009

Ronald L. Reece
Administrative Law Judge