THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOYCE C. BRAUN,
Grievant,

v. **Docket No. 2011-0674-BroED**

BROOKE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Joyce Braun, filed this grievance on November 1, 2010, against her employer, Brooke County Board of Education, alleging that according to "State code 18A-4-14, before a teacher uses planning time to complete extra duties, it must be mutually agreed upon between the teacher & the administrator. Completing the Woodcock-Johnson achievement test during my planning violates this code." For relief, Grievant states that "[S]pecial education teachers should not be required to complete testing during planning time or during instructional time. I should also be compensated at my hourly rate for any planning periods used in the past or future to complete testing."

This grievance was denied at level one on December 20, 2010, following a conference. A level two mediation session was conducted on February 11, 2011. Appeal to level three was perfected on February 18, 2011. A level three hearing was conducted before the undersigned Administrative Law Judge on July 11, 2011, at the Grievance Board's Westover office. Grievant appeared in person and by her representative, Owens Brown, West Virginia Education Association. Respondent appeared by its counsel, David

F. Cross, Office of Prosecuting Attorney for Brooke County, West Virginia. This grievance became mature for consideration on August 11, 2011.

Synopsis

Grievant complains that she was asked by Respondent to administer an achievement test during her planning periods. The plain meaning of W. VA. CODE § 18A-4-14 requires that each teacher must be provided with at least one planning period of the length of the usual class period in the school. A teacher cannot be required to give up his or her planning period. However, Grievant refused to administer the test and did not compromise any of her planning period time. Grievant did not meet her burden of proof and demonstrate that Respondent required her to give up her planning period. In addition, the relief requested is speculative or premature. Accordingly, the undersigned is without authority to address issues which call for such relief.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant is employed by the Brooke County Board of Education as a teacher at Follansbee Middle School. Grievant was employed at Follansbee Middle School teaching learning disabled students at the time of filing this grievance.

2. Follansbee Middle School has nine periods during the day which last for forty-seven minutes.

3. Grievant was entitled to a forty-seven minute planning period. Grievant was provided a split planning period for a total of seventy minutes for a planning period each day.

4. Grievant teaches behavioral disorder students. Those students were primarily behavioral disorder students who had individual education plans.

5. Respondent engages in three types of testing in order to evaluate the educational ability and status of its special needs students. The specific tests administered for this purpose for behavioral students are an IQ test, the Woodcock-Johnson Achievement test, and the behavioral rating scale known as the Connors Rating Test.

6. The Woodcock-Johnson Test is an achievement test which is designed to identify the learning level of an individual student, and is used to ascertain a specific educational plan for a student. The test is composed of sub-parts, which can be administered at different times. The test takes approximately one to one and a half hours to complete.

7. Special Education Director, Joyce Rae, found that it was necessary to have two students undergo testing to determine whether they were receiving appropriate public education. As a result, the Woodcock-Johnson Achievement test had to be administered to two students.

8. Grievant was asked to administer the Woodcock-Johnson Achievement test to these two students. Grievant indicated that she was too busy to administer the test.

9. Grievant was told that she could use part of her planning periods to administer the test. Grievant refused.

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 Board 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).

Grievant is not alleging she was denied her planning period, but that she was asked to take time away from her planning period to administer an achievement test, rather than for preparing classroom instruction. Grievant claims a violation of W. VA. CODE § 18A-4-14, and seeks compensation at her hourly rate if asked to administer the tests in the future. Respondent denies it violated W. VA. CODE § 18A-4-14, or acted in an arbitrary and capricious manner.

W. VA. CODE § 18A-4-14 provides the following with regard to daily planning periods for teachers:

> (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).

> Principals, and assistant principals, where applicable, shall cooperate in carrying out the provisions of this subsection, including, but not limited to, assuming control of the class period or supervision of students during the time the teacher is engaged in the planning period. Substitute teachers may be utilized to assist with classroom responsibilities under this subsection: Provided, That any substitute teacher who is employed to teach a minimum of two consecutive days in the same position shall be granted a planning period pursuant to this section.
>
> 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 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 . . .

The plain meaning of W. VA. CODE § 18A-4-14 is inescapable; each teacher must be provided with at least one planning period of the length of the usual class period in the school, but not shorter than thirty minutes. *Grant v. Waggy*, 180 W. Va. 481, 377 S.E.2d 473 (1988). Further, a teacher cannot be required to give up his or her planning period. *Bailes v. Nicholas County Bd. of Educ.*, Docket No. 89-34-119 (Aug. 30, 1989). 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. *Baker v. Pocahontas County Bd. of Educ.*, Docket No. 2009-0457-PocED (Dec. 8, 2009); *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).

Grievant is correct to an extent. Her planning period should not be used for administering an achievement test if it is not directly related to the day-to-day teaching process. Respondent argues that the scheduling of the test during Grievant's planning period did not violate W. VA. CODE § 18A-4-14(2) as the administration of the test during the planning period was necessary preparation for the instruction of pupils. The record of this grievance is not fully developed on that question. The record is clear that Grievant refused to administer two Woodcock-Johnson Achievement tests for two of her students. Therefore, Grievant did not lose any time in her planning periods. Grievant did not meet her burden of proof and demonstrate that she was required to give up her planning period. In addition, the relief sought by Grievant is both speculative and premature. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Russell v. Kanawha County Bd. of Educ.*, Docket No. 89-20-671 (Jan. 17, 1990). Accordingly, the undersigned is without authority to grant any relief requested.

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 Board 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. The plain meaning of W. VA. CODE § 18A-4-14 is inescapable; each teacher must be provided with at least one planning period of the length of the usual class period in the school, but no shorter than thirty minutes. *Grant v. Waggy*, 180 W. Va. 481, 377 S.E.2d 473 (1988). Further, a teacher cannot be required to give up his or her planning period. *Bailes v. Nicholas County Bd. of Educ.*, Docket No. 89-34-119 (Aug. 30, 1989). 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. *Baker v. Pocahontas County Bd. of Educ.*, Docket No. 2009-0457-PocED (Dec. 8, 2009); *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).

3. Grievant did not meet her burden of proof and demonstrate that she was required by Respondent to use her planning period to administer the achievement test.

4. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Russell v. Kanawha County Bd. of Educ.*, Docket No. 89-20-671 (Jan. 17, 1990).

5. The undersigned is without authority to grant any relief requested.

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 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: September 9, 2011

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Ronald L. Reece
Administrative Law Judge