WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JILL MANON,
Grievant,

v. **Docket No. 2011-1238-FayED**

FAYETTE COUNTY BOARD OF EDUCATION
and DEPARTMENT OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, Jill Manon filed this grievance against the Fayette County Board of Education ("FCBE"), Respondent on February 22, 2011, alleging "a violation of W. VA. CODE § 18-5-46. When her principal directed her to change a grade on a student's assignment therefore resulting in a change in the student's grade." Grievant seeks "the directive to be rescinded and to cease-and-desist from such future directives."

A conference was held at level one on February 28, 2011, and the grievance was denied at that level on March 17, 2011. Grievant appealed to level two and a mediation session was held on May 25, 2011. Grievant appealed to level three on June 13, 2011. A level three hearing was held before the undersigned Administrative Law Judge on October 17, 2011, in the Grievance Board's Beckley facilities. Grievant appeared in person and was represented by Sidney Fragale, AFT-West Virginia. Respondent FCBE was represented by Rebecca M. Tinder, Bowles Rice McDavid Graff & Love LLP. Respondent, West Virginia Department of Education, *in absentia,* is represented by its General Counsel, Heather L. Deskins.[1]

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[1] The West Virginia Department of Education has intervened in the operations of Fayette County Board of Education operations of Fayette County Schools. *See* W. VA. CODE § 18-2E-5. This fact however has very little, if any, barring on the issue(s) in litigation pursuant to the instant grievance.

This case became mature for decision on December 5, 2011, the extended deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

The vast majority of the facts are not disputed by either party. Grievant, a high school teacher, contends her principal's action of directing her to grade a student's assignment was a violation of W. VA. CODE § 18-5-46. Grievant did not establish Respondent's actions constituted an unlawful action. It is not found that the principal unlawfully directed a grade change. The administrator was directing a reasonable application of "class policy" dealing with late work in such a way as to not be arbitrary, nor unduly punitive and in accordance with his duty under W. VA. CODE § 18A-2-9. Grievant was instructed to accept the project and assign a grade. Grievant did not establish Respondent's actions constituted directing a teacher to change a student's grade in violation of W. VA. CODE § 18-5-46. Grievance DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. At all times relevant herein, Grievant was employed as a 10th Grade Biology teacher at Oak Hill High School. Grievant has been teaching for almost 27 years, employed by the Fayette County Schools.

2. At all times relevant herein, student, S.S.[2] was assigned to Grievant's 9th period (the last period of the day) Biology class and received the Welcome Handout [hereinafter "Class Policy"] near the beginning of the 2010-11 semester which outlines the rules and how Grievant's class operates. Gr. Ex. 2.

3. Among other provision, the Class Policy included:

a. in the Materials section, that a 2.0 or 2.5 inch three-ring binder and pouch was to be brought to class daily;

b. in the Daily Work section, that "[d]aily work is graded on what the student attempts to answer. . . . As long as you make an <u>honest</u> attempt, credit will be given for any reasonable answer. . . . Each corrected paper will be recorded in the gradebook. . . . Unless otherwise specified, assigned homework is due when it is called for immediately after the tardy bell rings. If a tardy or absence makes it impossible to turn it in then, it must be turned into the In Basket IMMEDIATELY upon the student's entry or return.";

c. in the Extra Credit section, that extra credit is available each week to all students;

d. in the Directions section, that "Failure to follow directions will result in half credit on daily assignments and a loss of 10 points on tests and quizzes. **Late work will not be accepted! EVER!**" and "once a student reaches their seat, they may not come back up to the teacher's desk." Gr. Ex. 2.

4. Grievant's classroom rules are not in violation of any school, county, state Board of Education policy or West Virginia State Code.

5. On January 10, 2011, S.S. arrived at class with his homework assignment, intact, in a 1.5 inch three-ring binder. S.S. stapled his class notes, #61, and added the notes to the binder.

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[2]Consistent with Grievance Board's practice initials are used in place of the name of minor students, this student and all minors referenced will be referred to by initials in this decision.

6. Upon closing the binder, some papers became caught in the rings of the binder. Shortly thereafter, Grievant instructed the students in the class to remove assignment #61 and turn in the binders.

7. Upon S.S. opening the binder to remove assignment #61, 10-20 pieces of paper fell from the binder to the floor.

8. After asking for and being denied more time to re-assemble his notebook, S.S., along with a classmate, picked up the papers, and S.S. reorganized and replaced the papers back in the binder. During the period of time in which this activity took place, Grievant had begun instructing the class.[3]

9. S.S. awaited for a time to deliver the binder to Grievant without interrupting her and, about 10-15 minutes into the class, he attempted to turn in the binder to Grievant.

10. At the time that S.S. approached Grievant with the reassembled binder, Grievant had just begun grading the binders turned in by students in the class (approximately 25).

11. Grievant refused to accept and grade the binder of S.S. and so informed S.S.

12. S.S. requested and was excused from class to go to the bathroom. S.S. instead, went to the office to lodge a complaint with Timothy Payton, Principal at Oak Hill High School, regarding the failure of Grievant to accept his assignment.

13. Principal Payton investigated the facts of the incident.

14. Principal Payton, after conducting an investigation into the incident, directed Grievant "to grade S.S.'s notebook", by letter dated January 11, 2011, and indicated that the student "is not to be penalized for turning it in late." Gr. Ex. 1.

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[3] This time period has been estimated to be 15 seconds to two minutes. Not an extended period of time, but a relatively short period of time.

15. The January 11, 2011 directive provided to Grievant states, in relevant part;

> On Monday, January 10, 2011, [S. S.] approached me saying that you would not accept his notebook. He had caught the ring of his binder on something and several pages had fallen loose from the notebook and had become mixed up. He said that he told you what happened and asked for a couple of minutes to organize those pages. You then refused him this opportunity and told him that his notebook was due at that time. After speaking with you on the morning of Tuesday, January 11, 2011, you explained that [S] did not turn his notebook in on time and that he was shuffling papers and not paying attention to you and disrupting the class. I explained to you what [S] had said to me about his notebook. If a student is disrupting class, please address those issues through the Student Code of Conduct. A student should not be penalized academically for this type of behavior. The main point of all classes is that students master the Content Standards and Objectives.
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> At this time you are directed to grade [S]'s notebook. He is not to be penalized for turning it in late. Your cooperation is appreciated and expected.

(Gr. Ex. 1).

16. Grievant had not completed grading all of the binders at the time when she met with Principal Payton and received the directive to grade the binder of S.S.

17. During the course of the investigation, Grievant reported to Principal Payton that S.S. was shuffling his papers, not paying attention and disrupting the class.[4] Grievant observed S.S. arranging papers of his notebook while she was collecting notebooks.

18. Both Principal Payton and the Director of Curriculum and Instruction for Secondary Schools, Anna Kincaid-Cline [hereinafter "Kincaid-Cline"], in meetings with Grievant, explained that not grading assignments is not an appropriate consequence for Student Code of Conduct violations, which consequences are spelled out in the Student Code of Conduct policy. Grievant was also reminded that the main point of all classes is for the student to master the Content Standards and Objectives of the course.

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[4] Initially Principal Payton was of the opinion that part of the reason for Grievant's failure to grade the assignment was related to misconduct.

19. When Grievant followed the directive from Principal Payton to grade S.S.'s handbook, the student's grade was established as 111 out of a possible 120 points.

20. Principal Payton and Director Kincaid-Cline had previously supported the application of the tenets of [Grievant's] Class Policy to other students who had failed to bring an assignment to class when other parent complaints were received. In other instances, the policy was found to be appropriate and applied in a reasonable manner.

21. Neither Principal Payton nor Director Kincaid-Cline approved of the application of tenets of the Class Policy to student S.S. who had completed his assignment, brought it to class, and suffered an unfortunate mishap just before the call to turn in the assignment was made.

22. Grievant admits that, since this event, she is not applying the tenets of the Class Policy in such a strict manner.

23. It is undisputed that, had S.S. been absent from class for any reason (e.g. illness or skipping), Grievant would have permitted S.S. to turn in the binder late to be graded and would have provided full credit to S.S.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant's complaint, in essence, charges her principal with interference in one of her duties, i.e., grading students' assignments. Grievant, in support of her grievance, cites W. VA. CODE § 18-5-46, "No teacher may be required by a principal or any other person to change a student's grade on either an individual assignment or a report card unless there is clear and convincing evidence that there was a mathematical error in calculating the student's grade." Further, Grievant notes academic freedom and also references to W. VA. CODE § 6C-2-3(v), "Any action, policy or practice constituting a substantial detriment to or interference with the effective job performance of the employee or the health and safety of the employee."

Academic freedom does not confer in a teacher the unfettered right to unregulated classroom conduct.

W. VA. CODE § 18-5-46 clearly applies when an assignment has been graded and there is a dispute regarding the relative level of mastery of the Content Standards and Objectives being tested through the assignment. The teacher's assessment of the level of mastery will stand unless there is clear evidence of a mathematical error in compiling the grade for the assignment. However, this trier of fact, is convinced, in this case, what was at issue was not a dispute over the relative assessment of the level of mastery of the

Content Standards and Objectives displayed in the assignment, but a dispute regarding the application of class policy.

Grievant, in essence, is asserting her autonomy to dictate the rules of her class room. Within reasonable parameters this concept is normally not disputed. However, in this case, it is contended that Grievant is applying her class policy in a rigid and punitive manner with no room for reasonable exceptions. This is problematic. The size of the notebook, being a 2.0 or 2.5 inch three-ring binder is not a true issue of contention.[5]

Respondent has persuasively argued that it is the duty of every principal to "supervise the management and the operation of the school or schools to which they are assigned. . . . the principal shall assume administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of the school or schools to which he is assigned." W. VA. CODE § 18A-2-9. Grievant was not required to change a grade given but was instructed to accept the project and assign a grade. At the time of the directive, not all the notebooks had been graded. The undersigned is persuaded that Grievant refused to accept S.S.'s notebook after an unfortunate mishap. The student had performed the assigned task, readily evident by the grade of 111 out of a possible 120 points. Principal Payton did not direct Grievant

[5] Grievant raised the issue that S.S. did not have the right size notebook, to house the documents, indicating that she had made binders available and S.S. chose not to avail himself of a binder provided by the school, again, leading the principal to conclude that part of the reason for Grievant's failure to grade the assignment was related to what she perceived to be misconduct. S.S. explained, as did his parent, that S.S. was told, by his parents, NOT to use the resources available through the school, to reserve those resources for the less fortunate students, and that the parents would provide the needed notebook for the class. Upon cross examination, Grievant admitted that, although contained in her Class Policy in the Materials section, a 2.0 or 2.5 inch three-ring binder and pouch was not required, but was only recommended. Gr. Ex. 2.

to change a student's grade, rather, the Principal directed Grievant to grade a student's assignment and not harshly apply the terms of the class policy - Welcome handout - by labeling it late. The undersigned finds that the Principal's directive to accept the student's notebook was reasonable in the circumstances of this matter.

Respondent has argued that directing an assignment be accepted and graded is different than requiring a change of a grade previously established. In the facts of this case, the undersigned is persuaded. The latter is a violation of W. VA. CODE § 18-5-46, the former is not. Grievant has failed to meet her burden of proof. The principal determined that Grievant applied her own policy regarding accepting assignments in an arbitrary and capricious manner. The student had the assignment in class at the time it was due and made a good faith attempt to turn it in, he substantially complied with the class policy. Accordingly the principal was enforcing class room conduct in a reasonable way when he directed Grievant to accept the assignment. It is not found that the principal was unlawfully directing a grade change. Grievant did not establish Principal Payton's action was a violation of W. VA. CODE § 18-5-46. The administrator was directing a reasonable application of "class policy" dealing with an assignment in such a way as to not be arbitrary nor capricious and in accordance with his duty under W. VA. CODE § 18A-2-9.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. WEST VIRGINIA CODE § 18-5-46 provides that, "[n]o teacher may be required by a principal or any other person to change a student's grade on either an individual assignment or a report card unless there is clear and convincing evidence that there was a mathematical error in calculating the student's grade."

3. Grievant did not establish Respondent's actions of directing her to accept a student's project and assign a grade constituted a violation of W. VA. CODE § 18-5-46.

4. Grievant has failed to meet her burden of proof.

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 (2008).

Date: April 30, 2012

Landon R. Brown
Administrative Law Judge