

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**BRIANA MARY CRISP and ERICA REANN LOCKHART,
Grievants,**

v.

Docket No. 2023-0581-CONS

**LOGAN COUNTY BOARD OF EDUCATION,
and DEPARTMENT OF EDUCATION,
Respondent.**

DECISION

Briana Mary Crisp and Erica Reann Lockhart, Grievants, filed individual grievances against their employer, the Logan County Board of Education ("LCBOE"), Respondent, protesting mandated forfeiture of legislatively guaranteed planning periods.¹ The original grievances were filed on or about January 12, 2023, and the grievance statements provide:

Grievant asserts that Logan County Schools is in violation of WV Code 18A-4-14(b) by mandating that Grievant cover classes during her planning period. Grievant does not wish to give up her planning period in exchange for pay or other compensation. Grievant wants to be able to properly plan, grade and prepare for her classes without interruption.

Relief Sought:

Grievant seeks for Logan County Schools to stop mandating her to give her planning period, even for pay, and instead be allowed to have her daily planning period as prescribed by state code and any other relief the grievance evaluator deems appropriate.

The West Virginia Department of Education is the state agency with the authority and responsibility for regulation of rules, policies and laws relating to education statewide. As such the agency was joined as a party to this matter on or about January 24, 2023. A conference was held at level one on February 3, 2023, and the grievance was denied

¹ Grievants, Briana Mary Crisp and Erica Reann Lockhart filed individual grievances Docket Nos. 2023-0577-LogED and 2023-0508-LogED the grievances by request were joined into the instant consolidated matter for adjudication.

pursuant to a February 8, 2023, correspondence in which the parties were unable to resolve the grievance. Grievant appealed to level two on February 13, 2023, and a mediation session was held on March 20, 2023. Grievant appealed to level three on March 28, 2023. A level three hearing was held before the undersigned Administrative Law Judge on September 13, 2023, and October 13, 2023, at the Grievance Board's Charleston office. Grievants appeared in person and were represented by legal counsel Jeffrey G. Blaydes, Esq., Blaydes Law, PLLC. Both LCBOE and the West Virginia Department of Education ("DOE") are Respondents in this case. However, pursuant to what is believed to be an understanding and agreement between Respondents, DOE made no appearance in this matter at Level III and allowed Respondent LCBOE to present Respondents defense. Respondent LCBOE was represented by Superintendent Jeffery Huffman, and counsel Donald Wandling, Esq., Wandling Law Office. At the conclusion of the level three hearing, the parties were invited to submit written Proposed Findings of Fact and Conclusions of Law. Both parties submitted fact/law proposals and this matter became mature for decision on or about December 20, 2023, on receipt of the last of these proposals.

Synopsis

Grievants, employed as full-time teachers, protest Respondent LCBOE's practice of mandating that each Grievant repeatedly sacrifice their planning period and cover classes of absent teachers. Applicable law, West Virginia Code § 18A-4-14, requires that a teacher be provided an uninterrupted planning period on each school instructional day which is the length of the usual class period in the school. Respondent is aware of this

proviso and despite the explicit directive, chooses to require teachers at Logan High School to give up their planning period.

Grievants explicitly express the desire to retain their daily planning periods. Nevertheless, Respondent, despite other feasible alternatives, chose to compel Grievants to sacrifice planning periods for other assigned activity. Respondent contended that absenteeism by teachers compelled it to procure the planning periods of Grievants. Respondent's rebuttal is more pretext than valid justification. Grievants have met their burden of proving, by a preponderance of the evidence, that they were unlawfully deprived of their planning periods. Accordingly, this grievance is **GRANTED**,

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

Findings of Fact

1. Grievants Briana Mary Crisp and Erica Reann Lockhart ("Grievants") are employed by Respondent Logan County Board of Education ("LCBOE")² as classroom teachers at Logan High School ("LHS").

2. Both Grievants teach English. Grievant Crisp has been teaching at LHS for approximately ten years and Grievant Lockhart has taught public school for approximately fifteen years, with eleven years at LHS.

² Both Logan County Board of Education ("LCBOE") and West Virginia Department of Education ("DOE") are Respondents in this case. However, in this decision, if not expressly stated, any reference to "Respondent" herein is to LCBOE.

The Planning Period

3. West Virginia Code § 18A-4-14 states in pertinent part:

(b) 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 day to be used to complete necessary preparations for the instruction of pupils. No teacher may 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). Educators shall receive uninterrupted time for planning periods each day. Administrators may not require a teacher to use the planning period time allotted to complete duties beyond instructional planning, including, but not limited to, administrative tasks and meetings.

The duration of the planning period shall be in accordance with the following:

(1) For grades where the majority of the student instruction is delivered by only one teacher, the planning period shall be no less than forty minutes; and

(2) for grades where students take separate courses during at least four separate periods of instruction, most usually delivered by different teachers for each subject, the planning period shall be the length of the usual class period taught by the teacher, but no less than forty minutes. 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 also 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.

(c) Nothing in this section prevents any teacher from exchanging is or her lunch recess or a planning period or any service person from exchanging his or her lunch recess for any compensation or benefit mutually agreed upon by the employee and the county superintendent or his or her agent: *Provided*, That a teacher and the superintendent or his or her 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 those teachers within the

individual school, and a service person granted rights under this section and the superintendent or his or her 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 those service personnel within the same classification category within the individual school.

4. A teacher's planning period is vital to the provision of a thorough and efficient education for public school students. Grievant Crisp indicated that the planning period is the only "student free" time a teacher has during the instructional day. During her forty-nine-minute planning period she grades papers; prepares lesson plans; answers student questions remotely; makes copies (at a copier some distance from her room); cleans; utilizes Google classroom; designs units; prepares the bulletin board; chairs an honor society; gets a snack; and takes a restroom break. Similarly, Grievant Lockhart communicated that the planning period is valuable to her for grading; making lesson plans; copying; cleaning; getting supplies; utilizing Google classroom; processing Learning Community data; doing literary initiative work; addressing social issues with the school counselor; and taking restroom breaks or getting snacks. (L3 testimony, Crisp and Lockhart; also see Shrum and Stanley)

5. As teachers at Logan High School, Grievants indicated to LHS administration that they did not want to give up their planning period.

6. For many years, at the start of each school year teachers at LHS were given the option to forego their planning period for compensation when classroom coverage was needed or opt out of providing coverage, consistent with a teacher's statutory right

to a planning period. (L3 testimony Stanley, Crisp, Shrum) The method of opting out is somewhat in dispute but it is agreed it was a previous option.³

7. Grievant Crisp has lost fourteen planning periods in approximately six months of instruction without her agreement during the 2022-23 and 2023-24 school years. (L3 testimony Crisp, See Gr.'s Ex. 5, 8, 10, 11, 12, 13, 14, 15, 16) Grievant Crisp also lost a planning period on September 12, 2023, or the day before the first hearing in this matter.

8. Grievant Lockhart has lost thirteen planning period in approximately six months of instruction without her agreement during the 2022-23 and 2023-24 school years. (L3 testimony Lockhart, Gr.'s Ex. 22, 23, 25, 26, 27, 33) She also lost her planning period on September 12, 2023, the day before the first hearing of the instant grievance.

Prior to December 2022

9. Prior to December of 2022, there were instances where large numbers of teachers (in the range of three to eleven) were absent from LHS. When teachers were sick or absent, LHS would seek substitute teachers first. If there remained a need, teachers who volunteered to give up their planning period were then utilized. LHS administrators would also cover classes. Central Office administrators were also options to cover classes and provide student supervision.

³ Grievants credibly testified that they were given a form at the start of each school year in a packet that would allow a teacher to give up their planning period for pay. If a teacher did not wish to give up their planning period, they did not fill out the form. Principal Stanley testified that she was not aware of such a form. No form was produced in response to a subpoena duces tecum issued by Grievants to LCBOE.

10. Prior to December of 2022, if there were not sufficient personnel to cover school needs, LHS would use both its gym and Little Theatre as larger areas to provide supervision for students.⁴

After December of 2022

11. Shortly before December 2022, the West Virginia Department of Education assumed control of LHS based upon finding of several issues with the management and administration of Logan County Schools.

12. In or around December of 2022, as a result of parental complaints and other observations, Superintendent Jeff Huffman⁵ directed Principal Kelly Stanley to revise the manner and supervision of students. Shortly thereafter, LHS initiated the practice of taking planning periods from teachers, this included the teachers who did not agree to give up their planning periods for pay. (L3 Testimony Principal Stanley)

13. Principal Stanley admitted that LHS and its administration had taken planning periods from Grievants without the agreement of Grievants.

14. Principal Stanley could not explain why Grievants lost planning time while someone else did not.⁶ Nor could she explain with specifics what occurred on each or

⁴ Witnesses generally testified that these areas were open so that teachers sitting in front of the group could observe and to protect students. From 2016 to December 2022, teacher Shrum frequently provided supervision for co teachers and was of the opinion that the use the gym or Little Theatre should not be perceived as a problem.

⁵ Superintendent Huffman was appointed Interim Superintendent of Respondent by the West Virginia Department of Education as a result of the DOE assuming control of the LCBOE and is now Superintendent for Respondent by contract. Notably, the report leading up to the state takeover of Respondent fails to mention concerns over teacher absenteeism or student supervision as a basis for the state takeover. (L3 Testimony Huffman; Gr. Ex. 34)

⁶ Since December of 2022, *substitute teachers* who have been called in have been granted planning periods on days when *regular teachers* were not. While substitute teachers are,

any day to justify the denial of the planning periods.⁷ Principal Stanely generally believed that the denial of planning periods was caused by a lack of teachers on a given day.

15. Principal Stanley conceded that Respondent took the planning periods of Grievants rather than using the gym or Little Theatre on any given day. It is not established that the practice of not using the gym or Little Theatre is any more or less beneficial to the students. Some argue it is more confusion, for both students and teachers.

16. Principal Stanley generally contended that she was directed to provide supervision without use of the gym or theatre by Superintendent Huffman. She indicated that there were general concerns about staffing and teaching supervision. As a result, Superintendent Huffman directed her to modify the supervision of students by foregoing the use of the gym and theatre and instead, use classrooms and available teachers.

17. Administrative personnel falsely claimed that Grievants were the only two teachers who sought to maintain their planning periods. To the contrary, evidence established that approximately eighteen teachers wanted to maintain their planning periods. (Stanley, Shrum; Gr.'s Ex. 1 and 3).

18. Respondent conceded that it has taken planning periods from Grievants without their consent and despite their objection.

in certain circumstances, entitled to a planning period, it is axiomatic that full-time teachers are as well. Respondent has elected to grant planning periods to substitute teachers while denying the same to full-time teachers.

⁷ Principal Stanely generally contends that the denial of planning periods was caused by a lack of teachers on a given day. However, she failed to provide any evidence of staffing shortages or teacher absences on the days that Grievants lost their respective planning periods. Nor did she testify that an actual emergency or exigent circumstance existed on any of those days.

19. By e-mail dated May 24, 2023, Grievant Lockhart lost her planning periods on eight consecutive days. The denial of planning periods on these days occurred *before* Respondent actually knew whether there was a need for coverage on those days. (Gr. Ex. 27). Superintendent Huffman admitted that he was unaware that Grievant Lockhart had been informed in advance that she would lose eight straight planning periods – before possible staffing issues were known for the days at issue.

20. There were no identified emergencies on those days in which Grievant Crisp or Lockhart lost their planning periods.

21. Teacher Shrum indicated that there were no “actual emergencies” when teachers who wanted their planning periods lost them after December 2022. Rather, she testified that it had “become the norm” to take planning periods from teachers who wanted their planning periods.

22. Since December of 2022, when Respondent modified its manner of student coverage at LHS, Grievant Crisp indicated that more students are skipping school; kids are leaving campus more frequently; and, as noted, some students have had to sit on the floor in the classroom. (Gr. Ex. 11).

23. Grievants and teacher Shrum are of the opinion that the new system has created confusion among students. Under the old system, the school made an announcement in the morning in which students would be told that all students in a particular teacher’s class would, for instance, report to the gym that day. Under the new system, signs are placed on the door of absent teachers’ rooms; kids report to those rooms; and then go to the rooms indicated on the sign. At a minimum, the new system

creates a distraction causing students to go to another room and leaving greater opportunity to miss or be late for class. Ms. Shrum noted that this did not occur as much under the old system, in part, because students enjoyed the gym and received the blanket, simple announcement in the morning. (Shrum, Crisp, Lockhart).

24. Additionally, under the new system, confusion was also created by: (1) the failure of Respondent to provide teachers covering classes with complete or updated class rosters; and (2) covering teachers being unfamiliar with the students who were supposed to be in their classes because they were not their regular students.

25. There are thirty-seven total teaching positions at LHS. Thirty-six are filled. Approximately sixteen to eighteen teachers have indicated a desire to maintain their planning periods. (Gr. Exs. 1 and 31). Respondent disputes these numbers.

26. Teacher Shrum is of the opinion that since December of 2022, teachers who wanted their planning period have lost it “almost daily.” She lost her planning period eight out of ten days in some pay periods and six out of ten for others. She viewed the Little Theatre as a safe place to supervise students because a teacher can face the students from the stage as being better than a crowded classroom with students “on the floor or against the door.” After December of 2022, Ms. Shrum observed LHS administrators checking the parking lot because of the increase in students leaving campus. She had not seen this occur before December of 2022.

27. Although Superintendent Huffman asserted that, as of December 2022, the gym and Little Theatre are perceived to not provide adequate settings for supervision of students when the school was short staffed. Nevertheless, the gym and Little Theatre

were used *after* December 2022 for supervision of students. (Gr.'s Ex. 10). Currently on a daily basis, the entire student body (about 560 students) of LHS reports to the gym in the morning. Additionally, when there are field trips, students report to one of these two locations to gather before leaving.

Respondent's Response to the Grievants

28. Respondent was not pleased with Grievants stance regarding planning periods. Grievant Lockhart knew then it would be a "challenge" to grieve this issue. Grievants were misinformed that they were the "only ones not wanting to cover."

29. When Grievant Lockhart objected to losing her planning period in January of 2023, she sought to meet with her union representative, Brandon Tinney (Gr. Exs. 19 and 20). Grievant Lockhart ultimately met with Mr. Tinney with students in the classroom (it was her planning period and she had to cover a class over her objection); and Assistant Principal Dalton stood outside the classroom door. Thereafter, Assistant Principal Dalton escorted Mr. Tinney to Grievant Crisp's classroom.

30. Teachers covering classes during their planning periods have not been given specific instructions as to what to do during class. They are not required to actually teach the class.

31. Grievants are unable to perform tasks that they would normally perform in a planning period while also supervising students.

32. Respondent contended that absenteeism by teachers caused Respondent to take the planning periods of Grievants. Teacher Shrum emphasized that "there have been absent teachers ever since" she started teaching thirty years ago.

33. Superintendent Huffman admitted that Grievants have been denied their planning periods but justified the denials because of his concerns regarding supervision. He also admitted that the entire student body at LHS reports to the gym every morning.

34. Superintendent Huffman would not agree to cease depriving Grievants of their planning periods moving forward.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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).

Citing West Virginia Code § 18A-4-14, Grievants employed as full-time teachers protest Respondent LCBOE's practice of mandating that each repeatedly sacrifice their planning period and cover classes of absent teachers. Grievants explicitly express the desire to retain their daily planning periods. Upon conceding that it violated the Grievants' right to a planning period, Respondent asserted that concerns over student

supervision required it to take the planning periods away due to emergencies or exigent circumstances at LHS. Respondent contended that teacher absenteeism and a shortage of willing substitute teachers caused it to develop a new method of supervising students. In support of its positions, Respondent asserted that West Virginia Code § 18A-5-1 provides that school personnel shall stand in “the place of the parents” in exercising authority over the school and control of students.

West Virginia Code § 18A-4-14 provides as follows with regard to planning periods:

(b) 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 day to be used to complete necessary preparations for the instruction of pupils. No teacher may 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). Educators shall receive uninterrupted time for planning periods each day. Administrators may not require a teacher to use the planning period time allotted to complete duties beyond instructional planning, including, but not limited to, administrative tasks and meetings.

* * *

(c) Nothing in this section prevents any teacher from exchanging his or her lunch recess or a planning period or any service person from exchanging his or her lunch recess for any compensation or benefit mutually agreed upon by the employee and the county superintendent or his or her agent: *Provided*, That a teacher and the superintendent or his or her 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 those teachers within the individual school, and a service person granted rights under this section and the superintendent or his or her 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 those service personnel within the same classification category within the individual school.

(emphasis added)

Teachers are entitled to a duty-free planning period. In the facts of the instance matter, there is no dispute that the right of each Grievant to a duty-free planning period has been repeatedly violated. The evidence from Grievants is uncontroverted. Grievants established by a preponderance of the evidence that Respondent violated their right to a duty-free planning period. Further, Respondent readily admits that it has deprived each Grievant (and others) of planning periods.

The concept that teachers are entitled to a duty-free planning period is not novel or new. This Board discussed and ruled on the issue as far back as thirty years ago. See e.g. *Smith v Lincoln County Bd. of Educ.*, Docket No. 89-22-544 (Nov. 14, 1989); *Bailes v. Nicholas County Bd. of Educ.*, Docket No. 89-34-119 (Aug. 39, 1989); *Hardman, et al. v. Kanawha County Bd. of Educ.*, Docket No. 95-20-249 (Oct. 19, 1995) *Redd v. McDowell County Bd. of Educ.*, Docket No. 2009-1477-McDED (May 26, 2011). The issue has been discussed; Respondent cannot seriously contend ignorance of the standard. Respondent knowingly and intentionally disregarded the wishes of teachers who identified and attempted to exercise their right to a duty-free planning period⁸. Respondent violated Grievants right to a duty-free planning period and it did such repeatedly.

Upon conceding that it violated Grievants' right to a planning period Respondent asserted that concerns over student supervision required it to take the planning periods

⁸ Planning periods are not fun and game times for teachers. Do not confuse planning periods with a 45-minute coffee break. Not all the duties required of a teacher are easily accomplished, there are those who are of the opinion that it is almost impossible to accomplish all the necessary tasks of an effective teacher without sacrificing personal time and finances to provide for the essential needs of their students.

away due to emergencies or exigent circumstances at LHS. Respondent contended that teacher absenteeism and a shortage of willing substitute teachers prompted it to implement a new method of supervising students when adequate substitutes and administrators were not available. In support of its position, Respondent asserted that West Virginia Code § 18A-5-1 provides that school personnel shall stand in “the place of the parents” in exercising authority over the school and control of students. The undersigned listened with intense dedication but was not persuaded by Respondent’s rebuttal.

The undersigned finds Respondent assertions to be pretextual. Respondent knew its actions were not in accordance with applicable standards and applicable law. Respondent could have acted more responsibly and honored the wishes of the limited number of teachers, who choose not to trade or give up their planning periods. Respondent systematically intimidated and forced teachers to sacrifice or exchange their planning period.⁹ Respondent went so far as to misinform Grievants that they were the “only ones not wanting to cover,” the only teachers with a problem with the process. This is and was false.

A review of the statutory provision(s) at issue is prudent. Nothing in West Virginia Code § 18A-5-1 permits Respondent’s communicated construction of the statute. West Virginia Code § 18A-5-1 does not permit Respondent to deny a teacher’s right to a planning period expressly granted in West Virginia Code § 18A-4-14. Of course, the

⁹ Grievants have demonstrated courage and fortitude to pursue their grievance in the face of organized and governing forces. Respondent continued to pressure Grievants to conform (i.e., give up their planning periods) right up to the first day of hearing.

plain meaning of these statutory provisions must be adhered to. In *Stanley v. Department of Tax and Revenue*, 614 S.E.2d 712 (2005), the West Virginia Supreme Court of Appeals stated the well-settled rule of statutory construction:

The general rule for interpreting differing statutory sections is that courts should attempt to harmonize them, if possible. Syllabus Point 9, *Bailey v. Norfolk and Western Railroad Co.*, 206 W. Va. 654, 527 S.E.2d 516 (1999) states:

A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, its terms are consistent therewith.

As such, the Legislative mandate that teachers receive planning periods cannot be eliminated by a county board of education. Nor can a board of education arbitrarily take planning periods from teachers. It is simply contrary to law and is clearly not “in accord with the spirit, purpose and objects” of this statutory provision. Grievants established by a preponderance of the evidence that Respondent violated their right to a duty-free planning period twenty-seven times in a period of approximately six instructional months.

The plain manner of West Virginia Code § 18A-4-14 is “inescapable.” In *Gant v. Waggy*, 377 S.E.2d 473 (1989), the Court addressed an instance where a county board of education attempted to break up the planning periods of teachers claiming that such action would aid in “scheduling” and would avoid “personnel disruption.” The Court, relying upon the plain language of the planning period statute, disagreed and adhered to the “obvious intention” of the Legislature to provide a planning period. In assessing *West Virginia Code* § 18A-4-14, the Court stated in part:

In approaching the interpretation and application of this statutory language, this Court is bound by the basic rule that:

When a statute is clear and unambiguous and the legislative intent is plain, it is the duty of the courts to apply the statute in accordance with the legislative intent therein clearly expressed.

[180 W.Va. 483] Syllabus point 7 of *State v. Bragg*, 152 W. Va. 372, 163 S.E.2d 685 (1968). Also, this Court is required to give effect to what it considers the legislative intent to be and will not change the plain language employed in framing the statute unless there is an impelling reason to do so. *State v. Ilix*, 132 W. Va. 516, 54 S.E.2d 198 (1949).

In W. Va. Code 18A-4-14, the Legislature has indicated that there will be at least one planning period within each regular school day and that “such planning period shall be the length of the usual class period in the school to which the teacher is assigned and shall not be less than thirty minutes.” This Court believes that the plain meaning of this language 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.

In arguing that the plain meaning of the statute should not be applied, the appellees have suggested that providing the teachers with a planning period of at least the length of a regular school period might cause scheduling and personnel disruption in the Pendleton County schools. This Court does not find this to be so impelling a reason as to permit deviation from the Legislature’s obvious intention. The Court believes that there are valid reasons for providing a teacher with a sufficiently long and uninterrupted planning period, the most salient of which is to afford the teacher with an opportunity to review, organize, and reflect on the material which is to be taught. Teaching is the fundamental function of the schools, and this Court believes that the obvious benefit of the provision of an appropriate planning period on the teaching process outweighs the negative scheduling effect that compliance with the legislative mandate might entail.

(emphasis added)

This recognition of the importance of the planning period is equally applicable herein.

Further it might be helpful to note that the Court has repeatedly held that “statutes relating to school employees are generally to be construed in favor of employees.” Syl. 1, *Morgan v. Pizzino*, 256 S.E.2d 592 (1979). Such a construction is appropriate herein.

The undersigned specifically emphasized that West Virginia Code § 18A-4-14 provides a specific right to teachers while West Virginia Code § 18A-5-1 provides a broad and general duty. The more specific must prevail over the general. The West Virginia Supreme Court of Appeals has held in *I.U.O.E. et al v. L.A. Pipeline*, 786 S.E.2d 620, as follows:

Ordinarily, where two statutes apply to the same subject matter, the more specific statute prevails over the general statute. "When faced with a choice between two statutes, one of which is couched in general terms and the other of which specifically speaks to the matter at hand, preference generally is accorded to the specific statute." [footnote omitted] As we have held: "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." [footnote omitted]

Finally, West Virginia Code § 18A-4-14 expressly sets forth the manner in which a teacher may lose a planning period – by agreement of the teacher and Respondent. Grievants explicitly and repeatedly expressed the desire to retain their daily planning periods. The only thing the parties of this grievance agree upon is that they each disagree with the others perception. The instant Grievants did not agree to exchange their planning period for compensation.

A careful review of applicable statutes demonstrates that Grievants have a right to the planning periods at issue and no other statute interferes with that right. As such, Grievants must prevail herein. However, assuming *arguendo*, that the existence of an emergency or exigent circumstances could possibly give rise to the unilateral denial of a planning period, the facts herein simply do not support Respondent's actions. Although Respondent argues that an emergency could justify the loss of a planning period, it's clear that the continuous denial of planning periods simply is not supported here.

Respondent's actions and misplaced reliance on West Virginia Code § 18A-5-1 have eviscerated Grievants' statutory rights to their planning period and wrongly embolden Respondent to alter numerous planning periods of Logan High School teachers.

The Grievance Board reached such a holding in *Smith v. Lincoln County Board of Education*, Docket No. 89-22-544 (Nov. 14, 1989); also see *Bailes v. Nicholas Co. Bd. of Educ.*, Docket No. 89-34-119 (Aug. 30, 1989). In *Smith*, the teacher was required to supervise students during her planning period thirty-seven times during a school year for "absent teachers." The board of education argued that it was permitted to take her planning period away and that the teacher could make up for the planning during the day. This Grievance Board disagreed, as does the undersigned, stating if Respondent's interpretation was accepted, West Virginia Code § 18A-4-14 would have little meaning. The statute unambiguously requires a school board to provide planning periods within the school day. The same analysis applies herein. Grievants are entitled to receive a planning period even where there are "absent teachers." This is particularly true given that Respondent had available other methods of providing safe coverage for students without taking teacher(s) planning periods – even when faced with "absent teachers."¹⁰ Respondent failed to credibly identify a single day or event wherein a staffing emergency actually existed. Respondent has overstepped addressing a problem that they, arguably, created. Grievants have carried their burden of proof by a preponderance of evidence.

¹⁰ For at least sixteen years, LHS utilized the gym and Little Theatre to supervise students when teachers were absent. No evidence was presented to show that using the gym and Little Theatre posed any risk or danger to the students. The uncontroverted evidence tends to indicate that these larger areas were actually safe places for students.

As such, Respondents are ordered to abide by the statutory right of Grievants and refrain from denying them a planning period.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant has the burden of proving her grievance by a preponderance of the evidence. See W. VA. CODE R §156-1-3. *Burden of Proof* Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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 § 18A-4-14 requires that a teacher be provided an uninterrupted planning period on each school instructional day which is the length of the usual class period in the school. This grievance is consistent with the West Virginia Constitution which requires that students receive "a thorough and efficient education." West Virginia Constitution Article XII, §1.

3. Grievants have met their burden of proof, by a preponderance of the evidence, in that they were deprived of their planning periods. Grievants established by a preponderance of the evidence a violation of West Virginia Code § 18A-4-14.

4. Respondents violation of West Virginia Code § 18A-4-14 was intentional and repetitive.

5. Respondent violated West Virginia Code § 18A-4-14 with respect to Grievants' planning period on at least twenty-seven occasions (fourteen for Grievant Crisp and thirteen for Grievant Lockhart) during the 2022-23 and 2023-24 school years.

Accordingly, this grievance is **GRANTED**.

Respondent is **ORDERED** to discontinue the practice of requiring Grievants to give up their planning periods without their written consent. Moreover, given the valuable planning period time lost to each Grievant, Respondent shall provide additional planning period time (above and beyond their normal planning period) in the amount of fourteen planning periods for Grievant Crisp and thirteen planning periods for Grievant Lockhart. The additional planning time shall be equal to what they have previously lost, or 49 minutes per planning period.

Any party may appeal this decision to the Intermediate Court of Appeals.¹¹ Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its

¹¹ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: January 22, 2024

Landon R. Brown
Administrative Law Judge