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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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DOUGLAS SMOOT

v.

Docket No. 89-20-038

KANAWHA COUNTY BOARD OF EDUCATION

DECISION

Grievant Douglas Smoot is employed by Respondent Kanawha County Board of Education as a social studies teacher at Roosevelt Junior High School (RJHS). On or before October 18, 1988, he initiated the following grievance¹ at Level I:

My principal [Patricia A. Petty] has engaged in a continuing pattern of harassment and reprisal, including giving me an inequitable and undesirable teaching schedule and alleging deficiencies in my grade book, lesson plans and attendance registers. The relief I seek is schedule adjustment and an end to the harassment and reprisal.

After denials at Levels I and II and waiver at Level III, this matter was advanced by Grievant to Level IV on January 26, 1989. Hearing was scheduled for February 27, but before that date the parties agreed to disposition of the case on

¹ Grievant actually filed two Level I grievances around this time which were consolidated at either Level I or II.

the basis of the record below² and to submission of their proposals as to law and fact by March 31.³

The crux of Grievant's allegations, as presented below, follows:

a) Ms. Petty assigned him the sixth, or next-to-last, period of the schoolday as his planning (preparation or "prep") time; he is the only full-time RJHS teacher so scheduled. Teachers are encouraged to be available during their planning sessions to cover classes for other instructors who are absent. Since it is more likely that teachers will be away from school toward the end of the day, for appointments and the like, Grievant is more likely to "lose" his planning period than other RJHS staffers.

b) He has been required to teach classes at each of the three RJHS grade levels, seventh, eighth and ninth, at least during school year 1988-89. He is the only member of the RJHS social studies department of which this is true. In addition, he has three distinct courses, i.e., more material to cover than others similarly situated, requiring disproportionately more preparation time.

² The Level II transcript is part of that record.

³ Grievant's proposed findings of fact and conclusions of law, accompanied by "data requested by Grievant and supplied by Respondent," were received March 24; Respondent has adopted the findings and conclusions included in the Level II decision as its proposal at Level IV.

c) He has more students per day than any of the other RJHS social studies department members, and he has responsibility for a homeroom. Further, he has more pupils in class per day than any other RJHS teacher with a homeroom.

d) He has more special education students "mainstreamed," or placed in non-special education courses, in his classes than any other social studies department member. Overall, he has an unfairly high ratio of low-ability pupils.

e) Ms. Petty has complained, unfairly, of supposed deficiencies in Grievant's record-keeping. Furthermore, some of her criticisms were directed toward the state of Grievant's grade book, which had to be replaced mid-year due to the theft of the first one. Grievant stated he thought Ms. Petty did not believe he had lost the original book and therefore was not understanding of his difficulty in reconstructing grade records from the earlier portion of the year. Grievant believes that "Principal Petty's October 24, 1988, memorandum to Grievant concerning his homeroom attendance register, grade book and lesson plan book represents a radical departure from past practice and written school policy."

f) All of the above are indicative of the "ongoing pattern of harassment" of Grievant by Ms. Petty found in previous grievance decisions, including one rendered at Level IV, Smoot v. Kanawha Co. Bd. of Educ., Docket Nos.

20-86-177/209-1 (Mar. 2, 1987), "and are a reprisal for those previous grievance and employment disputes." T. 12-13.⁴ Apparently in support of this, Grievant cites Ms. Petty's comment to him, during informal conference on some of the within concerns on November 2, 1988, to the effect that his actions toward her might be considered harassment.

The Kanawha County Board of Education responded to these respective claims as outlined below:

a) Grievant, while the only full-time RJHS instructor with "prep" sixth period, is not the only one with a planning period at a time when no other teacher is so occupied; further Grievant had not, through December 14, 1988, the date of the Level II hearing, been asked to cover any teacher's class during school year 1988-89.

b) Grievant is the only RJHS social studies staffer responsible for classes at each grade level. However, Ms. Howard, another social studies teacher, has five distinct course preparations due to different

⁴ No specific information was given on any other grievances involving Grievant and Ms. Petty. A close reading of the Mar. 2, 1987, Smoot Decision reveals that Hearing Examiner John M. Richardson placed considerable emphasis on an instance of questionable judgment of Ms. Petty's part, i.e., her observation of Grievant's class the day after a Level II hearing in which she had become quite upset with Grievant and his representative, and her subsequent rendering of a negative report which contributed to an eventual "Does Not Meet Standards" evaluation. That evaluation was ordered expunged from Grievant's personnel file by this Grievance Board.

requirements as to textbook utilization and varying levels of student ability.

c) Grievant has responsibility for approximately 140-150 students per day; Ms. Howard, 140-150; and the third and last member of the social studies department at RJHS, Ms. Johnson, 110. T. 27. Ms. Johnson has school attendance duties during one period of the day and so teaches one less class than the other two⁵ although she has a homeroom. Grievant also manages a homeroom, while Ms. Howard does not. Further, when divided by the number of class periods taught each day, Ms. Howard may have more students for which she is instructionally responsible than does Grievant, although any difference is not educationally or otherwise significant, see T. 28. Other RJHS homeroom teachers with responsibility for a similar, perhaps higher, number of students per day than Grievant are Mrs. Murray, Mrs. Austin, Mrs. Graham and Mrs. Wilburn. T. 28.

d) Ms. Howard has a number of mainstreamed students in at least two of her classes, including some from the "intensive service unit," thought to be more difficult

⁵ The record reveals Ms. Johnson also teaches an eighth grade mathematics class at RJHS. Also, at one point Ms. Howard was identified as the chairman of the school's social studies department, although no evidence was presented as to any additional duties that attend this title.

A fourth teacher, with responsibility for one ninth grade American history section and one seventh-eighth grade social studies class, is apparently not considered a member of RJHS' social studies department.

than the "resource room" students mainstreamed into some of Grievant's courses. T. 30. Additionally, even though RJHS has a relatively high percentage of low ability students, T. 31, Grievant's first period class is "the top group" of eighth graders, academically speaking. Id.

e) Grievant was not the only person counseled for deficiencies in record-keeping practices; instead, several RJHS teachers were subject to constructive criticism from Ms. Petty in this regard. There was no direct response to the charge that Ms. Petty was unfairly unsympathetic regarding the alleged theft of Grievant's grade book.

f) Charges of "ongoing harassment" and "reprisal" were flatly denied. Ms. Petty admitted that during a grievance conference she had "said that it appeared Mr. Smoot was harassing me because I don't harass Mr. Smoot at school." T. 36.

Supplemental evidence presented by Grievant at Level IV, see n. 3, indicates that at least of February 22, 1989, his prep period is not sixth period, but third period, which is in the morning. The schedules of Grievant and other RJHS personnel have obviously been altered since the time of the Level II hearing; the undersigned has not been advised to the extent these changes otherwise affect Grievant's complaints, save that he now has 169 students per day, while Ms. Howard has 150 and Ms. Johnson 128. It must be assumed

the other circumstances from which Grievant seeks relief remain extant.

The remainder of this Decision will be presented as formal findings of fact and conclusions of law:

FINDINGS OF FACT

1. Grievant Douglas Smoot is a social studies teacher at Roosevelt Junior High School (RJHS) and is employed by Respondent Kanawha County Board of Education. Patricia A. Petty is Principal at RJHS, which has a three-member social studies faculty, Grievant, Ms. Howard, and Ms. Johnson.

2. Grievant has filed other grievances against Respondent, complaining specifically of actions taken by Ms. Petty. One of those, namely, Smoot v. Kanawha Co. Bd. of Educ., Docket Nos. 20-86-177/209-1, resulted in a March 2, 1987 Level IV decision finding that Ms. Petty had harassed Grievant.

3. During school term 1988-89, Grievant was, at least before February 22, 1989, the only RJHS teacher assigned to a sixth period prep time. Teachers are often asked to cover, during their prep time, for their fellow instructors who are absent. The evidence is unrefuted that Grievant has

never been called upon to do this during 1988-89, and that he now has his planning time third period.⁶

4. Before February 22, 1989, Grievant had responsibility for 140-150 students per day, perhaps including homeroom pupils. This was a similar size load to other RJHS teachers, including one of the other two social studies department members, Ms. Howard, although Ms. Howard was and is without a homeroom. Evidence submitted by Grievant indicates homeroom attendance may be "discretionary" at RJHS, in any event.⁷

5. Grievant has three distinct courses for which he must prepare; Ms. Howard has five.

6. Grievant has a number of "mainstreamed" special education students in three of his classes. Ms. Howard also has mainstreamed students, but perhaps not as many, in two or three classes; however, certain of her mainstreamed students are from the intensive service unit and more

⁶ Even if Grievant were still assigned to sixth period for planning, and even if he had been required to fill in for other teachers during this time, the record does not show this would necessarily be a problem or afford him any basis for relief.

⁷ Grievant's current load of 169, as opposed to Ms. Howard's 150 and Ms. Johnson's 128, is irrelevant, but does not appear to be significantly different anyway. Ms. Johnson performs administrative duties for RJHS during one period and thus teaches one less class; Ms. Howard has no homeroom and accordingly has had, perhaps throughout school year 1988-89, actual instructional responsibilities for more students than has Grievant.

challenging to teach and manage than the resource room students assigned to Grievant.

7. RJHS has a large population of low-ability students, and Grievant has several of these in class. However, RJHS teachers must serve these pupils, and Grievant's responsibilities in that regard are not unreasonable. Furthermore, Grievant has one class of academically-advanced eighth graders.

8. Grievant and several other RJHS teachers were counseled, but not disciplined, by Ms. Petty in October 1988 regarding record-keeping deficiencies. At the same time, Grievant was complimented in some particulars for his record-keeping practices. No evidence was presented of any "written school policy" as alleged by Grievant to have been violated in this instance, although Ms. Petty may have changed RJHS "past practice."

9. Ms. Petty stated to Grievant at an informal conference related to the within grievance, conducted on or about November 2, 1988, that certain of his actions toward her might be considered harassment.⁸

⁸ In his proposed conclusions of law, Grievant, citing W.Va. Code §§18-29-2(n) and 18-29-3(s), refutes Ms. Petty's characterization of Grievant's actions by arguing, in effect, that it is impossible for a person in Grievant's position to engage in harassment. Without stating opinion on the propriety of Ms. Petty's comment, the undersigned would point out it is certainly conceivable that an individual grievant could intentionally abuse the grievance process and in that regard be guilty of some sort of

(Footnote Continued)

CONCLUSIONS OF LAW

1. Harassment, for purposes of the West Virginia education employee grievance procedure, is "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." W.Va. Code §18-29-2(n).

2. Reprisal is "the retaliation of an employer or agent toward a grievant. . .either for an alleged injury itself or any lawful attempt to redress it." Code §18-29-2(p).

3. A grievant must prove the allegations of his complaint by a preponderance of the evidence. Shaver v. Jackson Co. Bd. of Educ., Docket No. 18-88-107 (Nov. 7, 1988).

4. Grievant's request that his planning period be changed from sixth period is moot, inasmuch as the evidence reflects that, at least as of February 22, 1989, his prep time is third period. Accordingly, no relief on this point is available from this Grievance Board. See Wilburn v. Kanawha Co. Bd. of Educ., Docket No. 20-88-089 (Aug. 29, 1988).

(Footnote Continued)

"harassment," although perhaps not as defined in §18-29-2(n). This possibility is supported by §18-29-3(s), which provides that "[t]he number of grievances filed. . .by an employee shall not, per se, be an indication of such. . .employee's job performance" (emphasis supplied).

5. Grievant is not entitled to a presumption that Ms. Petty engaged in inappropriate behavior or any "ongoing pattern of harassment," related to the instant grievance, simply because of previous disputes between the two of them and/or the March 2, 1987, holding in the separate case of Smoot v. Kanawha Co. Bd. of Educ., Docket Nos. 20-86-177/209-1. See also Code §18-29-3(s) (number of grievances filed against the agent of a county board of education shall not, per se, be an indication of that agent's job performance).

6. Grievant has failed to establish harassment, reprisal, or any impropriety whatsoever, by Respondent or any of its agents, including Ms. Petty.⁹

Accordingly, this grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiner is

⁹ Even if Grievant had established that any of the circumstances he complains of are unfair to him, he did not show that his placement in those situations was the result of any untoward behavior on the part of Ms. Petty or Respondent or any of its other agents.

a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

A handwritten signature in cursive script, appearing to read "M. Drew Crislip", written over a horizontal line.

M. DREW CRISLIP
HEARING EXAMINER

DATED: April 17, 1989