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MARSHA BAILES and DANA THOMAS, JR.

v.

Docket No. 89-34-119

NICHOLAS COUNTY BOARD OF EDUCATION

DECISION

Grievants, Marsha Bailes and Dana Thomas, Jr., are employed by the Nicholas County Board of Education as learning resource teachers for gifted children. They filled a grievance at Level I on or about February 23, 1989 alleging violations of W.Va. Code §§18A-4-14, 18A-2-7, 18A-2-2 and 18-29-2(a) when they were required to perform substitute teaching duties during time formerly allocated for planning. Grievants' supervisor found he was without authority to resolve the matter and the grievance was denied at Level II following a hearing held March 3, 1989. The Board waived Level III proceedings and a Level IV hearing was held April 24, 1989. Proposed findings of fact and conclusions of law were submitted by May 12, 1989.

The facts giving rise to the grievance are not disputed. The grievants have worked as a team assigned to the learning center at Summersville Elementary School (SES) for the past four

years during which they have always taught classes Monday through Thursday without planning periods and used the entire day of Friday for that purpose. This arrangement, which other teachers at SES do not have, was authorized by Mr. Luther Baker, Special Education Director. On or about February 16, 1989, Mr. Lowell Morrison, principal at SES, asked grievants to substitute one-half day each for an absent teacher. Grievant Thomas expressed concern over the propriety of the request and called Mr. Baker, who came to the school and informed grievants that they would not have to comply. Mr. Baker subsequently conferred with Mr. Robert Bailey, Superintendent of Schools, and, upon his return to SES, informed grievants that a new policy on substitutes had been established which required that they substitute one-half day on Fridays on a rotating basis with other special education teachers. Mr. Baker also informed grievants that they were to do so only when a teacher was absent at SES on a Friday. Grievants were not required to substitute on the day Mr. Morrison requested¹ but did substitute on later occasions.²

Grievants contend they relinquished their right to daily planning periods in exchange for the benefit of a seven hour "planning day" and pursuant to the provisions of W.Va. Code

¹It is not clear from the record but apparently the grievants' initial reluctance to comply caused Mr. Morrison to find another substitute for that day.

²As of the date of the Level IV hearing grievants had filled in for absent teachers at SES approximately four times.

§18A-4-14(3) the Board is prohibited from depriving them of any part of that time. They further assert the Board's action constitutes a substantial detriment to or interference with their effective classroom instruction in violation of W.Va. Code §18A-29-2(a).³ Grievants request discontinuation of the requirement that they substitute or payment for hours in which they do as relief.

The Board maintains the mutual consent provisions of W.Va. Code §18A-4-14(3) apply only when a teacher has exchanged his or her planning period for a personal benefit and the "planning day" was not of that nature. The Board further contends it is only required to provide grievants a minimum of two-and-one-half (2 1/2) hours planning time per week and they would have one hour above that minimum even after the infrequent one-half day substitute assignments.⁴ The Board also asserts the seven hours planning time afforded the grievants is discriminatory to other teachers at SES.

The pertinent part of W.Va. Code §18A-4-14(3) provides:

Nothing in this section shall be construed to prevent any teacher from exchanging his lunch recess or planning period or any service personnel from exchanging his lunch recess for any

³Grievants did not develop the assertions that W.Va. Code §§18A-2-7 and 18A-2-2 had been violated at either Level II or IV and their post-hearing submissions make no reference to such. These contentions are therefore considered abandoned.

⁴It is agreed that grievants work a seven and one-half hour day with a one-half hour lunch break and that the substitute assignments are for three and one-half hours either in the morning or afternoon.

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. . . .

Because the Board's assertion that the grievants' planning time arrangement is discriminatory and therefore contrary to these provisions is correct, the parties' other contentions need not be addressed. It is clear that disparities in planning time which result from agreements such as those entered into between grievants and Mr. Baker are prohibited. The arrangement was therefore ultra vires and must be discontinued. See Freeman v. Poling, 338 S.E.2d 415 (W.Va. 1985); Parker v. Summers County Board of Education, Docket No. 45-89-052 (August 18, 1989).

In addition to the foregoing, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Grievants, at least since 1985, have taught classes for gifted children at SES Monday through Thursday without daily planning periods but were given the entire seven hour workday on Friday to use for that purpose.

2. Such an arrangement was not made available to other teachers at SES and they are afforded up to one hour per day or approximately five hours per week for planning.

3. Beginning in mid-February 1989 grievants were required to substitute one-half day on Fridays on which a SES teacher was absent on a rotating basis with other special education teachers at SES.

CONCLUSIONS OF LAW

1. Neither a county board of education nor its agents have the authority, under W.Va. Code §18A-4-14(3), to enter into an exchange of daily planning period for benefits agreement with a teacher within an individual school which results in discrimination toward other teachers within that school. DeFelice v. McDowell County Board of Education, Docket No. 33-88-232 (June 29, 1989).

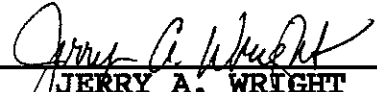
2. Unauthorized actions of county boards of education or its agents are nonbinding. Freeman v. Poling, 338 S.E.2d 415 (W.Va. 1985); Parker v. Summers County Board of Education, Docket No. 45-89-052 (August 18, 1989).

3. A county board of education may not assign responsibilities, including substitute teaching duties, to a teacher during his or her planning period without the teacher's consent.

Accordingly, the Nicholas County Board of Education is hereby **ORDERED** to provide grievants a schedule which entails planning time which is no greater than that of other teachers assigned to Summersville Elementary School. The Board is hereby

prohibited from assigning grievants substitute teaching duties during their planning periods unless they give their written consent.

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


JERRY A. WRIGHT
Chief Hearing Examiner

Dated: August 30, 1999