WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ALLEN KAPLAN,
Grievant,

v. **Docket No. 2009-1819-CONS(R)**

CABELL COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

This matter is before the undersigned Administrative Law Judge on remand from the Kanawha County Circuit Court, by Order dated January 6, 2017. The underlying grievance(s) originally initiated in 2008/2009, protested Grievant's work day, daily responsibilities and contended among other things that Grievant was not getting a duty-free lunch pursuant to W. VA. CODE §18A-4-14.[1] The relief sought included having identified responsibilities removed, have a defined workday, and receive a duty-free lunch. Subsequent to the filing of the grievances, Grievant retired from employment with Respondent, the Cabell County Board of Education. Grievant was formerly employed as an Assistant Principal.

In 2008, the issue(s) relevant to this grievance, were not overly complicated. Nevertheless, several years have now passed. This grievance has taken a tumultuous path, being remanded twice on January 24, 2014, and January 6, 2017.[2] Grievant, in

[1] Circuit Court of Kanawha County, Civil Action No.10-AA-74, on January 24, 2014, remanded and consolidated two related grievances filed by Grievant on September 10, 2008, and December 8, 2009.

[2] In addition to the noted Remands, following a Petition for Appeal to the Circuit Court of Kanawha County on April 28, 2010, the matter was dismissed by Order entered September 26, 2013, for the failure of the Grievant to pay a fee. Following a Motion for Reinstatement and

2018, no longer stands as he did in 2008.[3] The selective injunctive relief of having certain identified responsibilities removed, receiving a duty-free lunch, and having an agency defined workday, as performed by Grievant prior to September 2008, have little to no application with regard to Grievant's current duties as a substitute teacher-professional personnel. Grievant's effective date of retirement was June 7, 2012, one and a half years before the first Remand Order from the Circuit Court in 2014.

The current Kanawha Circuit Court Civil Action No. 16-AA-22 (January 6, 2017) Remand instructs this Board to rule on Petitioner's Motion to Amend by analyzing whether Respondent would be prejudiced by allowing changes in the relief requested by Grievant. The order cites *Samuel Goodson, et al., v Fayette County Board of Education*, Docket No. 2014-1654-CONS (November 12, 2015) which reads in relevant part:

> The grievance process is not "to be a procedural quagmire where the merits of the cases are forgotten." *Spahr*, 182 W. Va. at 730, 391 S.E.2d at 743. Neither the Grievance Board's procedural rules nor the Code address the amendment of grievance claims. Further, although the Code refers to level three as an "appeal," the administrative law judge does not review the propriety of the level one decision, but rather considers the claim completely anew. As neither the procedural rules nor the Code specifically prohibit "amendment" of a claim between levels, the question then becomes whether Respondent would be prejudiced by allowing the changes made in the statement of grievance here.

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payment of the fee on October 30, 2013, the matter was reinstated on the dockets of the Circuit Court of Kanawha County by Order entered January 8, 2014.

[3] Grievances were filled during Grievant's time as an assistant principal at HHS, prior to employment at Barboursville Middle School. Grievant resigned as an assistant principal and retired from employment with Respondent, effective June 7, 2012. Grievant was re-employed by Respondent, at its county board meeting, on June 19, 2012, as a substitute teacher-professional personnel. Grievant currently works as a substitute administrator for Respondent. *See* finding of facts 6, 7 of this Board's January 19, 2016 Decision and/or R Ex 2 and 3 of the instant grievance.

Petitioner's Motion to Amend his grievance was filed "after" Respondent's August 29, 2014, Motion to Dismiss.[4] Grievant motioned to amend the relief requested by his prior grievance statements on or about October 13, 2014. Such motions can be made before level three and an administrative law judge has the discretion to approve or deny dependent upon several collective factors, citing 156 C.S.R. 1 § 6.2 (2008) granting administrative law judges the authority to take action considered appropriate consistent with WEST VIRGINIA CODE § 6C-1-1 *et seq*.

As noted in the January 19, 2016 Decision, Docket No. 2009-1819-CONS, the undersigned Administrative Law Judge consciously declined to issue a Grievance Board ruling in response to Respondent's Motion to Dismiss or Grievant's subsequent request to amend the requested relief, prior to the occurrence of a fact-finding level three hearing. Level three proceedings were held before the undersigned Administrative Law Judge on December 15, 2014, and October 5, 2015, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by legal counsel, Andrew J. Katz, Esquire. Respondent was represented by Rebecca Tinder, Esquire, of Bowles Rice, LLP. Further, after the January 6, 2017 Kanawha Circuit Court Remand, Civil Action No. 16-AA-22, there were two phone conferences on August 4, 2017, October 26, 2017 and the submission of written arguments and proposed findings of fact and conclusion of law presented by both parties regarding amending the relief requested and prospective damage.

[4] Respondent contended that all issues raised in the consolidated grievance were moot, in that the only relief requested is no longer applicable since Grievant's retirement thus, this grievance should be dismissed.

Synopsis

The Circuit Court of Kanawha County remanded and consolidated two related grievances filed by Grievant. The underlying grievances originally initiated in 2008/2009, protested Grievant's work day, daily responsibilities and contended among other things that Grievant was not getting a duty-free lunch pursuant to W. VA. CODE §18A-4-14. The relief sought included having certain identified responsibilities removed, have a defined workday, and receive a duty-free lunch. Subsequent to the filing of the grievances, Grievant retired from employment with Respondent, the Cabell County Board of Education. The selective injunctive relief of having certain identified responsibilities removed, receiving a duty-free lunch, and having an agency defined workday, as performed by Grievant prior to September 2008, have little to no application with regard to Grievant's current duties as a substitute teacher-professional personnel. Grievant now wishes to contend entitlement to back wages. It is lawful to a allow timely request to amend a filed grievance. Nevertheless, the assigned ALJ, the trier of fact, does not find that Grievant is entitled to additional wages for duties performed.

The following Findings of Fact are made based upon the record of this case as developed both prior and post Circuit Court remand, which among other information and evidence of record, encompasses post remand briefing. After a detailed review of the entire record, the undersigned Administrative Law Judge adopts the findings of facts 1-37 of the prior January 19, 2016 Decision, Docket No. 2009-1819-CONS, as fully set out herein.

Findings of Fact

1. When this grievance was originally initiated on September 10, 2008, Grievant worked as the Assistant Principal at Huntington High School (hereinafter "HHS"), employed by the Cabell County Board of Education, Respondent.

2. The Level One grievance, filed on September 10, 2008, indicated:

> Grievant believes SAT responsibilities along with other administrative duties prevent him from effectively completing daily responsibilities in a reasonable time. Grievant is also not getting a duty free lunch pursuant to WV Code 18A-4-14.
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> Relief Sought:
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> Grievant wishes to have SAT responsibilities removed from duties, have a defined workday, and receive a duty free lunch.

3. A second grievance, filed on December 8, 2009, indicated:

> Cabell County BOE and the WV State Superintendent of Schools has failed to define the workday for assistant principals. Grievant believes SAT responsibilities along with other administrative duties prevent him from effectively completing daily responsibilities in a reasonable time[.] Grievant is also not receiving a daily uninterrupted duty-free lunch period of at least 30 minutes as guaranteed in WV Code 18A-4-14.
>
> Relief Sought:
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> Grievant wishes to have SAT responsibilities removed from duties and assigned to a separate position, have a defined workday and receive a daily duty-free lunch period of not less than 30 minutes.

4. Grievant was an Assistant Principal at HHS for approximately six school years, 2004-2010. Further, Grievant was an Assistant Principal at Barboursville Middle School for the 2010-11 and 2011-12 school years.

5. Grievant resigned as an Assistant Principal and retired from employment with the Cabell County Board of Education, effective June 7, 2012. R Ex 2

6. Grievant was re-employed by Respondent, on June 19, 2012, at its County Board meeting, as a substitute teacher-professional personnel. R Ex 3 Grievant currently works as a substitute administrator for Respondent.

7. Typically, when Mr. Kaplan worked as an Assistant Principal for Respondent at Huntington High School, he would arrive at the school at approximately 6:00 a.m.

8. There was a daily, mandatory staff meeting at 6:30 a.m. The staff meeting would end around the time that the buses would arrive and the administrators had various duties. Grievant typically watched the cafeteria area in the morning during the students arrival. After the conclusion of this activity, Grievant would go to his office and begin some administrative activity. The exact duty would vary depending on curriculum demands and seasonal priorities. Sometimes, for example, Grievant would deal with student attendance issues, meetings, various parent concerns or perform teacher evaluations.

9. After his morning activities, Grievant attended to lunch duties. During the school's recognized lunch, Grievant would supervise both lunch periods.

10. After lunch, Huntington High School's school day continued until 3:20 p.m., when students were dismissed from their final class.[5] Immediately before this time,

[5] It is not well-defined what Grievant did immediately after the students' lunch period, prior to bus pick-up at the end of the day and why he was prohibited from eating during this period of time.

Grievant would go down to the "bus loop" to do bus duty. Grievant supervised students getting on the buses until the final one departed, usually around 4:00 p.m.

11. Bus duty was often not the end of Grievant's work day. For example, all administrators were to attend the five home football games. Additionally, on a rotating basis between 4 assistant principals, school administrators had to cover home boys' and girls' basketball, boys' and girls' soccer and occasionally volleyball games.

12. Assistant principals also generally attended student social activities such as homecoming, prom, honors student presentations and awards assemblies. The time period involved for these activities varied, but it is readily acknowledged that these activities which took place every year encompassed several hours. Homecoming and prom dance each encompassed a time period of approximately 4-5 hours.

13. In addition to the identified extra-curricular activities, assistant principals performed "SAT" tasks.[6] At HHS, the Student Assistance Team included Grievant, as the principal's designee, in accordance with West Virginia Board of Education (hereinafter "WVBE") Policy 2510. R Exs 7 & 8*, WVBE Policy 2510, § 8.9.1,* (eff. July 7, 2008 & July 14, 2011).[7]

14. SAT's are a way of assisting students with academic needs. It is not part of the special education program, rather, a way of assisting non-special education

[6] It is not clear whether SAT stands for Student Activity Team or Student Assistance Team. All parties readily use the term acronym SAT not the full name.

[7] At the level three hearing, Grievant waived any claim to relief from SAT duties, for this and/or other rationale, (which rationally includes the fact that Grievant no longer performs the duties). There is no longer a claim for injunctive relief from the duties pending.

students with their academic needs. As the SAT Coordinator Grievant would disseminate the SAT information to teachers and parents.

15. Administrators employed by Respondent are permitted to take lunch when their schedules and activities permit.

16. The Cabell County Board of Education adopted a policy that provides that classroom teachers are provided a "one half hour duty free lunch period" along with "homeroom, class changes, planning periods and staff development" during their eight hour work day. R Ex 10, Board Policy 3251

17. This policy permits teachers to "exchange his/her lunch recess for any compensation or benefit mutually agreed upon by the employee and the Superintendent of Schools or his/her agent." *Id.*

18. Before Grievant filed his first grievance, on September 10, 2008, Grievant would allegedly eat lunch 10-15 minutes before the two lunch periods.

19. Subsequent to the level one hearing on his first grievance, Grievant was provided a 30-minute lunch period. Heightened efforts were made by Respondent via its Superintendent and other administrative personnel, i.e., the school principal to assure that Grievant received a duty free lunch post December 8, 2008.[8] R Ex 4

20. In the 2009-10 school year, Grievant signed an agreement whereby he would be compensated for giving up his right to a duty free lunch. R Ex 11

[8] Specifically, on December 8, 2008, the parties agreed that Grievant should take a 30 minute lunch after the second lunch (approx. 12:30-1:00) or as otherwise designated if there are no emergencies or unusual needs prohibiting the same. R Ex 4

21. Grievant acknowledged that he received either a free meal or reimbursement for each and every year he was an administrator from the 2009-10 school year or, in place of his alleged duty free lunch.

22. Grievant received a duty free lunch period shortly after September 10, 2008, but no later than December 8, 2008, and Grievant received either a free meal or reimbursement for working during his lunch every year he was an assistant principal from the 2009-10 school year on.

23. Grievant transferred from his Assistant Principal position at HHS at the end of the 2009-2010 school year and began as the Assistant Principal of Barboursville Middle School (hereinafter "BMS"), at the beginning of the 2010-2011 school year. R Ex 1

24. It is not contested that during the two years, at Barboursville Middle School, 2010-11 and 2011-12 school years, that Grievant did not have an adequate lunch break or was not compensated for working during his lunch.

25. At Barboursville Middle School, assistant principals were expected to work approximately 7:00 a.m. to about 3:10 p.m. In addition to that, assistant principals there had about 8-9 hours per year of after-hour work activities.

26. Todd Alexander is Assistant Superintendent for Respondent.

27. Grievant, along with all other assistant principals, received a salary supplement from the Board, in addition to the minimum pay required by law, in recognition of the additional hours that administrators may engage as a result of administrative meetings, curriculum development, student supervision, assigned duties, parent conferences, group or individual planning and extra-curricular activities.

28. Cabell County assistant principals received a $6,000 supplement. Assistant Superintendent Alexander testified that this money "supplements" what an assistant principal would earn under the teacher pay scale. This supplement was, in part, for extracurricular activities. Further, this supplement is paid, at least in part, because during the work day, an assistant principal has more duties than a classroom teacher. *See* L-3 Testimony.

29. In accordance with a level two mediation, the parties reached a conditional "settlement" of this grievance matter on the 8th day of December 2008. The parties agreed:

> In exchange for the dismissal of this grievance, the Respondent will:
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> a. request a Superintendent Interpretation to clarify the definition of "workday" and "flex time" as it relates to administrative positions at schools;
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> b. provide, thru [sic] the building principal, SAT training to clarify rules and roles; and
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> c. permit the grievant to take a 30 minute lunch after the second lunch (approx 12:30-1:00) or as otherwise designated if there are no emergencies or unusual needs prohibiting the same.

R Ex 4

30. A provision/term of the settlement entered into by the parties was reliant upon an action to be performed by a third party a non-signatory to the agreement.

31. The West Virginia State Board of Education (i.e., State Superintendent), was not a party to the December 8, 2008 settlement. The agreement was signed by Grievant, his representative, an attorney, the mediator, Respondent's counsel and the Assistant Superintendent for the School Board of Cabell County.

32. The parties proceeded with the terms of the agreement. A request was made for a Superintendent interpretation on or shortly after December 10, 2008, and the other terms of the Agreement were implemented.[9] G Ex 1 & R Ex 5

33. An official response from the Office of the State Superintendents of the WV State Board of Education was not timely forthcoming.

34. Accordingly, approximately a year later, on December 8, 2009, Grievant filed the second grievance, alleging substantially similar allegations as set forth by the September 10, 2008 filing.

35. Subsequent to Grievant's refiling of his grievance, General Counsel for the State Superintendent of School issued a December 14, 2009 correspondence which clearly states that this letter is not meant to be, and should not be construed as being, an interpretation coming from the Superintendent.

36. The response from the State Superintendent's Office was not as definitive as was reasonably anticipated. The parties sought a citable Superintendent interpretation to clarify identifiable issues as they relate to administrative positions at schools.

37. General Counsel for the State Superintendent indicated in the December 14, 2009 correspondence that neither "statute or State Board policy limits or was ever intended to limit an administrator's work day to eight hours." R Ex 5

38. After the level three hearing had been scheduled and rescheduled several times a hearing was conducted on October 5, 2015. A January 19, 2016 Grievance Board decision denied the grievance.

[9] The claims regarding alleged lack of a duty free lunch ended factually no later than December 8, 2008.

Discussion

Grievant motioned to amend the relief requested by his prior grievance statements on or about October 13, 2014. Such motions can be made before level three and an administrative law judge has the discretion to approve or deny dependent upon several collective factors, citing 156 C.S.R. 1 § 6.2 (2008) granting administrative law judges the authority to take action considered appropriate consistent with WEST VIRGINIA CODE § 6C-1-1 *et seq*. Neither the Grievance Board's procedural rules nor the Code address the amendment of grievance claims. As neither the procedural rules nor the Code specifically prohibit "amendment" of a claim between levels, the question identified as relevant for the instant matter is whether Respondent would be prejudiced by allowing an alteration in the requested relief. *See* Kanawha Circuit Court, Civil Action No. 16-AA-22 (January 6, 2017) Remand Order.[10]

It is recognized that Grievant communicated a desire to revise his relief request to include back pay. *See* October 13, 2014 Motion to Amend Grievance. Further, it is noted it was after Respondent filed a *Motion to Dismiss* (August 29, 2014) contending that all issues raised in this consolidated grievance were now moot, ("the only relief requested is no longer applicable") that Grievant attempted to revise his requested relief and seek back pay.[11] Grievant attempts to explain his delayed request for back pay as "clarification" of the relief originally sought.

[10] The Remand highlighted three questions (1) would Respondent be unduly prejudiced by the granting of Grievant's Motion to Amend; (2) was Grievant entitled to an 8 hr day; and (3) was Grievant entitled to a 30-minute duty free lunch.

[11] The undersigned Administrative Law Judge consciously declined to issue a Grievance Board ruling in response to Respondent's Motion to Dismiss or Grievant's subsequent request to amend the requested relief, prior to the occurrence of a fact-finding level three hearing. *See* January 19, 2016 Decision.

While amendments are allowed, the liberty permitted in the amending of a pleading does not generally entitle a party to be dilatory in asserting claims or negligent in the relief requested. Whether Respondent is unfairly prejudiced in allowing the requested amendment, is not a simple consideration. If granted, the proposed revision would ideally eliminate a prevalent issue of mootness.[12] Given that so many years have elapsed from the original filings in 2008/2009, it is debatable that to not allow adjustment in the disposition of the parties' positions, including relief, is unrealistic. But then again to allow Grievant to cure what Respondent perceives and poignantly highlighted as a fatal flaw is also problematic.[13]

Grievant maintains Respondent is not prejudiced in that the motion was filed almost a year prior to the level three hearing on the grievance, arguing that Respondent had notice and enough time to defend against the back-pay claim. The undersigned concurs with Respondent in that Grievant's "argument is misplaced. Respondent was prejudiced because Grievant waited almost six (6) years after his first grievance, and almost five (5) years after his second grievance, to amend his complaint. It is the

[12] This board does not provide advisory opinions or issue decisions on moot issues. The Grievance Board will not hear issues that are moot. "'Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues].' *Bragg v. Dep't of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)." *Pritt, et al., v. Dep't of Health and Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008). Further, this Grievance Board does not issue advisory opinions. *See Dooley v. Dep't of Transp.,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.,* Docket No. 91-35-229/239 (Nov. 27, 1991); *Priest v. Kanawha County Bd. of Educ.,* Docket No. 00-20-144 (Aug. 15, 2000).

[13] Respondent among other arguments highlights that this Board has held a grievant is not entitled to retroactive back wages when he fails to properly assert such a claim and his failure to exercise diligence economically prejudices a school board and public interest. *Miller v. Ohio County Board of Education*, Docket No. 15-88-013-3 (May 13, 1998).

significant passage of time between the original grievance and the Motion to Amend that is prejudicial, not the difference in time between the Motion to Amend and the level three Hearing." While Grievant's requested relief may be permissible, the request is far from being "well-timed."

Grievant cites no legal authority *requiring* the undersigned to grant the Motion to Amend. In accordance with W. Va. Code § 6-C-4(c)(2), Grievance Board Administrative Law Judges conduct proceedings in an impartial manner, ensuring "that all parties are accorded procedural and substantive due process." Discretion is afforded the ALJ in the course of handling administrative appeals, so long as the actions do not violate applicable statutes and rules.[14] An ALJ cannot proceed in an arbitrary and capricious manner, but does have discretion to grant, deny or delay a ruling on a motion presented. As a result, in the circumstance of the instant case the ALJ was under no obligation to grant the Motion to Amend, but had the discretion to do so pursuant to his authority as outlined in 156 CSR 1, § 6.2 which provides "the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate and consistent with the provision of W. Va. Code § 6C-2-1 *et seq*." as well as § 6.17 of 156 CSR 1. This latter section provides that "[a]dministrative law judges have full and complete authority to preside and control all aspects of a hearing."

This trier of fact tends to distinguish the difference between addressing additional arguments related to the original grievance, and such situations from a grievant seeking

[14] A Public Employees Grievance Board "administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq*." W. VA. CODE ST. R. § 159-1-6.2 (2008)."

to change the grievance itself or the relief sought. Grievant, who was represented by either a WVEA representative or counsel during this extensive process, was aware, or should have been aware of his rights and the grievance process. As previously stated, to request the relief is permissible, the motion however was not well-timed, nor is the motion in and of itself, the true north of this grievance. The prospective relief of back wages has consequences, or benefit, "*if*" Grievant prevails on the merits.

The undersigned is of the belief that addressing the merits of this matter was the expectation of the Kanawha County Circuit Court original remand. *See* January 24, 2014, Remand Order of the Honorable Charles E. King Jr., Judge of the Circuit Court of Kanawha County. In recognition of the merits, the undersigned held level three hearings on December 15, 2014, and October 5, 2015, at the Grievance Board's Charleston office. Further, after the Kanawha Circuit Court, Civil Action No. 16-AA-22 (January 6, 2017) Remand there were two phone conferences, August 4, 2017, October 26, 2017, and the submission of written arguments and proposed findings of fact and conclusions of law presented by both parties regarding amending the relief requested and prospective damages.

ARGUEMENDO, Grievant's motion to amend relief request was granted, in that the undersigned contemplated the merits and potential relief for Grievant despite Respondent's pending motion to dismiss.[15] The essence of Grievant's complaints are that he was required to work more than an 8-hour day as an assistant principal and

[15] It is highlighted that Respondent's Motion to Dismiss was filed prior to Grievant's request to amend. If the undersigned had granted Respondent's Motion to Dismiss, Grievant's request would theoretically be null and void.

regularly work through lunch. Inclusive in this is whether Grievant is entitled to an 8-hr day; and his entitlement to a 30-minute duty free lunch.

Under W. Va. Code § 18A-4-14, certain school personnel who are employed for more than three and one-half hours per day must be provided a duty-free lunch "recess" of not less than thirty minutes daily and this "recess shall be included in the number of hours worked." That statute also authorizes an employee to waive his or her lunch recess in exchange for compensation.[16] Any professed claims for wages pertaining to alleged lack of a duty-free lunch ended factually no later than December 8, 2008. *See* fof 20-23.

Grievant has testified regarding his daily duties and the type of activities he performed on a regular basis. Grievant's testimony was not as persuasive as he perceives.[17] There were major gaps in his daily activities. He testified for an extensive period, but the timeline for his actions, as presented, was not so packed that it is reasonable to concluded he was forced to forgo a 30-minute lunch period every day. There were major time gaps in his daily activity. Grievant's testimony regarding his

[16] Policy 4320 requires that a contract be executed if an employee does waive his or her lunch period in exchange for a free meal. In the 2009-10 school year, Grievant signed an agreement whereby he would be compensated for giving up his right to a duty-free lunch. R Ex 11 Grievant received a duty-free lunch post shortly after September 10, 2008, but no later than December 8, 2008, and Grievant received either a free meal or reimbursement for working during his lunch every year he was an assistant principal from the 2009-10 school year on.

[17] An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994). The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994).

required and discretionary activities were informative and admirable but not demonstrative. The accuracy of Grievant's estimated daily schedule is highly suspect and not perceived to be reliable. This trier of fact is far from convinced that Grievant could not and did not have 30 minutes of free time. Grievant admittedly was a smoker, who was able to leave the school grounds and satisfy a then addicted habit. *See* Grievant L-3 cross examination testimony. Grievant had discretion throughout the day to tailor his actions. Grievant's testimony was biased and riveted with self-serving admissions to the point of being less than persuasive. Yes, Grievant had some busy days, but pursuant to Grievant's recollections he was so busy "every" day it was inconceivable for him to eat, duty free. Grievant's recollection of his unwavering mandatory daily activities is less than plausible. It is found to be factually inaccurate, by this trier of fact. While Grievant may be entitled to 30 minutes of duty-free time, Grievant failed to establish that he is entitled to additional wages stemming from his "alleged" inability to eat lunch duty free for two years.

Among other contentions, Grievant is asserting that he should be paid (receive additional pay, "now" for work done then) for working hours in excess of 8 hours per day. The undersigned specifically acknowledges and recognizes the parties tend to agree that "at least sometimes, [Grievant] worked greater than eight hours per day as an Assistant Principal at Huntington High School." The parties do not agree regarding the cumulative number of hours worked, or average per day, if all extra-curricular activity was factored into the computation.[18]

[18] It is recognized that Grievant cumulatively worked over 8 hours a day, it is not established that Respondent mandated all such workage. *See* discussion in January 19, 2016

Grievant testified that as an Assistant Principal, he worked 1.5 hours over what should have been his regular 8 hour work day. Further he was required to attend extra-curricular activities outside of the work day throughout the school year, e.g., homecoming events, school plays/pageants and various sporting events (football, basketball, wrestling, etc.), which can be cumulatively averaged out to an additional 1.5 hours a day. *See* Grievant's Memorandum regarding Level of Damages.

Pursuant to Grievant's calculations his total for all work calculates out to 11 hours a day, cumulative 3 additional hours of work above 8 hours per day. Grievant highlights that the rate of pay for professional employees, who had to work beyond 8 hours, at the time he was the Assistant Principal at Huntington High School, was $18.75/hr. Grievant proposes the hourly rate times the number of hours worked over 8 is arguably the amount of past due wages.[19] Grievant's contention does not represent an accurate representation of disputed issue(s) and relevant facts.[20] The issues in contention are more complicated

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Decision While Grievant was an administrator, he received satisfactory or better evaluations of his performance and was advised that he "holds himself to a very high standard of performance…[and] is very self-driven." *See* R Ex 12 and Grievant's testimony. It is admirable that Grievant was dedicated to his profession and demonstrated an exemplary level of involvement. Further, it is also more likely than not that Grievant attempted to do an outstanding job and in doing so placed higher demands upon himself than were placed upon him by his supervisor, the Principal and Respondent employer. Not all of the hours of work performed by Grievant were mandated by Respondent. *See* January 19, 2016 Decision.

[19] The total for all work above 8 hours is 3 hours (per day) x 180 days x $18.75/hr = $10,125.00.

[20] Respondent also provides for consideration that Grievant's delay in seeking economic relief should not be allowed to impact the financial integrity of a public-school district. A timely presentation of this relief would have only had a minor economic impact if Grievant had been successful. Instead, Grievant's delay would cause an increase in interest accrued and any awards would come from the Respondent's current budget. Respondent suggests it is patently unfair to require a public-school system to use funds currently budgeted for educational purposes for additional relief, and any applicable interest possibly accrued, that Grievant could have sought when he initially filed. Such a delay, if relief were to be awarded, could amount to a windfall to Grievant, all caused by the delay in requesting monetary relief, not in his first grievance, not in his

than a simple math equation. In the fact pattern of this matter, there are disputed and convoluted issues providing counterbalance discussion.

W. VA. CODE § 18A-4-3 provides that Principals and Assistant Principals receive a salary supplement above the normal teaching salary. The formula for calculating this salary supplement is commonly referred to as the "Principal Index." Grievant was aware that as a professional administrator he would be called upon to perform tasks outside of the traditional school day.[21] Grievant received a salary supplement for serving as an Assistant Principal. *See* W. VA. CODE § 18A-4-3 It is reasonable to conclude that this supplement was, at least in part, to compensate administrators for the extra time they had to spend at work dealing with administrative functions. It stands to reason that the supplement a county School Board pays to its Principals and Assistant Principals is intended to recognize that their work days are often extended to supervise various after school and extracurricular events. *Redd v. McDowell County Bd. of Education,* Docket No 2008-1773-McDED (Nov 9, 2012); *Redd v. McDowell County Bd. of Education,* Docket No. 2009-1477-McDED (May 26, 2011).

In addition to the minimum pay required by law, Grievant, received a salary supplement from Respondent, in recognition of the additional hours that an administrator may engage because of meetings, curriculum development, student supervision, assigned duties, parent conferences, group or individual planning and extra-curricular

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second grievance, but years later, in an untimely motion to amend.

[21] The duties and responsibilities of school principals and assistant principals may begin before the students arrive at school and may continue into the late afternoon and evening hours with responsibilities involving both curricular and extracurricular events, before, during and after the instructional day.

activities. Cabell County assistant principals received a $6,000 supplement. It is recognized to a substantiated degree that Grievant sometimes worked greater than eight hours per day as an Assistant Principal at Huntington High School; however, it is not demonstrated to any degree of certainty that Grievant was impermissibly required to violate applicable standard of professional employee conduct. Certain evening hours worked by Assistant Principals are generally part of the duties assigned to Assistant Principals and are traditional recognized as standard duties and consistent with school law. Grievant performed the duties of an assistant principal, which included hours during and beyond the instructional day. Those are the hours required of school administrators. This trier of fact is unpersuaded that the 8-hour work day policies referenced in the record are applicable to this school administrator. It is the undersigned's finding that Grievant performed the recognized duties of an assistant principal and was compensated accordingly.

The contention of alleged past due wages, in the fact pattern of this matter is much more convoluted than a mathematical equation (hrs x days of school year x $$ amount). As previously acknowledged, the option of amending Grievant's requested relief was within the identified discretion of the instant ALJ to approve or deny the motion(s) as filed. It is safe to say there is a difference of opinion as to whether the merits of this case have been in discussion*, ad nauseam*. Grievant's never say die has revised life into this case, more than once. This trier of fact held level three proceedings, merits and other relevant information was noted. Generally, a merit based discussion provides more insight than a ruling on a procedural technicality. It may have been the undersigned's attempt to address the merits despite the pending motion to dismiss or motion to amend which

breathed additional life into this grievance matter. This is regrettable, the intent was to address the relevant key concerns and bring an enlightened conclusion to relevant issues. Nevertheless, the selective injunctive relief of having certain identified responsibilities removed, receiving a duty-free lunch, and having an agency then defined workday, as performed by Grievant prior to September 2008, have little to no application with regard to Grievant's current duties as a substitute teacher-professional personnel. Further, Grievant has repeatedly attempted to press for a definitive legal definition of professional administrator's lawful work day, this is distinguished and recognized in the current circumstance of this case as a declaratory ruling. This board does not provide advisory opinions. *See* W. VA. CODE ST. R. § 156-1-6.21 (JULY 7, 2008). Lastly, while it may be lawful and not necessarily unduly prejudicial, in the circumstances of this matter, to allow Grievant to amend his requested relief, it was thought to be more prudent to provide Grievant with the opportunity to present his case, despite Respondent's also pending motion to dismiss. In other words, Grievant was provided the benefit of having his motion tabled and contemplated, as granted but failed to receive the requested benefits, in that the undersigned in review of the merits and arguments presented rules in favor of Respondent. Grievant was aware that his duties as a professional administrator were not the same as a teacher. Grievant was aware that as a professional administrator he would be called upon to perform tasks outside of the traditional school day. Grievant received a salary supplement and other related benefits for serving as an Assistant Principal. Grievant is not entitle to additional wages for the work he performed some ten years ago.

Conclusions of Law

1. Because the subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance 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. When it is not possible for any actual relief to be granted, any ruling issued regarding the questions raised by this grievance would merely be an advisory opinion. "This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp.,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.,* Docket No. 91-35-229/239 (Nov. 27, 1991). *Priest v. Kanawha County Bd. of Educ.,* Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.,* Docket No. 02-21-028 (June 21, 2002).

3. Grievant transferred to an alternative position in 2010-2011 school year and ultimately resigned as an assistant principal retiring from employment with Respondent, effective June 7, 2012. The selective injunctive relief of having certain identified responsibilities removed, receiving a duty-free lunch, and having an agency then defined workday, as performed by Grievant prior to September 2008, have little to no current application. The issues as raised are moot.

4. Grievant motioned to amend the relief requested by his prior grievance statements. Such motions can be made before level three and an administrative law judge has the discretion to approve or deny dependent upon several collective factors. WEST VIRGINIA CODE § 6C-1-1 *et seq*; also see 156 C.S.R. 1 § 6.2 (2008)

5. Grievant's motion to amend his relief requested was *de facto* granted, in that the undersigned contemplated the merits and potential relief for Grievant despite the offsetting pending motion to dismiss.

Accordingly, for the foregoing reasons, and for all the reasons apparent in the record and addressed and/or properly referenced in the related January 19, 2016 Decision, this grievance is **DISMISSED,** with damages and interest **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: March 23, 2018

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Landon R. Brown
Administrative Law Judge