

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**THERESA HOLT,
Grievant,**

v.

Docket No. 2020-0120-KanED

**KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Theresa Holt, is employed by Respondent, Kanawha County Board of Education. On August 12, 2019, Grievant filed this grievance against Respondent stating,

Violation of WV § 6C-2-2 discrimination, grievance, unequal treatment of similarly situated employees. Planning Period. Grievant's planning period falls outside the instruction day. This is time that all or most classroom teacher[s] have unscheduled and therefore is an additional planning time for the other staff causing an unequal distribution of planning time. A lack of uniformity in the planning schedule. WV 18A-4-14.

For relief, Grievant seeks "compensation for loss in planning, backpay plus any related benefit to that, and equalized planning opportunity for all similarly situated staff."

Following the September 18, 2019 level one conference, a level one decision was rendered on October 3, 2019, denying the grievance. Grievant appealed to level two on November 5, 2019. Following mediation, Grievant appealed to level three of the grievance process on March 6, 2020. A level three hearing was held on August 25, 2020, before the undersigned from the Grievance Board's Charleston, West Virginia office via video conference. Grievant appeared and was represented by Allen Stump, West Virginia Education Association. Respondent appeared by Principal Melissa Wilfong and was represented by counsel, Lindsey D.C. McIntosh, General Counsel. This matter became

mature for decision on September 29, 2020, upon final receipt of the parties' written proposed findings of fact and conclusions of law.¹

Synopsis

Grievant is employed by Respondent as a classroom teacher at Mary Ingles Elementary School teaching special education. Although Grievant receives the planning period required by statute, Grievant protests Respondent's failure to provide her an additional planning period as other classroom teachers have been provided, asserting discrimination. Respondent's failure to provide Grievant with an additional planning period is not discriminatory as the difference in treatment is related to Grievant's job responsibilities. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a classroom teacher at Mary Ingles Elementary School teaching special education.
2. All classroom teachers, including Grievant, are provided a planning period after the instructional day.
3. All classroom teachers, excluding Grievant, are provided an additional planning period during the instructional day while their students attend a related arts class.

¹ The parties' proposed findings of fact and conclusions of law were to be filed by September 23, 2020. Respondent placed its proposed findings of fact and conclusions of law in the mail on September 22, 2020, but addressed the same to the Grievance Board's former mailing address. Respondent hand-delivered its proposed findings of fact and conclusions of law to the Grievance Board on September 29, 2020.

4. Grievant teaches in a self-contained classroom, meaning that she teaches the same students all day.

5. The other special education teacher at Mary Ingles Elementary School is a resource teacher who does not have the same students throughout the day.

6. Grievant's students have intellectual disabilities which require Individualized Education Plans ("IEPs"). The students' IEPs all require that they have adult support for transitions and large group activities.

7. Although Grievant's students do attend a related arts class with another teacher during the school day, as their IEPs require that they have adult support for transitions and large group activities, they must have additional adult supervision for the related arts class.

8. During the 2018 – 2019 school year, Grievant had five students. Grievant had an aide for her classroom and the aide supervised the students during the related arts class.

9. During the school year at issue, 2019 – 2020, Grievant had three students.

10. Due to the reduction in students for 2019 – 2020, the aide position was cut from Grievant's classroom and Grievant was required to supervise her students during the related arts class herself.

11. The instructional day at Mary Ingles Elementary School ends at 2:00 p.m. but the end of the work day is 3:00 p.m.

12. During the 2019 – 2020 school year, Grievant's planning period was from 2:05 p.m. to 2:45 p.m., with an additional period from 7:00 a.m. to 7:10 a.m.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant argues she has suffered discrimination because she receives a shorter amount of planning time than the other classroom teachers at her school. Respondent admits that Grievant does receive a shorter amount of planning time than the other classroom teachers but asserts that difference in treatment is not discriminatory because it is due to Grievant's different job responsibilities and that Grievant receives the amount of planning time required by statute.

For purposes of the grievance process, “‘discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d). In this case, Respondent does not dispute that Grievant is similarly situated to the other classroom teachers at Mary Ingles Elementary School or that the other classroom teachers receive an additional planning period during the instructional day but argues that the difference in treatment is due to Grievant's job responsibilities.

The West Virginia State Code requires that boards of education provide planning periods as follows:

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.

W. VA. CODE § 18A-4-14(b). “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. . .”

W. VA. CODE § 18A-4-14(b)(1).

Grievant currently receives her statutorily-required forty-minute planning period after the instructional day but does not receive the additional planning period during the instructional day that other classroom teachers at Mary Ingles Elementary School enjoy. Grievant’s position is unique at Mary Ingles Elementary School in that she is a special education teacher that has the only self-contained classroom and in which all the students have IEPs that require adult support for transitions and large group activities. The other classroom teachers have their additional planning period while their students attend the related arts class because their students do not have IEPs that require adult support for transitions and large group activities. Thus, the difference in Grievant’s treatment is due to her job responsibilities.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d).

3. The West Virginia State Code requires that boards of education provide planning periods as follows:

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.

W. VA. CODE § 18A-4-14(b).

4. “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. . .” W. VA. CODE § 18A-4-14(b)(1).

5. Grievant receives her statutorily-required planning period.

6. Grievant failed to prove Respondent’s failure to provide her with an additional planning period is discriminatory as Grievant is not provided an additional planning period due to the difference in her job responsibilities.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The civil action number should be included so that the certified record can be properly filed with the circuit court. See *also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: November 9, 2020

Billie Thacker Catlett
Chief Administrative Law Judge