

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KATHY NELSON,

Grievant,

v.

Docket No. 2019-0172-CONS

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Kathy Nelson,¹ filed a level one grievance against her employer, Respondent, Wayne County Board of Education, dated June 29, 2018, which stated as follows: “18A-4-14 Loss of Planning During the two practice SAT tests on December 6th and March 15th, along with the SAT on April 9th the grievant missed planning periods and would like to be reimbursed for those planning periods.” As relief sought, “[p]ayment for loss of planning plus related benefits and interests.”

A level one conference was conducted in this matter, but the date of which is unknown. The level one decision denying the grievance at level one is dated October 22, 2018. Grievant appealed to level two on November 1, 2018. A level two mediation was conducted on March 29, 2019. Grievant perfected her appeal to level three on April 8, 2019. The level three grievance hearing was conducted on October 24, 2019, at the Grievance Board’s Charleston, West Virginia, office before the undersigned administrative law judge.² Grievant appeared in person and by representative, Ben

¹ Previously, there were other Grievants named in this matter. By the time of the level three hearing, all except for Grievant Nelson had withdrawn their grievances.

² This case was originally scheduled for a level three hearing to be held on August 2, 2019, but was continued upon Grievant’s motion by Order entered June 13, 2019.

Barkey, West Virginia Education Association. Respondent appeared by counsel, Leslie K. Tyree, Esquire, and by its representative Tammy Forbush, Principal of Spring Valley High School. This matter became mature for consideration on December 13, 2019, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a classroom teacher. Grievant was required to assist in administering practice SAT testing and actual SAT testing on certain dates during the 2017-2018 school year. As a result of the testing requirement and protocols, Grievant missed her planning periods on each of the days, while some of the other teachers assisting with the testing did not. Thereafter, Respondent denied Grievant's claim for compensation for the lost planning periods. Grievant asserts that Respondent violated West Virginia Code § 18A-4-14 and engaged in discrimination in violation of West Virginia Code § 6C-2-2(d). Respondent denies Grievant's claims. Grievant proved her claims by a preponderance of the evidence. Accordingly, this grievance is GRANTED.

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. Grievant has been so employed by Respondent for twenty-one years, the last seven of which being at Spring Valley High School.
2. At all times relevant herein, Tammy Forbush is the Principal at Spring Valley High School.

3. On December 6, 2017, and March 15, 2018, SAT practice tests were administered at Spring Valley High School. The actual SAT test was administered on April 9, 2018.

4. Grievant was one of the teachers who were required to administer both the practice tests and the actual SAT test during the 2017-2018 school year.

5. The SAT practice test dates are scheduled several weeks in advance. The county chooses such dates from a window of time specified by the county. The SAT test is also scheduled in advance and is set by the county in conjunction with the state testing schedule.³

6. Spring Valley High School attempts to simulate the SAT testing experience during the practice testing. As such, the school attempts to follow the rules and protocols of the actual SAT test when administering the practice tests, including how the test is timed. Accordingly, the school followed an alternate school schedule on the practice test dates. Meaning, those students taking the practice test on both of those dates did not attend their classes as regularly scheduled, and instead, took the tests starting at 8:00 a.m. Also, once the tests start, there are no breaks given. Those administering the test also had to follow this alternate schedule.

7. The alternate schedule caused Grievant and some of the other teachers administering the practice testing to miss their planning periods on both December 6, 2017, and March 15, 2018. However, some of the teachers' planning periods were unaffected. Such depended on when their planning period was regularly scheduled.

8. Spring Valley High School also followed a similar alternate school schedule

³ See, testimony of Tammy Forbush, Principal, Spring Valley High School.

on April 9, 2018, when the actual SAT test was administered. Spring Valley High School is required to follow the strict rules and protocols required by the SAT in administering the test. Otherwise, the students' test scores will not be valid. One such requirement is that once the test is started, there are no breaks. Further, according to Principal Forbush, the teachers administering the test are generally not allowed to leave the room once testing begins, and other teachers are not permitted to substitute for, or relieve, those teachers administering the test once it has begun.⁴

9. As a result of the alternate schedule and the requirements and protocols of the SAT test on April 9, 2018, again, Grievant and other teachers administering the test missed their planning periods. However, some of the Spring Valley High School teachers' planning periods were unaffected. As with the practice test, it depended on when their planning period was regularly scheduled.

10. Grievant also administered the SAT make-up test that was held on or about April 23, 2018. She, again, missed her planning period on that day as a result. However, this date is not mentioned on Grievant's statement of grievance form.

11. While Principal Forbush testified that when a teacher is required to miss a planning period, they try at the local level to resolve the issue by allowing the teacher to come in late or leave early without charging leave or docking pay, apparently no such offer was extended to Grievant.

12. Grievant emailed Principal Forbush in or about May 2018 asking for compensation for the planning periods she missed on December 6, 2017, March 15,

⁴ No documentation of the SAT requirements or protocols was presented as evidence at the level three hearing, and none is otherwise contained in the record of this grievance.

2018, and April 9, 2018. It is unknown whether Grievant asked for compensation for the missed April 23, 2018, planning period. Principal Forbush declined Grievant's request. Grievant then forwarded the email to Superintendent Todd Alexander. It is unclear from the record as to whether Superintendent Alexander responded to Grievant's email. Nonetheless, Grievant's request for compensation was not granted. Thereafter, Grievant filed this grievance seeking compensation for the missed planning periods.

13. At some time during the 2018-2019 school year, Respondent implemented a policy whereby teachers who are required to miss their planning periods may request reimbursement for the same by simply submitting a form.

Discussion

As a preliminary matter, in its proposed Findings of Fact and Conclusions of Law, Respondent argues only that this grievance is untimely filed and, as such, asks the grievance be denied. However, Respondent did not file a motion to dismiss at any level of the grievance process in this matter, and did not orally move for such during the level three hearing. In fact, when asked if there were any preliminary matters to be addressed at the commencement of the level three hearing, the parties indicated that there were none. A review of the hearing recording confirms that Respondent made no mention of dismissal or timeliness at any time during the level three hearing. "An application to an administrative law judge for an order must be by motion, in writing, unless made during a hearing, and must be filed and served on all parties promptly, as soon as the facts or grounds on which the motion is based become known to the moving party." W. VA. CODE ST. R. § 156-1-6.6 (2018).

The level one decision dated October 22, 2018, states that counsel for

Respondent, Ms. Tyree, served as both counsel for Respondent and as the level one evaluator. Therein, the level one evaluator finds as a matter of fact that Grievant failed to timely file the grievance; however, she concluded only that Grievant failed to meet her burden of proof and, accordingly, denied the grievance. From this, it is apparent that Respondent was aware of the facts of this matter and the possible ground of untimeliness as early as level one, but failed to move for dismissal before the Grievance Board. For this reason, the timeliness of the filing of this grievance will not be further addressed herein.

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 that as a result of SAT testing and practice testing, she lost her planning period on three separate dates, December 6, 2017, March 15, 2018, and April 9, 2018, and seeks monetary reimbursement for the same.⁵ Respondent does not deny that Grievant missed her planning periods on the days in question because of the testing schedule and protocols. Principal Forbush testified that if a teacher were to miss a planning period due to such testing, she would try to resolve the issue by allowing the

⁵ Grievant did not mention April 23, 2018, date in her statement of grievance or in her proposed Findings of Fact and Conclusions of Law. Therefore, no claim for reimbursement for that date will be considered.

teacher to come in later, or leave early on another day, or something such as that. However, it does not appear that anyone offered this to Grievant.

West Virginia Code § 18A-4-14, "Duty-free lunch and daily planning period for certain employees," states, in part, as follows:

(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 if 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:

. . . (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 thirty 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 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 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

Id. Pursuant to this statute, Grievant was entitled to her planning period on December 6, 2017, March 15, 2018, and April 9, 2018, she was denied the same, and she was not compensated for that time. Therefore, Grievant has proved by a preponderance of the evidence that Respondent violated W. Va. Code § 18A-4-14.

Discrimination for purposes of the grievance process has a very specific definition. “‘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). Therefore, in order to establish a discrimination claim under the grievance statutes, an employee must prove the following by a preponderance of the evidence:

- (a) that he or she has been treated differently from one or more similarly-situated employee(s);
- (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm’n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep’t of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

The evidence presented establishes that while Grievant lost her planning periods on the three days in question, not all teachers at Spring Valley High School lost their planning periods because of the SAT testing. Teacher Connie Weber testified at the level three hearing and stated that she helped administer the testing on those dates and she

did not lose her planning period because her planning period was scheduled in the afternoon after the testing was completed. Grievant is similarly situated to Ms. Weber, they were treated differently with respect to their planning periods, the difference in treatment was not related to their job responsibilities, and Grievant did not agree to this difference in treatment. Accordingly, Grievant has proved her claim of discrimination by a preponderance of the evidence. For the reasons set forth herein, this grievance is GRANTED.

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. “An application to an administrative law judge for an order must be by motion, in writing, unless made during a hearing, and must be filed and served on all parties promptly, as soon as the facts or grounds on which the motion is based become known to the moving party.” W.VA. CODE ST. R. § 156-1-6.6 (2018).

3. “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 if 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: . . . (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 thirty 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 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 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”
W. Va. Code §§ 18A-4-14(b) and 18A-4-14(c).

4. Discrimination for purposes of the grievance process has a very specific definition. “‘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).

5. Grievant proved by a preponderance of the evidence that Respondent violated West Virginia Code § 18A-4-14 when it denied her planning periods on December 6, 2017, March 15, 2018, and April 9, 2018 as asserted in her grievance.

6. Grievant proved by a preponderance of the evidence that Respondent discriminated against her in violation of West Virginia Code § 6C-2-2(d) by denying her planning periods on December 6, 2017, March 15, 2018, and April 9, 2018 while other similarly situated employees were not so denied.

Accordingly, this Grievance is **GRANTED**. Respondent is hereby **ORDERED** to compensate Grievant for the planning periods she was denied on December 6, 2017, March 15, 2018, and April 9, 2018, based upon her daily rate of pay on those dates, plus interest at the statutory rate.

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: January 31, 2020.

Carrie H. LeFevre
Administrative Law Judge