RONALD DENNIS, et al.

v. Docket No. 95-52-166

WETZEL COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievants are seventeen teachers employed by Wetzel County Board of Education (WCBE) and assigned to Long Drain School (LDS), a K-8 configured school. They filed a grievance object ing to the Fall 1994 alteration of their planning period from the prior school year and seeking restoration of the former planning period and compensation for planning time they were denied. Following adverse decisions at the lower grievance levels, they appealed to level four and requested a decision based on the record adduced at the March 24, 1995, level two hearing. The case became mature for decision on June 15, 1995, upon receipt of the last of the parties' fact/law proposals.1

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1Grievants, through their union representative, filed fact/law proposals on or about June 12, 1995.

Based on all matters of record, the following findings of fact are made.

Findings of Fact

1. During the 1993-94 school year, most teachers at LDS had a forty-five minute, uninterrupted planning period.2

2. As a result of scheduling changes for the 1994-95 school year, i.e., a loss of staff due to the movement of seventh and eighth grade students from LDS to WCBE's high school for two periods of instruction per day and the inception of all day kindergarten at LDS, staff would not be available at the

school to cover for the forty-five minute planning periods. Thus, LDS Principal William Jones planned to reduce the teach ers' planning period to thirty minutes for the 1994-95 school year. T.10, 17. According to Mr. Jones, some LDS staff learned of this as early as June 1994, when they attended a "summer academy session" at LDS.3 T2.28.

3. After the 1994-95 school year began, with the reduced planning period in effect, Grievants, who were displeased with the situation, were asficials to submit a proposal "to solve the problem." The finished "proposal" offered six possible solutions, but essentially down-played the

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2Lead Grievant Dennis was the only grievant to appear and testify at the level two hearing. According to him, kindergarten and first grade teachers had a forty-minute planning period. T2.11.

3Mr. Jones was WCBE's sole witness at the evidentiary hearing.

feasibility of five of them. The sixth proposed solution was to restore a full-time art teacher at LDS, despite the fact that such additional staffing would exceed State guidelines.4 This proposal was not acted upon by WCBE when Grievants presented it at WCBE's December 13, 1994, meeting. T2.13-14; GR EX 1.

4. Grievants who teach the "primary" grades at LDS are: Kindergarten, Olivia Gump and Johanna Lemasters; first grade, Janet Park and Henrietta Thomas; second grade, Raye Burgess and Theresa Hucik; third grade, Patricia McGlumphy and Teresa Shackelford; fourth grade, Donna Dennis and Barbara Brasher; and fifth grade, Ronald Dennis and Jo Ellen Snider (K-5 Grievants).

These Grievants teach nearly all subjects to their students in "self-contained" classrooms. Essentially, the length of time spent on each subject in these K-5 classrooms varies at the discretion of the teachers. However, scheduling for music and physical education classes, the Josten's Computer Lab and library time, must be constant at thirty minutes each. T.22-23, 49.

5. According to a roster of LDS' teachers/Grievants submitted by Grievant's representative, Jeff Hohn and Jeff Sands (K-8 Grievants) teach "K-8th." Mr. Sands teaches music, T2.48, and it is presumed that Mr. Hohn is LDS' physical education (PE)

4The proposal to WCBE was highly critical of the fact that other schools, but not LDS, had an art "specialty" teacher. However, it is noted that elementary teachers are trained to teach all subject areas, including sulasses as art and PE, for example.

teacher. Again, music and PE are thirty-minute classes, at least for the K-5 students. T2.33-34.

6. Teachers/Grievants who teach in "departmentalized" grades six through eight, Kathy Longwell, Carol Roberts-Reading, and Karen Longwell (6-8 Grievants), teach seven classes per day on a "bell schedule." Four of the seven class periods are forty-five minutes long. The last period, "seventh period," is seventy-three minutes long, although this time is divided into three segments during which different subjects are taught. T2.23-24.

7. Some departmentalization occurs in grades four and five at LDS. Grievant Dennis explained, for example, that he

taught all fifth grade math and social studies, while the other fifth grade teacher taught all fifth grade English and science. He and his peer formulated their own schedule for the pupil exchange, utilizing the school's "bell schedule," in conjunction with the exchange. T2.19-21, 32.

8. For the 1994-95 school year, Grievant Dennis' working hours were from 7:50 a.m. until 3:20 p.m. The instructional day began at 8:15 a.m. and ended at about 3:05 p.m. He began the instructional day teaching math to his fifth grade class for forty-five minutes; math again to the alternate fifth grade class for forty-five minutes; spelling for thirty minutes; reading for thirty-five minutes; and Josten's computer lab or the library for thirty minutes. Grievant Dennis then had a thirty-minute lunch period (without duties), followed by a thirty-minute duty period. After that, he taught social studies to his fifth grade class for forty-five minutes and social studies again to the alternate fifth grade class for forty-five minutes. At that point, his students went to music or PE class, and he had a thirty-minute planning period. When the students returned, he engaged in a twenty-minute "activity period" with them, until it was time to prepare for their dismissal. T2.35-36.

9. admitted that he had the authority to set and adjust his teaching schedule somewhat, as far as the length of time for each instructional period. Dennis stated he could not fill his instructional day if he "cut" each class to thirty minutes' duration. T2.38.

10. According to his own testimony, Grievant Dennis spent 295 minutes, or just under five hours, of his seven and one-half hour work day directly teaching in eight time slots, on average,

just under thirty-seven minutes per class.

11. School officials advanced two separate proposals to Grievants for planning periods longer than thirty minutes, which Grievants refused. The first was a forty-one minute planning period, and the second was a "split" or interrupted planning period totalling fifty-two minutes.

12. The forty-one minute planning period, rejected in November 1994, was predicated upon scheduling changes which would introduce "cross grade level grouping in grades K through 5" for classes in math, PE, and music. Mr. Jones said the teachers (Grievants) rejected it as being "not workable," but did not articulate why they felt it was not workable.3 T2. 44-45; WCBE EX 1.

13. The second proposal was rejected by LDS' teachers in January 1995. This proposal also involved major schedule changes whereby, in addition to the teachers' thirty-minute planning time, they would have an additional twenty-two minute planning period at another time in the instructional day, on some type of rotating basis. T2.47-48; WCBE EX 2.

14. According to Mr. Jones, K-5 teacher/Grievants have the authority to control the length of time for which they teach all subjects, except for the computer lab, music and PE, which must be thirty minutes long. T.49.

Discussion

With respect to planning periods, the applicable law is W.Va. Code §18A-4-14(2), which provides, in pertinent part, that

[e]very teacher who is regularly employed for a period of time more than one-half the cl
regular school day shall be provided at least one planning period within each school instructional day

to be used to complete necessary preparations for the instruction of pupils. Such planning period shall be the length of the usual class period in the school to which such teacher is assigned, and shall be not less than thirty minutes[.]

Because the issue of planning periods at LDS has been recognized as a "problem" for LDS and WCBE during the 1994-95 school year due to the inception of all day kindergarten, staffing changes

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3Mr. Jones said that Grievant Dennis and two other grievants assisted him with the formulation of the forty-one minute planning period. Dennis said he did have "discussions" with the principal on the issue. T2.25-26.

and other problems that may or may not remain constant, this Decision will only address the situation that existed during the 1994-95 school year.

At level two, the grievance evaluator agreed that the 6-8 Grievants should have been given a forty-five minute planning period during 1994-95. Therefore, that issue is not in dispute, although a question remains whether the 6-8 Grievants are entitled to compensation for any "lost" planning time. Other issues remaining in this appeal are whether the K-5 and K-8 Grievants were also entitled to a forty-five minute planning period, and if so, whether they are entitled to compensation for any lost planning period time.

Initially, despite the division of LDS into distinct "primary" and "middle-school" modules and the fact that the music and PE teachers had only thirty-minute classes with LDS' students, Grievants argue that, for the sake of "uniformity,"

all of LDS' teachers must have a forty-five minute planning period. According to Grievants' fact/law proposals on that issue, reproduced here in part:

Even in a self-contained classroom, teachers work by a schedule and must adhere to a lesson plan. Though teachers may deviate on the amount of timed on each subject from day to day, the 315 minutes per day of required instructional time remains a constant. Instructional time is the common denomina tor between the primary school and the middle school.

There is absolutely no basis in fact or law that all teachers in a given school, especially in a K-8 configured school, must have uniform planning periods during any given school year. In particular, Grievants' argument about the LDS situation ignores actual teaching schedules in place at LDS during the 1994-95 school year. The argument also ignores the fact that music and PE teachers, K-8 Grievants, have thirty-minute class es. Moreover, while requirements may dictate that each student receive 315 minutes per day of instruction, there was no showing that all of the K-5 Grievants actually teach 315 minutes per day. This is because some subjects, such as music and PE, are taught by "specialty" teachers.

Grievant Dennis established that, during 1994-95, LDS' teachers had a seven and one-half hour work day (7:50 a.m. until 3:20 p.m.), but a six hour and fifty minute "instructional" day (8:15 a.m. until 3:05 p.m.), which totals 410 minutes. See Lincoln County Bd. of Educ. v. Adkins, S.E.2d 775 (W.Va. 1992) (teachers are paid for work day which includes the time allocat ed for the instructional day and other activities such as homeroom, class changes, lunch, planning periods, and staff development). In fact, Dennis' non-instructional time during

the 410-minute instructional day consisted of 115 minutes, which included twenty-five minutes in the morning before his first class began; sixty minutes at midday for lunch and duty; and thirty minutes in the afternoon for planning while his students attended music or PE classes.

Thus, throughout Grievant Dennis' 410-minute instructional day, he actually devoted only 295 minutes to formal instruction, not the 315 minutes of "required" instructional time for stu dents as indicated in Grievants' brief. That Griev the other fifth-grade teacher taught four classes on the bell schedule, that is, four forty-five minute class periods per day, in conjunction with their pupil exchange was by their own design and not due to the dictates of Mr. Jones or WCBE.

One reason why longer planning periods are reasonable for teachers who truly teach on a departmentalized schedule is because of the greater number of students for whom classwork must be individualized (when necessary), tested and graded.

During the 1994-95 school year, Grievant Dennis' work load increased as a result of his collaboration with just one other teacher and instructing one other set of students. It must be remembered that he and his peer designed their own exchange classes to comport with LDS' bell schedule.

WCBE's view, that LDS has two divergent groups of teachers, those who teach the 6-8, upper-grade departmentalized classes and those who teach the K-5, lower grades, which could be treated differently on the issue of planning periods, is reason able. Moreover, another group of teachers existed in 1994-95, the K-8 specialty teachers for PE and music. Given the facts in this record, a thirty-minute planning period for the K-5 and K-8 Grievants (specialty teachers) in 1994-95 would be adequate and

legally sound under Code §18A-4-14(2).

As for the 6-8 Grievants' claim for back wages, WCBE contended that compensation should be denied altogether for several reasons. For example, WCBE opined that the 6-8 Grievants were not entitled to additional compensation because planning periods fall within a work/instructional day for which they already receive a full salary. It also contended that Grievants and WCBE's superintendent never entered into any "mutually agreed" plan by which Grievants could exchange their planning period time for compensation or other benefits under Code §18A-4-15(3).4 These particular arguments ignore the fact that a grievant is entitled to be "made whole" when he prevails ide §§18-29-1, et seq. Obviously, it would be nearly impossible to give the 6-8 Grievants a planning period "time credit" in a succeeding year. Moreover, Grievants could hardly agree to give up some planning period time when WCBE had already taken the time from them.

Finally, WCBE declared that Grievants failed to mitigate or minimize their damages when they refused longer planning peri ods. Specifically, WCBE argued that it can only be liable for the natural and proximate consequences of its unlawful acts, and if the Grievants have rendered these consequences more severe to themselves by some voluntary act from which it was their duty to refrain, or by their neglect to reason ably exert themselves to limit or minimize the injury, and thereby suffers additional injury from the Board's original wrong, evidence is admissible in mitigation to determine the extent to which damages claimed from such original act of the Board are attributable to

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4Code §18A-4-15(3) provides in pertinent part that:
[n]othing in this section shall be construed to
prevent any teacher from exchanging his lunch, recess
or a planning period . . . for any 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.

such subsequent act or omission of the grievants.
Haywood v. Massie, 188 Va. 176, 49 S.E.2d 281 (1948);
See generally Oresta v. Romano Bros. Inc., 137 W.Va.
633, 73 S.E.2d 622 (1953).

At level two, WCBE urged that Grievants should be "estopped from
seeking compensation," T2.9, ostensibly because they could have
utilized those proposed longer planning periods and still pursue
a grievance iftisfied with the length
and/or nature of the altered planning periods.
Grievants did not respond in any manner to WCBE's arguments
about the compensation issue, except to suggest that the pro
posed planning periods which were rejected were "undoable."
This response is not acceptable. Certainly, when any proposed
plan is rejected, it becomes "undoable" without any further
effort expended by the parties to find the ways and means to
make it work. It is, therefore, determined that Grievants have

not demonstrated any factual or legal basis for their failure to mitigate their damages.

However, WCBE's admission that the 6-8 Grievants were due a forty-five minute planning period for the entire 1994-95 school year, as well as Grievants' failure to mitigate their damages in November 1994 by refusing an uninterrupted forty-one minute planning period, must be taken into consideration in this matter. Therefore, the 6-8 Grievants are entitled to compensa tion amounting to fifteen minutes per day until November 10, 1994, and also compensation for the remaining 1994-95 school year amounting to the four-minute per day difference between the legal planning period and the forty-one minute proposed planning period, said compensation based on each Grievant's regular contracted rate.

In addition to the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. Because LDS' K-5 teachers had no "usual class period" by which to measure a corresponding planning period and because every schedule is different insofar as the K-5 grades are concerned, K-5 teachers were entitled to a thirty minute plan ning period during 1994-95, which they received. Likewise, the thirty-minute planning period for K-8 specialty teachers who teach thirty-minute classes was sufficient under W.Va. Code §18A-4-14(2).

2. WCBE admitted a violation of Code §18A-4-14(2) with respect to the 6-8 Grievants' planning period; therefore, the 6-ed to redress.

3. The 6-8 Grievants failed to mitigate their damages by refusing proposals to increase their planning time during the

1994-95 school year; had they accepted an offer for a forty-one minute planning period in November 1994, they could have still pursued a grievance on the issue of lost planning time and/or any other injustice they perceived with the new schedule.

4. The appropriate remedy for a violation of Code §18A-4-14 is money damages. See Smith v. Lincoln County Bd. of Educ., Docket No. 89-22-544 (Nov. 14, 1989).

5. Altogether, because WCBE's proposed planning period for the 6-8 Grievants still fell four minutes short of the required planning period, these Grievants are entitled to compensation for fifteen minutes per day from the time the 1994-95 school year began, and for four minutes per day from November 10, 1994, until the end of the school year.

Accordingly, this grievance is GRANTED, in part, and DENIED in part. The Wetzel County Board of Education is Ordered to compensate the 6-8 Grievants in a manner consistent with this Decision, while no relief is due for the remaining Grievants.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wetzel 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: June 27, 1995.