BETTY JONES, et al.,

Grievants,

v.

DOCKET NO. 96-22-493

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants are teachers for the Lincoln County Board of Education ("Board"), representing Midway Elementary, Hamlin Elementary, Griffithsville Elementary, and the Charles Yeager Career Center. The Midway Elementary Grievants ("AFT Grievants") filed this grievance in or about September 1996, alleging they were not being provided planning periods in violation of W. Va. Code § 18A-4-14. About the same time, the other Grievants ("WVEA Grievants") also filed a grievance contending they were not being given planning periods in violation of that Code Section. Separate level two hearings were held on these grievances on October 2 and 3, 1996. The AFT Grievants appealed to level four on November 19, 1996, and the matter was held in abeyance pending receipt of the lower level transcript and a level two decision. The AFT Grievants never received a level two decision, and this case was scheduled for a level four hearing on March 26, 1997. At thelevel four hearing, the parties agreed to submit the case upon the record developed in the WVEA Grievants' level two hearing, and make additional stipulations, which were received on April 11, 1997.

In the meantime, the WVEA Grievants appealed to level four on May 1, 1997, requesting their grievance be consolidated with the AFT Grievants', and be submitted on the record. A level two decision on the WVEA Grievants' case was issued on May 7, 1997. Thereafter, the two grievances were consolidated by Order dated May 19, 1997, and became mature for decision on May 30, 1997, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

SUMMARY OF THE EVIDENCE

The record consists of the level two transcript from the WVEA Grievants' level two hearing, exhibits and decision, and stipulations entered into between the Board and the AFT Grievants.

FINDINGS OF FACT

1. Grievants are employed by the Board as teachers at Hamlin Elementary, Midway Elementary, Griffithsville Elementary, and the Charles Yeager Career Center, a vocational-technical school.

2. Grievants were not provided planning periods during the 1995-96 or 1996-97 school years.

3. Grievants did not waive their planning periods, nor were they compensated for them during those school years.

4. The Lincoln County School system was over the three percent casual deficit allowed by law, by approximately $938,000.00, at the end of the 1995-96 school year. 5. The Board has been mandated by the West Virginia State Board of Education, under a plan of correction, to reorganize and reduce its deficit.

6. The current vocational school instructional schedule requires teachers to arrive by 8:05 a.m. and leave at 2:55 p.m., for a total of 6 hours and 50 minutes.

7. The current Midway Elementary instructional schedule requires teachers to arrive by 7:15 a.m. and leave at 2:30 p.m., for a total of 7 hours and 15 minutes.

8. The current Griffithsville Elementary instructional schedule requires teachers to arrive by 7:55 a.m. and leave at 3:05 p.m., for a total of 7 hours and 10 minutes.

9. The current Hamlin Elementary instructional schedule requires teachers to arrive by 7:45 a.m. and leave at 2:05 p.m., for a total of 6 hours and 20 minutes.

DISCUSSION

W. Va. Code § 18A-4-14, as amended in 1993, provides, in pertinent part:

> (2) 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 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. No teacher shall 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).
>
> 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 is 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.
>
> (3) Nothing in this section shall be construed to prevent any teacher from exchanging his lunch recess or a planning period or any service personnel from exchanging his lunch recess for any compensation or benefitmutually 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, ... (Emphasis added).

The issue of planning periods is not new to the Grievance Board or the West Virginia Supreme Court of Appeals. Considerable changes have occurred regarding this statute over the years, and a brief overview of the statute, rules, amendments and case law is helpful to the understanding of this issue.

The subject of planning periods in elementary schools was addressed by this Grievance Board in Phillips, et al. v. Greenbrier County Bd. of Educ., Docket No. 9-13- 074/075 (June 28, 1990). At that time, the statute provided that planning periods were to provided within each “regular school day”, as opposed to “instructional day.” In Phillips, the Administrative Law Judge, addressing the grievants' argument that the planning period had to occur within the instructional day, stated:

> [These cases] illustrate the difficulties, perhaps the impossibility, of providing planning periods in the elementary schools . . . . While at the high school level, for example, a teacher can readily be assigned a free period for planning within the instructional day, that is not true for a teacher at the elementary level, who is in charge of all the regular instruction of his or her students throughout the day. That is, the administrative task of assuring that the students are otherwise occupied, such as in music classes, on a daily basis so as to allow the teacher a free period each and every day during the instructional day would be daunting. While ordinarily a statute should be construed consistently with its plain language, 'to interpret...[a statute] so literally as to obtain an absurd result . . . is precluded in the law, State ex rel. McLaughlin v. Morris, 128 W. Va. 456, 461 (1946)[.]'

The Administrative Law Judge concluded by holding that planning periods did not have to occur during the instructional day. The reasoning in Phillips was upheld by the West Virginia Supreme

Court of Appeals in Lincoln County Bd. of Educ. v. Adkins, 188W Va. 430, 424 S.E.2d 775 (1992), which held that “the 'planning period statute', which entitles teachers to one planning period within each regular school day, does not require that teachers' schedules be arranged so that the planning period occurs during the instructional portion of the day.” Syl. Pt. 6. (Emphasis added).

Adkins noted that W. Va. C.S.R. § 126-42-6.31 (eff. June 1, 1987) defined an “instructional day” as “time allocated within the work day for the mastery of learning outcomes by students. The instructional day includes both regular and discretionary instructional time.” Section 126-42-6.33 (eff. June 1, 1987) defined “work day” as “time allocated for the instructional day and other activities such as homeroom, class changes, lunch, planning periods, and staff development that may not exceed eight clock hours.” The Adkins Court concluded that planning periods, while part of the “work day”, were not required to be part of the “instructional day”, and could occur outside the instructional portion of the day, as long as it did not exceed the 8- hour time limitation. In Adkins, the evidence established the Lincoln County Board of Education had established by policy an 8-hour work day for all teachers. Adkins made it clear that a planning period could occur before the instructional day begins, or after the instruction day ends, as long as it fell within that 8-hour work day.

Subsequently, and in response to Adkins, Code § 18A-4-14 was amended in 1993. The amendment deleted the phrase “regular school day” and inserted in its place “school instructional day.” Thus, the statute now clearly provides that planning periods must occur within the instructional day. Therefore, it is necessary to once again look at the pertinent definitions to determine exactly when planning periods may be scheduled, and when they may not. It is necessary to note here that W. Va. C.S.R. 126-42-1, et seq, was significantly amended effective July 1, 1997. The amendments altered the definitions of “instructional day” and “work day”, and added a definition of “school day”. While these changes are significant for future scheduling of planning periods, this grievance was filed over the lack of planning periods during the school years 1995-96 and 1996-97, and the Rules in effect during that time period are the Rules applicable to this decision.

Thus, “instructional day” is defined as “the time allocated within the work day for the mastery of learning outcomes by students. The instructional day includes both regular and discretionary instructional time.”

“Work day” is defined as the “time allocated for the instructional day and other activities such as homeroom, class changes, lunch, planning periods, and staff development that may not exceed eight

clock hours."

There is no statutory time limit, nor one imposed by the Rules, on the length of the "instructional day", only that it is the time allocated for the "mastery of learning outcomes by students." Grievants contend the instructional day at their respective schools is confined to the time that students are actually present in the school building, which times correlate with those set forth in Findings of Fact Nos. 6 through 9. I disagree.

Code § 18A-4-14 states that planning periods are "to be used to complete the necessary preparation for the instruction of pupils." This preparation is necessarily incidental to the "mastery of learning outcomes by students", for without such preparation, the teaching of classes could be disorganized, illogical, and counterproductive. The amendment to the Code Section to include planning periods within the instructional day necessarily lifts planning periods out of the definition of "work day" and inserts it into"instructional day." Looking at the definition of "work day", it includes such things as homeroom, lunch, class changes, and staff development, things which are not incidental to the "mastery of learning outcomes by students". Clearly, the Legislature felt that planning periods were more appropriately geared to the "mastery of learning outcomes by students", as opposed to more mundane functions such as eating, breaks, and waiting for classes to begin or the buses to arrive, when it inserted them into the instructional day. By its own term, planning "period", it appears the Legislature intended that that portion of the day a teacher spends in preparation for his or her classes should constitute a "period" within the instructional day, comparable to other periods, such as math, science, history, and english.

Therefore, I find that Grievants are entitled to planning periods within the instructional day, but the instructional day includes a planning period designated as such, as opposed to a period in lieu of another period.

Turning to the instant case, it is undisputed the Grievants were not provided with planning periods in accordance with Code § 18A-4-14 during the 1995-96 and 1996-97 school years. The case law provides that Grievants are entitled to a planning period the length of the "usual class period". With the exception of the vocational school, which operates on block scheduling, very little evidence was presented regarding the length of the "usual class period" in these schools. A proposed schedule for an Aide at Midway Elementary indicates the length of a usual class period is 30 minutes. The teachers at Griffithsville testified they would be satisfied with a 30-minute planning period, although it

is unclear whether the classes there are 30 minutes or 45 minutes in length. No evidence was presented on the usual class periods at Hamlin Elementary. Based on the scant evidence and testimony, I find the Grievants at Midway, Griffithsville, and Hamlin Elementary Schools are entitled to a 30-minute planning period. Acknowledging that the vocational school is on a block schedule, with four 90-minute instructional blocks, no evidence was presented to justify a 90-minute planning period for the vocational teachers, not to mention the virtual impossibility of providing a 90-minute planning period within an 8-hour day. Therefore, the teachers at the vocational center are also entitled to a 30-minute planning period, relying on the Grievance Board's precedent regarding vocational teachers in Hardman v. Kanawha County Bd. of Educ., Docket No. 95-20-249 (Oct. 19, 1995), aff'd Circuit Court of Kanawha County, Civil Action No. 95-AA- 270 (Apr. 22, 1997).

Finally, Code § 18A-4-14 provides that the number of hours a teacher is expected to work cannot be extended to provide for planning periods. Grievants' contend this provisions means that the instructional portion of the day as set forth in Findings of Fact Nos. 6 through 9 cannot be extended to add a planning period. I disagree with Grievants' interpretation of that statute. A teacher's “work day” is an 8-hour day, and Grievants have presented no evidence to establish that their work day is officially something other than 8 hours. The varying schedules between the four schools represented here indicate that the work day must be at least 7 hours and 30 minutes. Therefore, to add 30 minutes to the beginning or end of the instructional schedules to provide a planning “period”, would not extend Grievants' work day beyond 8 hours, and thus, would not violate that provision of W. Va. Code § 18A-4-14.

The record supports that Grievants and the Board attempted to work out solutions to this problem, and, apparently concluded that the situation was unworkable. However,much of the “unworkability” stems from the Grievants' apparent refusal to tack their planning periods onto the existing instructional schedule. This Grievance Board has consistently held that the proper resolution of differences between an employee and an employer is for the employee to do whatever he or she is being asked by the employer, and then grieve. The Grievants in this instance should have accepted an additional 30- minute planning period at the end of the class schedule, and then grieved.

Because Grievants decided not to accept any proposals offered by the Board to accommodate them, and because they refused to tack on the planning period to the instructional schedules, they are not entitled to any relief for the lack of planning periods. This is not a case where the Board has

refused to provide planning periods, wherein it has been held that monetary damages are warranted. See Dennis v. Wetzel County Bd. of Educ., Docket No. 95-52-166 (June 6, 1995); Hardman v. Kanawha County Bd. of Educ., Docket No. 95-20-249 (Oct. 19, 1995). It is clear that there were ongoing discussions between the Board and the Grievants on this issue, but to no avail. I cannot find the inability to resolve this problem rested solely with the Board. See Taylor, et al. v. Kanawha County Bd. of Educ., Docket No. 96-20-406 (Feb. 28, 1997).

In conclusion, under W. Va. Code 18-4-14, and the Rules which were governing during the time period leading to this grievance, I find that adding an additional 30-minutes to the instructional schedules set forth in Findings of Fact Nos. 6 through 9 would not have violated the statute, as a planning period is part of the instructional day and is intended to be a separate "period" during the instructional day, as opposed to a period in lieu of another scheduled period. Further, adding an additional 30 minutes to the instructionalschedules would not increase the number of hours to be worked by the Grievants beyond an eight-hour day. Therefore, that portion of the statute also was not violated.

CONCLUSIONS OF LAW

1. It is incumbent upon the Grievants to prove their case by a preponderance of the evidence.

2. Grievants have proven by a preponderance of the evidence that they did not have planning periods during the 1995-96 or 1996-97 school years.

3. Grievants are entitled to a planning period the usual class length within each school instructional day.. Grievants have not proven by a preponderance of the evidence that they are entitled to anything more than the minimum 30-minute planning period provided by W. Va. Code § 18A-4-14. See Hardman v. Kanawha County Bd. of Educ., Docket No. 95-20-249 (Oct. 19, 1995), aff'd Circuit Court of Kanawha County, Civil Action No. 95-AA-270 (Apr. 22, 1997).

4. W. Va. C.S.R. § 126-42-6.31 (eff. June 1, 1987) defined "instructional day" as "time allocated within the work day for the mastery of learning outcomes by students. The instructional day includes both regular and discretionary instructional time."

5. W. Va. C.S.R. § 126-42-6.33 (eff. June 1, 1987) defined "work day" as "time allocated for the instructional day and other activities such as homeroom, class changes, lunch, planning periods, and staff development that may not exceed eight clock hours."

6. The 1993 amendment to W. Va. Code § 18A-4-14 effectively removed “planning periods” from the definition of “work day” and inserted them into the definition of “instructional day.” 7. W. Va. Code §18A-4-14 provides that planning periods are “to be used to complete the necessary preparation for the instruction of students.” Consequently, this preparation is necessarily incidental to the “mastery of learning outcomes by students” and is properly construed to be a separate “period” within the instructional day, rather than time provided in lieu of another period.

8. W. Va. Code § 18A-4-14 provides that the number of hours to be worked by a teacher cannot be extended to provide for planning periods. Grievants have not proven that their work day is less than 8 hours.

9. Adding 30 minutes before or after the Grievants' instructional schedules would not have extended their work day beyond 8 hours, and thus would not have violate W. Va. Code § 18A-4-14.

10. Grievants have failed to prove by a preponderance of the evidence that the inability to agree to a workable solution to provide planning periods during the 1995-96 or 1996-97 school years rested solely with the Board.

Accordingly, this grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of * 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: August 12, 1997