

CHARLES GLOVER, et al.,

Grievants,

v.

Docket No. 99-50-503

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On September 17, 1999, Charles Glover and 32 other teachers (Grievants) employed by Respondent Wayne County Board of Education (WCBE) initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that WCBE had violated W. Va. Code §§ 18A-4-14 and 18A-2-3 in regard to affording them required planning periods, and calling out substitutes to fill in for absent employees. Following denial of the grievance at Level I, Grievants appealed to Level II where an evidentiary hearing was conducted on October 29, and November 16, 1999. A Level II decision denying the grievance was issued by James J. Ross, the Superintendent's designee, on November 22, 1999. Grievants appealed to Level IV on November 29, 1999, by-passing Level III as authorized by W. Va. Code § 18-29-4(c). By agreement of the parties, on February 1, 2000, a Level IV hearing was conducted in WCBE's Central Office in Wayne, WestVirginia. [\(See footnote 1\)](#) At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on February 17, 2000, following receipt of the parties' written post-hearing arguments.

Based upon a preponderance of the credible evidence contained in the record established at Levels II and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievants are employed by Respondent Wayne County Board of Education (WCBE) as teachers assigned to Wayne Middle School (WMS).

2. The average class period at WMS is approximately 45 minutes. HT Vol. II at 14.

3. In addition to a personal planning period, classroom teachers at WMS are scheduled to have a second planning period of approximately 45 minutes to accommodate the interdisciplinary team teaching concept that has been applied in WCBE middle schools for several years. The core academic curriculum is delivered to middle school students through team teaching.

4. During the 1998-99 school year, WMS teachers were not required to perform duties during their team planning period. Substitute teachers were routinely called out to cover for the absence of regular teachers at WMS, thereby assuring that the regular teachers received both their personal and team planning periods.

5. WCBE experienced a financial deficit in excess of \$300,000 for the 1998-99 school year. More particularly, WCBE spent more than \$200,000 for substitute teachers beyond the amount the West Virginia Department of Education allocated to WCBE for that purpose for the 1998-99 school year. HT Vol. II at 56.

6. The West Virginia Department of Education recommended reducing expenditures on substitute teachers as one way of cutting WCBE's deficit. HT Vol. II at 57. Therefore, at the beginning of the 1999-2000 school year, WCBE Superintendent Wilt Salmons instructed his Principals not to call out substitutes, unless the number of absent teachers was so great their duties could not be covered by the regular teaching staff.

7. At WMS, substitute teachers are not called out unless four or more teachers are absent on a given day. HT Vol. II at 4.

8. During the 1999-2000 school year, nearly all 35 WMS teachers have been required to perform duties during their team planning period to cover for the absence of other teachers. From September 1, 1999, through January 31, 2000, WMS teachers have been required to cover a total of 614 class periods. G Ex A at L IV.

9. In most cases, teachers do not learn that they will be required to provide coverage during their team planning period, until they report to school each morning. HT Vol. II at 7.

10. With certain limited exceptions, each teacher at WMS normally receives a 45 minute personal planning period each day. 11. The effectiveness of the team teaching concept is inevitably denigrated when teachers on a team are not able to meet and plan together for their classroom activities, or conduct parent-teacher conferences with all members of the team present.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. Grievants contend WCBE is violating W. Va. Code § 18A-4-14, because they are not consistently being provided uninterrupted team planning periods they received during the previous school year. Grievants further assert WCBE is violating W. Va. Code § 18A-2-3 by failing or refusing to call out substitute teachers until a minimum number of teachers are absent from their school.

W. Va. Code § 18A-4-14(2) states:

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 regular class period in the school to which the 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 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.

W. Va. Code § 18A-2-3 provides:

The county superintendent, subject to approval of the county board, shall have authority to employ and assign substitute teachers to any of the following duties: (a) To fill the temporary absence of any teacher or an unexpired school term made vacant by the resignation, death, suspension or dismissal; (b) to fill a teaching position of a regular teacher on leave of absence, and (c) to perform the instructional services of any teacher who is authorized by law to be absent from class without loss of pay, providing such absence is approved by the board of education in accordance with the law. Such substitute shall be a duly certified teacher.

Grievants contend that they should continue to receive two uninterrupted planning periods, consistent with the team teaching concept employed at WMS. However, Grievants have provided no persuasive authority for the relief they are seeking through this grievance. The statute which establishes an entitlement to a daily planning period is fairly specific, providing only for a planning period equal to a regular class period, and not less than thirty minutes. [\(See footnote 2\) Gant v. Waggy](#), 180 W. Va. 481, 377 S.E.2d 473 (1988); [Jones v. Lincoln County Bd. of Educ.](#), Docket No. 96-22-493 (Aug. 12, 1997). [But see Collins v. Wayne County Bd. of Educ.](#), Docket No. 99-50-535 (Feb. 23, 2000); [Tate v. Raleigh County Bd. of Educ.](#), Docket No. 96-41-067 (Aug. 30, 1996); [Hardman v. Kanawha County Bd. of Educ.](#), Docket No. 95-20-249 (Oct. 12, 1995). It does not provide a basis for awarding any greater privileges. [See Pliska v. Marshall County Bd. of Educ.](#), Docket No. 98-25-225 (Oct. 28, 1998).

This Grievance Board's decision in [Scalia v. Randolph County Board of Education](#), Docket No. 42-86-054-2 (Aug. 29, 1986), [aff'd sub nom. Randolph County Bd. of Educ. v. Scalia](#), 182 W. Va. 289, 387 S.E.2d 524 (1989), cited by Grievants in support of their claim, involved assigning noninstructional school personnel to serve as substitutes. Although there was some evidence that Grievants are sometimes required to teach outside their areas of certification when covering for absent teachers at their school, the situation in [Scalia](#) is readily distinguishable from this grievance covering teachers in a number of disciplines who are required to fill in for absent teachers during one class period each day, losing their team planning period. In [Scalia](#), the employees were required to serve as substitute teachers for the entire school day, foregoing their regular duties for several days at a time. Therefore, [Scalia](#) does not compel the result Grievants are seeking in this grievance.

County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, [Dillon v. Bd. of Educ.](#), 177 W. Va. 145, 351 S.E.2d 58 (1986). [W. Va. Code](#) § 18A-2-3 gives WCBE's Superintendent broad discretion to call or not call substitutes, as he determines. [See generally Pockl v. Ohio County Bd. of Educ.](#), 185 W. Va. 256, 406 S.E.2d 687 (1991). Grievants note that [W. Va. Code](#) § 18A-4-10 allows school boards to pay substitutes from the budget of the next fiscal year, suggesting that this provision permits WCBE to exceed its budget for substitute teachers year after year. That [Code](#) section also provides: "When an allowable absence does not

directly affect the instruction of the pupils or when a substitute employee may not be required because of the nature of the work and the duration of the cause for the allowable absence of the regular employee, the administration, subject to board approval, may use its discretion as to the need for a substitute where limited absence may prevail." Unless Grievants can establish they are entitled to more than the single 45-minute planning period they are presently receiving in most circumstances, or that WCBE has abused its discretion by requiring them to provide coverage during their team planning period, they have not established any basis for relief under W. Va. Code § 18A-2-3. [\(See footnote 3\)](#)

Where the school board's action is not prohibited by a specific statute, nor specifically permitted under any particular legislative enactment, the board's determination may be reviewed to ascertain if the school board acted in an arbitrary and capricious manner. See Pockl, supra. In applying an "arbitrary and capricious" standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286.

In this matter, WCBE elected to spend less money on hiring substitutes, and chose to accomplish this, in part, by requiring Grievants to cover for their absent peers during their team teaching planning period. Although this choice has inevitably had a detrimental effect on the team teaching effort, because teachers can no longer meet on school time with their team members to plan their activities in unison, or hold parent-teacher conferences between all core instructors and a student's parent or parents simultaneously during the instructional day, this represents an educational determination, not a personnel action. A county board has considerable latitude in determining such matters as what curriculum will be offered, and the methodology through which courses will be presented. See Glick v. Logan County Bd. of Educ., Docket No. 97-23-435 (Jan. 29, 1998). Hill v. Kanawha County Board of Education, Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom. Hill v. Raglin, Cir. Ct. of Kanawha County, No. 95-AA-106 (Jan. 8, 1997). See also Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995). Although reasonable people may disagree as to the wisdom of this course of action, the arbitrary and capricious standard of review does not permit an

administrative law judge to simply substitute his judgment for that of the school board. Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997). See Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). See generally, Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990).

In a perfect world, WCBE would have sufficient funding to hire all the substitutes it wants, keep class sizes to an ideal level, put a personal computer on every desk, and make a hundred other improvements in the schools. Certainly, team planning is a worthwhile expenditure of time which benefits the students. However, WCBE faces real funding constraints that require the administration to make difficult decisions. Grievants failed to establish that WCBE's decision to require them to cover for absent employees, rather than call in and pay substitutes, thereby depriving Grievants of an uninterrupted team planning period, separate from their personal planning period, was arbitrary and capricious in the circumstances presented. Whether WCBE spends the money saved through this effort on the Superintendent's salary, pay raises for school administrators, or purchasing new school buses, such expenditures do not impact the decision at issue in this grievance, so long as the school board uses the funds for an authorized purpose. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. W. Va. Code § 18A-4-14 requires that all teachers receive an uninterrupted daily planning period of not less than 30 minutes. Gant v. Waggy, 180 W. Va. 481, 377 S.E.2d 473 (1988); Jones v. Lincoln County Bd. of Educ., Docket No. 96-22-493 (Aug. 12, 1997).

3. Respondent Wayne County Board of Education is not violating W. Va. Code §§ 18A-4-14, or 18A-2-3, by requiring Grievants to forego their team planning period to provide coverage for absent

teachers.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: March 30, 2000

[Footnote: 1](#)

Grievants were represented by Susan Hubbard with the West Virginia Education Association. WCBE was represented by counsel, David Lycan.

[Footnote: 2](#)

There was some testimony presented that Grievant Glover and approximately 20 other teachers at WMS have not received any personal planning period on at least one day, with some teachers having no personal planning period on as many as four days, during the 1999-2000 school year. It is clear from the record at Level II that the focus of this grievance is upon the loss of an uninterrupted team planning period on a daily basis, not the occasional loss of a personal planning period. Therefore, the loss of personal planning periods will not be further addressed in this decision. See W. Va. Code § 18-29- 3(j); W. Va. Dep't of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993).

[Footnote: 3](#)

Even if Grievants were deprived of their minimum planning period, the primary remedy available through this Grievance Board would be monetary damages, and injunctive relief requiring restoration of planning periods. See, e.g., Taylor v. Kanawha County Bd. of Educ., Docket No. 96-20-406 (Feb. 28, 1997).