

RICHARD COLLINS, et al.,

Grievants,

v.

Docket No. 99-50-535

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants, 65 teachers, [\(See footnote 1\)](#) filed this grievance against the Wayne County Board of Education ("WBOE") on or about September 3, 1999. [\(See footnote 2\)](#) The statement of grievance reads:

The Wayne County Board of Education has circumvented the intent of Chapter 18A-14-4 with regard to the length of teachers' planning periods by

instituting an alleged "modified block" schedule at Spring Valley High School for the school year 1999-2000 which purports that classes are of 45-minute length and that the school day encompasses eight such class period; two adjacent so-called 45- minute "class periods," a total of 90 minutes, are now required to complete one credit per semester, whereas one 90-minute block of time in the 1998-1999 schedule was required per credit. A typical student still earns four credits per semester in four subject areas; most teachers have four groups of students each day for a total of 90 minutes' instruction to each group, which is not, in fact, a departure from last year's instructional load. The reason for the alleged change of schedule is so that teachers will now be given a 45-minute planning period; the other 45 minutes of the teachers' time, which period of time is paired with and adjacent to the planning period, may now be used for coverage for absent teachers in lieu of calling in substitute teachers or for other purposes convenient to the administration.

As relief Grievants seek:

The grievant(s) request that the Wayne County Board of Education abandon the current alleged modified block schedule in use at Spring Valley High School, admit that the prevailing class period in actual practice at the school is in fact 90

minutes in length, and comply with state law by reinstating a teacher planning period equal in length to the usual class for teachers as required by Chapter 18A-14-4 [sic] of the School Laws of West Virginia. [\(See footnote 3\)](#)

The following Findings of Fact are made from the evidence presented at Level II.

FINDINGS OF FACT

1. Grievants are employed full-time by the Wayne County Board of Education ("WBOE") as teachers at Spring Valley High School ("SVHS"). 2. During the 1998-99 school year, most class periods at SVHS were 90 minutes in length, and teachers were allowed one 90 minute planning period each day. Some classes were of shorter duration than 90 minutes.

3. In December 1998, WBOE voted that its high schools use a schedule consisting of eight 45 minute class periods, beginning with the 1999-2000 school year. Most classes at SVHS now consist of two 45 minute periods of instruction, however, some classes consist of only one 45 minute period. For those classes which consist of two consecutive 45 minute periods of instruction, after the first 45 minutes of class a bell rings and the students are allowed a five minute break, after which they return to the same class with the same teacher, and instruction in the same course is resumed. These students receive one grade for the two 45 minute periods of instruction. After 90 minutes of instruction, the students are excused to go to their next class. At lunchtime, the students attend class for two periods consisting of 1 hour and of 30 minutes, separated by a 30 minute lunch break.

4. The length of the usual class period at SVHS is 90 minutes.

5. Each teacher at SVHS is allowed a 45 minute planning period each day.

6. Each teacher at SVHS also has a 45 minute duty period immediately preceding or following the planning period. During this time a teacher may be called upon to cover a class, which may consist of supervising the students while they perform an activity which has been previously assigned by their regular instructor, or observing a student teacher, or to supervise students during lunch or perform related lunch duties. 7. There are 93 teachers employed at SVHS, and during each 45 minute period of time, 7 to 10 teachers have a duty period. When a teacher is absent, coverage is rotated among those teachers on duty. As of October 29, 1999, Grievant Collins had covered classes during his duty period four or five times, Grievants Lucas and Trimboli had covered classes during their duty periods two times [\(See footnote 4\)](#), **and Grievant Clary had covered one class during her duty period. Grievant Thompson has agreed to cover a class for a teacher who has**

medical treatments on Fridays, during both her planning and duty periods, and would have done the same last year to help another teacher. She has not been called upon to cover any other classes. [\(See footnote 5\)](#) All teachers at SVHS have had to cover classes during their duty periods about the same number of times as these Grievants. When they are not covering another class, teachers at SVHS may use their duty period as they choose.

8. Grievant Ball always has lunch duties during her duty period, as do all other teachers at SVHS who have duty periods during lunch. Grievant Ball did not agree to exchange her duty period for lunch duty.

9. In addition to completing necessary preparations for the instruction of students, teachers at SVHS use their planning period for providing individual instruction to students, conferring with school administrators and colleagues, performing department chair duties, holding supervisory conferences with student teachers and conferring with the student teacher supervisor, placing telephone calls to parents, meeting with parents, making and putting up bulletin boards, writing letters of recommendation for students and completing college application referral forms, and completing attendance forms. [\(See footnote 6\)](#)

10. By letter dated December 23, 1998, Assistant State Superintendent David Stewart provided Wilts Salmons, Wayne County Superintendent of Schools, with the Department of Education's recommendations for correcting the near deficit situation WBOE had experienced for three years. There were many recommendations. One of the recommendations was to curtail all nonessential expenditures for the remainder of the 1998-99 school year, including the use of substitute teachers, in order to try to prevent a deficit situation at the end of the school year. Other recommendations included reducing the number of professional and service employees, reviewing all contracts over 200 days and reducing extended contracts to the minimum amount necessary, reviewing overtime policies, and exploring school consolidation. WBOE has implemented a plan to reduce the number of employees by 30 a year for three years.

11. During the 1998-99 school year, WBOE exceeded the amount of money reimbursed by the State Department of Education for substitutes by over \$200,000.00, and this overage was paid out of WBOE's funds. WBOE ended 1998-99 with a deficit of about this amount. In addition, WBOE is experiencing a shortage of substitute teachers. WBOE believes it has

reduced the cost of employing substitute teachers with the implementation of the 45 minute planning period and 45 minute duty period, and that was one of the reasons this system was implemented. This system has also provided the flexibility to offer some additional courses and allowed for better supervision of students when they are in the hallways, [\(See footnote 7\)](#) and those were also reasons this system was implemented.

DISCUSSION

Grievants bear the burden of proving the elements of their grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27- 074 (Oct. 31, 1996). Grievants contend that each class period at Spring Valley High School is actually still 90 minutes in length, arguing that the insertion of a 5 minute break does not convert a 90 minute class into two 45 minute class periods for purposes of determining the length of their planning periods. They believe they are, by law, still entitled to a 90 minute planning period each day.

Respondent argued the length of the class periods is now 45 minutes, and Grievants are not entitled to have more than a 45 minute planning period. Respondent also pointed to Tate v. Raleigh County Board of Education, Docket No. 96-41-067 (August 30, 1996), in support of the proposition that teachers are not entitled to a planning period of more than 60 minutes. Finally, Respondent pointed out that it had been essentially directed by the State Board of Education to cut costs in order to avoid a budget deficit, and that one of the areas suggested for cuts was the use of substitute teachers; and by implementing the 45 minute duty periods, it had reduced the cost of employing substitute teachers. It argued the 45 minute instructional periods had resulted in other benefits to the students in terms of the variety of classes available, and better student supervision in hallways, in that, rather than students leaving 90 minute class periods to go to the restroom unsupervised, for example, students now use the break period for this, and teachers are in the hallway during the break, as well as during duty periods. Finally, Respondent pointed out that Grievants were essentially getting an uninterrupted 90 minute planning period anyway, as their duty period adjoined their planning period, and each had covered a class very few times.

W. Va. Code § 18A-4-14 provides as follows with regard to planning periods:

(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 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, and that service personnel granted rights under this section and the superintendent or his agent may not agree to terms which are different from those available to any other service personnel within the same classification category granted rights under this section within the individual school or to terms which in any way discriminate among such service personnel within the same classification category within the individual school.

The first issue is whether two 45 minute periods of instruction in the same course, with the same group of students for a single grade, separated by a 5 minute break, represents one 90 minute class period. Although the break between 45 minute periods of instruction seems to be a good idea, it does not magically convert one 90 minute class into two 45 minute classes. When a student attends a particular class for 45 minutes, gets a 5 minute break, and then returns to the very same classroom, with the very same teacher, and the instruction is resumed in the very same course at the point it ended 5 minutes earlier, the two 45 minute periods of instruction are one class.

While the statute requires that teachers be given a planning period which is the length of the usual class period in the school, as pointed out by Respondent, this Grievance Board has determined that the above cited statutory provision preceded the development of 90 minute class periods, and therefore, the Legislature did not intend this statute to require 90 minute planning periods. Tate, supra. The Administrative Law Judge ("ALJ") concluded in Tate:

It seems clear that ninety-minute classes were not the norm when Code §18A-4-14

was enacted; it appears that the Legislature most likely contemplated one-hour instruction periods. Although the cited provision explicitly links the length of the planning period to class length, it is reasonable to find some implicit limitation on the amount of time in a given school day which can be devoted to preparation for instruction. It is obvious that at some point, a minute for minute calculation of planning time dictates an impractical result. The undersigned declines to find the statute so restrictive of a county board's ability to arrange teacher and student schedules.

Grievants pointed to Gant v. Waggy, 180 W. Va. 481, 377 S.E.2d 473 (1988), in support of their argument that the statutory language requires that they receive 90 minute planning periods. That case is a per curiam opinion with a single syllabus point as follows: "When a statute is clear and unambiguous and the legislative intent is plain, it is the duty of the courts to apply the statute in accordance with the legislative intent therein clearly expressed." The issues were whether the planning period had to be a single uninterrupted period of time or could consist of two separate periods of time occurring at different points in the day, and whether upper grade teachers who taught longer class periods at an elementary school were entitled to longer planning periods than those who taught lower grades at the same school for shorter periods of time. The Court found that the planning period must be uninterrupted, and that those who taught in the upper grades were entitled to a longer planning period of 56 minutes, while those who taught in the lower grades were only entitled to a planning period of 45 minutes. The Court went on to say:

This Court believes that the plain meaning of this language [of Code § 18A- 4-14] is inescapable. Each teacher must be provided with at least one planning period of the length of the usual class period in the school, but no shorter than thirty minutes.

In arguing that the plain meaning of the statute should not be applied, the appellees have suggested that providing the teachers with a planning period at least the length of a regular school period might cause scheduling and personnel disruption in the Pendleton County schools. This Court does not find this to be so impelling a reason as to permit deviation from the Legislature's obvious intention. The Court believes that there are valid reasons for providing a teacher with a sufficiently long and uninterrupted planning period, the most salient of which is to afford the teacher with an opportunity to review, organize, and reflect on the material which is to be taught. Teaching is the fundamental function of the schools, and this Court believes that the obvious benefit of the provision of an appropriate planning period on the teaching process outweighs the negative scheduling effect that compliance with the legislative mandate might entail.

. . .

To this Court, it seems obvious there is some correlation between the amount of planning required and the length of time a teacher will teach. The longer a teaching period, the more preparation required. In tying the length of the planning period to the length of the teaching period, it appears that the Legislature considered that correlation and intended that teachers who taught for longer periods be provided with more planning time.

The ALJ in Tate, however, specifically considered Gant in reaching his decision.

The ALJ in Tate further explicitly affirmed the holding in Hardman v. Kanawha County Bd. of Educ., Docket No. 95-20-249 (Oct. 12, 1995), [\(See footnote 8\)](#) that “when a class period at a particular school exceeds the 'usual' length of one hour, an accommodation can be reached between the requirements of the statute and the county board's duty to run an efficient school system.” The ALJ in Tate ruled, however, that “it is the county board's burden to show that the accommodation is needed.” The ALJ found that the board of education had met this burden in Tate, but nonetheless ordered that teachers be allowed a minimum of a 60 minute planning period. [\(See footnote 9\)](#)

Hardman, *supra*, involved teachers at vocational schools who taught two classes per day of 183 minutes and 135 minutes. In Hardman, the ALJ found that the grievants did not demonstrate a need for a planning period of more than 30 minutes, apparently placing the burden of proof on the grievants to demonstrate a need for a planning period which was the length of the usual class period. Likewise in Jones v. Lincoln County Board of Education, Docket No. 96-22-493 (August 12, 1997), the ALJ stated, “[a]cknowledging 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.” Hardman was then cited by the ALJ in Jones for the proposition that vocational teachers are entitled to a 30 minute planning period.

This Grievance Board follows the legal doctrine of stare decisis.

A simple statement of this rule will be found in Black's Law Dictionary, 3d Ed., wherein it is stated that it means: “To stand by decided cases; to uphold precedents; to maintain former adjudications, * * *. The doctrine of stare decisis rests upon the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent

authority.” Its further purpose is “To adhere to precedents, and not to unsettle things which are established.” In re Proposal to Incorporate Town of Chesapeake, 130 W. Va. 527, 45 S.E.2d 113 (1947).

Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995). Accordingly, the Tate and Hardman holdings that teachers are not always entitled to a planning period equal to the usual class period at the school will be followed. However, it appears that the two cases are conflicting on the issue of who bears the burden of proof. The Circuit Court in affirming Hardman did not specifically address this issue. The undersigned concludes that the better approach is that taken in Tate, due to the statutory language. Accordingly, the burden of proof will be upon Respondent to demonstrate an accommodation between the requirements of the statute and the county board's duty to run an efficient school system is needed. However, Grievants may rebut this by demonstrating a need for a planning period of more than 60 minutes.

WBOE was faced with a number of unpleasant alternatives for reducing its expenses. It could eliminate jobs, which it is also doing, reduce contract terms and thereby reduce employee salaries, or it could begin the unpopular task of school consolidation. An immediately available alternative was to reduce the amount of time for planning periods, and use existing personnel to cover classes rather than expend funds for substitutes. The undersigned finds that WBOE demonstrated an accommodation was necessary due to financial constraints, in order to reduce the cost of substitute teachers, and, for those teachers who do not have lunch duty, a reasonable accommodation was reached which provides them with 90 consecutive minutes of uninterrupted time on most days for planning. While they do not receive at least 60 minutes for planning everyday, they receive more than 60 minutes a majority of the time, and never receive less than 30 minutes. Grievants argued in their written submission that the absences during the first month of school were not representative of those during the rest of the school year, as teachers are generally absent less the first month, and teachers would be likely to have to cover more classes during their duty periods later in the year. No evidence of this was presented. In fact, Gary Adkins, WBOE's Assistant Superintendent, testified to the opposite. He testified absences are greater at the beginning of the school year.

Those Grievants who have lunch duty are not in the same position as other teachers at SVHS, as they always have lunch duty during their duty period. It is not clear from the record whether they have lunch duty only during one 30 minute lunch period, or whether they have lunch duties for their entire 45 minute duty period. Following the holding in Tate, supra, they are entitled to at least 60 uninterrupted minutes during the instructional day for their planning period. To the extent they do not receive this much planning time, their schedules must be rearranged to accomplish this. To the extent they have not received this much planning time to date this school year, they are entitled to compensation.

While Grievants obviously use their planning periods for school related activities, many of these activities do not involve “completing necessary preparations for the instruction of pupils”, which is the stated statutory purpose of the planning periods. Grievants have not demonstrated a need for more than a 60 minute planning period for this purpose.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. The burden of proof is upon Grievants to prove the elements of their grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27-074 (Oct. 31, 1996).
2. W. Va. Code § 18A-4-14 requires that a teacher be provided an uninterrupted planning period within each school instructional day which is the length of the usual class period in the school.
3. Grievants have met their burden of proving they are entitled to an uninterrupted 90 minute planning period.
4. As the Legislature did not contemplate 90 minute class periods at the time W. Va. Code § 18A-4-14 was enacted, “when a class period at a particular school exceeds the 'usual' length of one hour, an accommodation can be reached between the requirements of the statute and the county board's duty to run an efficient school system,” however, “it is the county board's burden to show that the accommodation is needed.” Tate v. Raleigh County Bd. of Educ., Docket No. 96-41-067 (Aug. 30, 1996).
5. Grievants may offer evidence to rebut that an accommodation is needed, to demonstrate a need for a planning period of more than 60 minutes.

6. WBOE has demonstrated an accommodation was needed due to financial constraints, in order to reduce the cost of substitute teachers, and, for those teachers who do not have lunch duty, a reasonable accommodation was reached which provides them with 90 consecutive minutes of uninterrupted time on most days.

7. A reasonable accommodation was not reached for those Grievants who have lunch duty for 45 minutes, as they are entitled to 60 uninterrupted minutes for a planning period during the instructional day.

8. "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)." Hardman v. Kanawha County Bd. of Educ., Docket No. 95-20-249 (Oct. 19, 1995). Compare, Taylor v. Kanawha County Bd. of Educ., Docket No. 96-20-406 (Feb. 28, 1997).

Accordingly, this grievance is **DENIED IN PART, AND GRANTED IN PART**. The Wayne County Board of Education is **ORDERED** to make any and all necessary schedule adjustments so that those Grievants who have 45 minutes of lunch duty during their duty period receive 60 uninterrupted minutes during the instructional day as a planning period. The Wayne County Board of Education is further **ORDERED** to compensate those Grievants who have 45 minutes of lunch duty during their duty period for all days during the 1999-2000 school year on which they were afforded less than a 60 minute period which they could use for planning, based upon their daily rate of pay.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: February 23, 2000

Footnote: 1

The Grievants signed their names to several sheets of paper attached to the grievance form. Some of the names are illegible. It appears the Grievants are: Richard Collins, Patricia Bash, Shari Wellman, Missy Bailey, Kim Bailey, Cheryl Arley Howerton, Anne E. Bradley, Beverly Smith, Janet L. Diamond, Dale Blevins, Devona Myers, Phil Lucas, Joy Chittum, Susie Thompson, Pam Perdue, Alicia Spears, Cathrine J. Hann, Lynn Movar, Mary Rinaldi, Gary Norris, Susan Wilburn, Helen Lafferty, Connie J. McCozy, Howard Carroll, Hugh R. Wright, Don Money, Rudy Frye, Beverly Wheaton, Maura Williams, Jane T. Bartram, Robert A. Wyant, Sharon Adkins, B. J. Morrone, Linda Dempsey, Karen Lucas, Lea Hardcoret, Jaylen Turner, Betty Anne Hale, Karen S. Maynard, Sherlene Hiroskey, Tracy Foster, James Case, Rebecca A. Dark, Mona J. Evans, Sarah Dixon, Sandra Perry, Sharon Trimboli, Connie Dillon, Deana Prince, Charles W. Adkins, Brenda Damron, Minetta Rice, Barb Murphy, Willa Wallace, Karen Alexander, Kim Enders, Janice K. Clary, Peggy A. Connelly, Mary Ball, Judy Beck, Vernon Shy, Jack Sanders, Mike Smith, David Duncan, and Tina C. Haslett.

Footnote: 2

Barry J. Scragg, Principal of Spring Valley High School, responded at Level I on September 13, 1999, that he was unable to resolve the grievance. Grievants appealed to Level II, where a hearing was held on October 29, 1999. A decision denying the grievance was issued on December 20, 1999. Grievants waived Level III, appealing to Level IV on December 22, 1999. The parties agreed that this grievance could be decided based upon the record developed at Level II. Grievants were represented by Judy Davis, and Respondent was represented by David Lycan, Esquire. This matter became mature for decision on February 3, 2000, upon receipt of the last of the parties' post-hearing written submissions.

Footnote: 3

In their written argument at Level IV, Grievants for the first time asked that they be reimbursed at their daily salary rate for the planning time they have lost. W. Va. Code § 18-29-3(k) provides that, "[a]ny change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner." In addition, W. Va. Code § 18-29-5 provides that the Level IV hearing examiner shall have the power to "provide such relief as is deemed fair and equitable."

Footnote: 4

Grievant Lucas had also chosen to cover one class during her planning period, because the science department has decided to cover the classes in that department in this manner.

Footnote: 5

None of the other Grievants testified, except Grievant Ball, whose testimony on this issue is covered in Finding of Fact Number 8.

Footnote: 6

Grievants grade papers, compute grades, and record test scores during their planning periods. These will be considered necessary preparations for the instruction of students for the purposes of this decision.

[Footnote: 7](#)

Members of the "SBA Team" toured SVHS during the 1998-99 school year and issued a reprimand regarding the school's condition, after they found cigarette burns on commode seats and urinals, and writing on the bathroom walls. A similar tour in September 1999 found the school in good shape, with no violations.

[Footnote: 8](#)

Hardman was affirmed by the Circuit Court of Kanawha County, Civil Action No. 95-AA-270, on April 22, 1997. The Supreme Court of Appeals of West Virginia refused the appeal.

[Footnote: 9](#)

The undersigned would note that in Miller v. Kanawha County Bd. of Educ., Docket No. 94-20-409 (Oct. 28, 1994), issued just one year before Tate, the ALJ ruled that the grievants were entitled to 95 minute planning periods on the two days a week that the usual class period was 95 minutes, although they were only entitled to 50 minute planning periods the other three days of the week when the usual class period was 50 minutes. Tate did not address or overrule Miller.