ROBERT McDOUGAL, et al.,

Grievants,

v.

DOCKET NO. 01-24-484

MARION COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Robert McDougal filed this grievance on May 2, 2001. It was denied at Level I on May 15, 2001, and a Level II hearing was convened on July 18, 2001, at which time all Marion County custodians (See footnote 1) were joined as grievants. The grievance was again denied at Level II, and was appealed to Level IV. The statement of grievance filed at Level IV reads:

> Grievants are regularly employed custodians who hold 208-day contracts. Monday, April 16, 2001 was originally designated as an “outside school environment” (OSE) day by the Respondent for the custodians who held 208-day employment terms. This day was converted to a work day although students did not attend classes on that date. The grievants wererequired to work although no other employees worked on that date. Grievants allege a violation of West Virginia Code § 18-5-15.

As relief, Grievants seek payment of overtime (time and one-half) wages for the work performed on April 16, 2001, or other appropriate relief. A Level IV hearing was convened on October 2, 2001, at which time the parties stipulated that the facts were not in dispute and agreed to submit the matter for consideration based on the lower-level record. Grievants were represented by WVSSPA representative John Roush, Esq. and Respondent was represented by Stephen R. Brooks, Esq. of Flaherty, Sensabaugh & Bonasso. The matter became mature for a decision on November 14, 2001, following submission of the parties' proposed findings of fact and conclusions of law. Based on the

underlying record and the stipulations of the parties, the undersigned makes the following findings:

FINDINGS OF FACT

1. Grievants are all similarly-situated service personnel regularly employed as custodians by Respondent in various Marion County schools for the 2000-2001 and 2001- 2002 school years on 208-day contracts.

2. Marion County schools were closed on January 22, 2001, due to adverse weather. Grievants were not required to work that day, although they were paid for working that day.

3. April 16, 2001, was originally scheduled as an OSE day on the custodian calendar. On April 6, 2001, a memorandum was issued to all custodians by Thomas E. Long, Marion County Superintendent of Schools, stating:

> Because of the school closing on Monday, January 22, 2001, School and Custodian Calendars must be changed because we have dropped below 178 days of instruction.
>
> The O.S.E. day originally scheduled for April 16 on the Custodian Calendar is now lost. The schedule shall be as follows:
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> April 16 - Work Day
>
> April 17 - Work Day/Faculty Senate Day
>
> April 18 - Regular School Day

4. Grievants worked their normal shifts on April 16, but no students attended school that day and no other professional or service personnel at their schools were required to work. Grievants were paid at their regular rate for working that day.

5. Respondent filed a “Report of Canceled and Rescheduled Instructional Days 2000-2001 School Year” with the State Department of Education on or about May 22, 2001. On this report Respondent stated that instructional days had been rescheduled for April 18, 2001, and February 2, 2001.

6. Grievants' employment term was for 208 days in the 2000-2001 school year, and Grievants were paid for 208 days.

DISCUSSION

In this nondisciplinary grievance, Grievants bear the burden of proving their allegations by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

Grievants argue that W. Va. Code § 18-5-15 limits the reasons for changing an OSE day to a work day to those cases where the OSE day must be used to make up an instructional day. In pertinent part, W. Va. Code § 18-5-15(a) reads:

> Noninstructional days in the employment term may be used for making up canceled instructional days, curriculum development, preparation for opening and closing of the instructional term, in-service and professional training of teachers, teacher-pupil-parent conferences, professionalmeetings and other related activities. In addition, each board shall designate and schedule for teachers and service personnel six days to be used by the employee outside the school environment. However, no more than eight noninstructional days, except holidays, may be scheduled prior to the first day of January in a school term.
>
> Notwithstanding any other provisions of the law to the contrary, if the board has canceled instructional days equal to the difference between the total instructional days scheduled and one hundred seventy-eight, each succeeding instructional day canceled shall be rescheduled, utilizing only the remaining noninstructional days, except holidays, following such cancellation, which are available prior to the second day before the end of the employment term established by such county board.

Respondent, argues that Grievants' citation is inapposite and that W. Va. Code § 18A-5-2 applies instead, giving the Board the authority to reschedule work days lost due to canceled school days. The relevant portion of that section reads:

> Any school or schools may be closed by proper authorities on account of the prevalence of contagious disease, conditions of weather or any other calamitous cause over which the board has no control. Under any or all of the above provisions, the time lost by the closing of schools is counted as days of employment and as meeting a part of the requirements of the minimum term of one hundred eighty days of instruction. On such day or days, county boards of education may provide appropriate alternate work schedules for professional and service personnel affected by the closing of any school or schools under any or all of the above provisions. Professional and service personnel shall receive pay the same as if school were in session. Insofar as funds are available or can be made available during the school year, the board may extend the employment term for the purpose of making up time that might affect the instructional term.

Actually, both sections must be read together. “Chapters 18 and 18A of the West Virginia Code must be read *in pari materia*, and the provisions of Chapter 18A are to be used when the two Sections are inconsistent. W. Va. Educ. Assoc. v. Preston County Bd. of Educ., 171 W. Va. 38, 297 S.E.2d 444 (1982); Smith v. Siders, 155 W. Va. 193, 183 S.E.2d 433 (1971),” Moss v. Wirt County Bd. of Educ. Docket No. 98-53-402 (Mar. 3,1999). Looking at the very first sentence of W. Va. Code § 18-5-15(a) (See footnote 2) , it is evident that there is a distinction between instructional days and employment days. The instructional term must fit within the employment term. However, this opening

sentence also makes clear that these terms relate to teachers and students, not necessarily to service personnel. "'Service personnel' means all non-teaching school employees not included in the . . . definition of teacher." W. Va. Code § 18-1-1(h). It is not until the sixth paragraph of § 18-5-15(a) that service personnel are mentioned at all, and again a clear distinction is made between them and teachers. (See footnote 3) That provision requires the Board to schedule for both teachers and service personnel at least six OSE days within the employment term. OSE days are a type of noninstructional day, and the following paragraph requires the Board to use noninstructional days to make up missed instructional days in some circumstances. Obviously, since no students attended on April 16, the custodians' OSE day was not converted into an instructional day. Grievants' argument that Respondent is limited in its authority to reschedule noninstructional days is misplaced, however, as whether a day is instructional or not is irrelevant to the employment term of service personnel. The only effect W. Va. Code § 18-5-15 has on service personnel employment terms is to grant them six OSE days.

Service personnel work schedule adjustment is more directly addressed by W. Va. Code § 18A-5-2. The relevant part of that section, as reproduced above, allows a boardto close the school on account of the weather and expressly authorizes the board to provide an alternate work schedule for service personnel.

Respondent complied with both W. Va. Code §§ 18-5-15 and 18A-5-2 in adjusting the work schedule for the custodians as a result of a work day lost due to weather. January 22, 2001, originally scheduled as a work day, was effectively converted to an OSE day, and the previously-scheduled OSE day was converted to a work day. Grievants' contention that they should be paid for working on April 16 would result in a fundamental unfairness, since they were already paid for working that day. Before the schedule change, there were 202 days of work (including holidays) and six OSE days; after, there were 202 days of work and six OSE days.

Grievants' also argue that they should be paid at the overtime rate for working April 16th because it was effectively a holiday. The only legal holidays are listed in W. Va. Code § 18A-5-2, and no mention is made there of OSE days. Also, "[t]here is nothing in the statutes or law to support [the] characterization of an OSE day as a 'vacation' day." Moss, *supra*. Because Grievants worked the number of days they were scheduled to work, got the number of OSE days they were required to have, and were properly paid for the work they performed, they suffered no harm, and thus no relief is

available or appropriate.

The following conclusions of law may be drawn from this discussion:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. CSR 1 § 4.21. "The preponderance standard generallyrequires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. "Chapters 18 and 18A of the West Virginia Code must be read *in pari materia*, and the provisions of Chapter 18A are to be used when the two Sections are inconsistent. W. Va. Educ. Assoc. v. Preston County. Bd. of Educ., 171 W. Va. 38, 297 S.E.2d 444 (1982); Smith v. Siders, 155 W. Va. 193, 183 S.E.2d 433 (1971)," Moss v. Wirt County Bd. of Educ. Docket No. 98-53-402 (Mar. 3, 1999).

3. The only effect W. Va. Code § 18-5-15 has on service personnel employment terms is to grant them six OSE days.

4. West Virginia Code § 18A-5-2 allows a board to close the school on account of the weather, to include the day missed thereby in the employment term of all employees, and to provide an alternate work schedule for service personnel.

Accordingly, this grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Marion 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 GrievanceBoard. 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.

Dated: December 13, 2001 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Robert McDougal, Shelly Ammons, Ronald Bagwell, William Barker, Frank Beavan, B. W. "Ace" Berry, Susan Bland, Byram Brewer, James Buchanan, Michael Burkman, Dolly Cole, Larry Colisino, Deborah Cook, Carolyn Dean, Catherine Estel, Mark Frisenda, Betty Grugin, Daniel Gorman, Jr., William Harris, Frank Helms, Jr., Sherry Heston, Delaine Higgins, Katherine Kerns, Peggy Kuhn, Thomas Loss, Donna Loudermill, Deborah Manuel, Everett Martin, II, Michael McDougal, Donald Minor, Gordon Myers, Jr., Nancye Perry, Carolyn Reynolds, Velva Sheppard, Philip Sims, Jack Snider, Alan Sypolt, Patricia Tennent, Carole Toothman, Stanley Toothman, Carlotta Tuttle, James Walker, Jr., Ruth Walker, Penny White, Cora Wolfe and Roger Wolfe.

Footnote: 2

"The board shall provide a school term for its schools which shall be comprised of: (1) An employment term for teachers; and (2) an instructional term for pupils."

Footnote: 3 *"In addition, each board shall designate and schedule for teachers and service personnel six days to be used by the employee outside the school environment."*