DENIS CHAPMAN, et al.,

Grievant,

v. Docket No. 01-06-036

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants are numerous teachers from Cabell Midland High School and Huntington High School, filed this consolidated grievance against their employer, the Cabell County Board of Education ("CCBOE" or "Board"). (See footnote 1) The Statement of Grievance reads:

> **Violation of WV Code 18A-4-14 with regard to grievants' daily planning period reduction for this school year from 90 minutes to 45 minutes. Planning should be at least 60 minutes. (See footnote 2)**
>
> **Relief Sought: Relief sought is to be granted at least 60 minutes of planning and any compensation due.**

The Cabell Midland High School Grievants filed on September 15, 2000, and the grievance was denied at Level I on October 27, 2000. The Huntington High School Grievants filed on November 9, 2000. By agreement of the parties, the second grievance was waived to Level II, the grievances were consolidated, and a Level II hearing was held on November 29, 2000. The grievance was denied on February 1, 2001. Grievants elected to by-pass Level III. Grievants appealed to Level IV on February 13, 2001, and byagreement of the parties, a Level IV hearing was held in Huntington, West Virginia at CCBOE's Board office on August 8, 2001. This grievance became mature for decision on September 11, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 3)

Issues and Arguments

Grievants argue their planning periods should not have been decreased from 90 minutes to 45 minutes for this school year when the school adopted a modified block schedule. They assert W. Va. Code § 18A-4-14(2) requires at least a 60 minute planning period, noting that even though the majority of high school classes were changed to 45 minutes, many teachers still have 90 minute classes. Grievants aver "the sole purpose of the modified block schedule within the two high schools is to destroy the 90 minute planning period for teachers, not curriculum enhancement." (Level II Trans. at 11). Grievants also argue the total number of minutes spent in ninety minute classes exceeds the total number of minutes spent in forty-five minute classes; thus, longer planning periods are required.

Respondent first asserts the grievances are untimely filed. Second, Respondent maintains the purpose of the change was due to curricular concerns. Third, Respondent avers the teachers are receiving the required statutory planning period, as the planning period is to be the length of the usual class period, and it is. After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants are all employed as teachers at either Cabell Midland High School or Huntington High School.

2. Before the 2000 - 2001 school year and after several years of planning and research, the CCBOE high schools switched from a block schedule of four, ninety minute periods, to a modified block schedule with both ninety minute and forty-five minute periods. Modified block classes last approximately 45 minutes; block classes last approximately 90 minutes. With the modified block schedule, there are eight, possible, forty-five minute classes periods.

3. Prior to the switch to the modified block schedule, teachers had a ninety minute planning period, the length of the normal class period. See note 2, infra.

4. After the switch, the percentage of block classes was approximately 41%, and the percentage of modified block classes was approximately 59%.

5. There are more total instructional minutes spent in the ninety minute classes, than spent in the forty-five minute classes in a year.

6. For the 2000 - 2001 school year, the teachers' planning periods were changed from 90

minutes to 45 minutes.

7. At times, teachers perform other duties required by their schools during their planning periods. They are not required to perform these duties during planning periods, but are required to perform these duties. Examples of these duties are making parent phone calls and completing forms. 8. All teachers receive their required duty free lunch, and many teachers perform some type of "duty." These duties include bathroom and hall monitoring.

9. Respondent had multiple reasons for switching from the block schedule to the modified block schedule. They were: 1) the need for some students (those lower quartile test scores) and some course content (Foreign Languages and some Math concepts) to be taught over a longer period of time and in smaller increments, to increase the time for processing and integrating the information; 2) increasing the number of class periods available, expanded the number of electives a student can take, thus enlarging a student's exposure to additional content and options. For example, a student could take one half credit in piano and one half credit in art, instead of only one class or the other; 3) with forty-five minutes spent in planning periods instead of ninety, the number of teachers needed could decrease to match more closely the state funding level; 4) increasing the number of class periods available provides the option of rendering extra support classes for students who need additional assistance; and 5) increasing the number of class periods available could, though the above-stated changes, result in fewer dropouts and a decrease in the failure rate.

10. The length of the usual class period in CCBOE's high schools is forty-five minutes.

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 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. KanawhaCounty Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires 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.

The first issue to address in Respondent's timeliness argument. The undersigned Administrative Law Judge finds the alleged failure to provide Grievants with a ninety minute planning period is a continuing practice; and thus, is timely filed. The West Virginia Supreme Court of Appeals stated in Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.3d 399 (1995), that a continuing practice can be grieved at any time, but relief is limited to prospective relief and to back relief from and after fifteen days preceding the filing of the grievance. Accordingly. if proven, the failure to grant Grievants a sufficient planning period would be seen as a continuing practice, but the relief would be limited to fifteen days before September 15, 2000, for the Cabell Midland High School teachers and fifteen days before November 9, 2000, for the Huntington High School teachers.

As for the merits of the case, 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 towhich 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).**

(Emphasis Added.)

The key issue here is what the above-underlined language means. Grievants contend the language is clear, and since more class time is spent in ninety minute classes, Grievants are entitled to ninety minute planning periods. In the alternative, Grievants argue that if the term "usual class period" is considered ambiguous, construction of the statute requires ninety minute planning periods because ninety minute class times "predominate the day" at both high schools.

Respondent points to the definition of usual class period found in Miller v. Kanawha County Board of Education, Docket No. 94-20-409 (Oct. 28, 1994). The administrative law

judge in Miller stated, the "usual class period for determining the length of the planning period pursuant to W. Va. Code § 18A-4-14(2) is the class period that most frequently occurs on any given day of a weekly class schedule." The West Virginia Supreme Court of Appeals has stated that when a statute is clear and unambiguous, and the legislative intent is plain, it will not be interpreted, but will be given its full force and effect. State v. Jarvis, 199 W. Va. 635, 487 S.E.2d 293 (1997); State v. Epperly, 135 W. Va. 877, 65 S.E.2d 488 (1951). See Gant v. Waggy, 180 W. Va. 481, 377 S.E.2d 473 (1988).

Here, the undersigned Administrative Law Judge finds the phrase "[s]uch planning period shall be the length of the usual class period in the school to which such teacher is assigned . . . " to be clear, and it does not need to be construed. The length of the usualclass period at Cabell Midland High School and Huntington High School is forty-five minutes, and the required length of the planning period should be and is the same. (See footnote 4)

Additionally, this Grievance Board has noted in the past that teachers are salaried, professional employees, and "often perform duties beyond their regularly scheduled work day, including grading papers, participating in parent-teacher conferences, and tutoring at-risk students, for which they are not compensated beyond their salary." Hussel v. Mason County Bd. of Educ., Docket No. 96-26-073 (July 24, 1996). See Smith v. Mingo County Bd. of Educ., Docket No. 95-29-530 (Mar. 18, 1996); Oblinger v. Lincoln County Bd. of Educ., Docket No. 89-22-552 (Jan. 5, 1990). While granting teachers sufficient planning time during each work day to meet each and every requirement of this complex and paperwork intensive profession might be the ideal, this is currently not the requirement of W. Va. Code § 18A-4-14(2).

The above-discussion will be supplemented by the following Conclusions of Law.

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 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. KanawhaCounty Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-

174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires 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. These grievances challenged a continuing practice, unlawful decrease in the length of the planning period, and were therefore timely filed. Grievants may contest the alleged present violation, but the relief would be limited. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.3d 399 (1995).

3. W. Va. Code § 18A-4-14 requires 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.

4. The "usual class period for determining the length of the planning period pursuant to W. Va. Code § 18A-4-14(2) is the class period that most frequently occurs on any given day of a weekly class schedule." Miller v. Kanawha County Bd. of Educ., Docket No. 94-20-409 (Oct. 28, 1994).

5. Grievants have not met their burden of proof and demonstrated CCBOE violated W. Va. Code § 18A-4-14(2) by allotting them forty-five minute planning periods.

Accordingly, this grievance is DENIED.

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

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: November 21, 2001

Footnote: 1

The names of the numerous Grievants are contained in the record.

Footnote: 2

Many witnesses said they wanted a ninety minute planning period. The Grievance Board has determined that the W. Va. Code § 18A-4-14 requirement preceded the development of 90 minute class periods, and the Legislature did not intend the statute to require ninety minute planning periods, because "a minute for minute calculation of planning time dictates an impractical result." Tate v. Raleigh County Bd. of Educ., Docket No. 96-41-067 (Aug. 30, 1996). However, it is noted that a board of education has the burden of proof on whether and how the longer planning period would impair the operation of the school.

Footnote: 3

Grievants were represented by Susan Hubbard from the West Virginia Education Association at Level II and Attorney Jason Poling at Level IV. Respondent was represented by Attorney Howard Seufer.

Footnote: 4

The case of Midkiff v. Wayne County Board of Education, Docket No. 99-50-484 (March 16, 2000) is not applicable. In Midkiff, the administrative law judge found the county had converted to a modified block schedule in name only; in actuality classes were still being taught in ninety minute blocks with a break in the middle.