DEBORAH ARBAUGH, et al.,

Grievants,

v. **DOCKET NO. 02-06-110**

CABELL COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievants Deborah Arbaugh, Marion Dailey, Stacy Morgan, Nancy Murrell and Karen Dee Stowasser filed this grievance on January 15, 2002, against Cabell County Board of Education, Respondent. Their Statement of Grievance reads:

> Violations of WV Code 18-29-2, section "a" an action, policy or practice constituting a substantial detriment to [or] interference with effective classroom instruction, job performance; section "m" discrimination; section "n" harassment; and section "o" favoritism with regard to directive to discontinue using a common lesson plan.
>
> The directive violates their academic freedom, integrity and professional reputations with regard to lesson plans.
>
> Their shared lesson plans are flexible, meet student needs, and reflect team grade level planning.
>
> The grievants have been singled-out and treated differently than other third grade teachers in the county.
>
> The undue stress and unfair treatment has directly interfered with their effective classroom instruction and has placed them in a negative employment situation.

As relief, Grievants seek "to be permitted to do shared lesson plans to meet the needs of their students and for all violations to cease with an explaining of reasons for violations." Level I of the grievance procedure was bypassed, and a Level II hearing was held February 21, 2002. After a Level II decision was issued March 22, 2002, Respondent waived Level III, and an open Level IV hearing was held June 14, 2002, at Respondent's Board meeting room in Huntington (See footnote 1). Following the hearing, the parties agreed to simultaneously submit their proposed findings of fact and

conclusions of law by July 1, 2002, and the matter became mature for decision on that day.

Although numerous witnesses testified on many issues in both the Level II and Level IV hearings, much of the evidence presented did not tend to apply to the grievable events stated in the grievance. The undersigned excluded as irrelevant much of the evidence proffered by Grievants, as it tended to prove facts that were not in dispute. Grievants sought to present extensive evidence on how they modified their lesson plans after they were created to customize them for their separate classes. This evidence was deemed immaterial because the issue was what happened before the lesson plans were created and how they were created. Among other issues raised that are immaterial to the merits of the grievance, was the validity of either Superintendent Roach's educational philosophy or Grievants' teaching practices. Whether Grievants are effective teachers or not is not at issue. Grievants' claim that they have been placed in a “negative employment situation” is too vague to be considered. Based on the evidence contained in the Level II record and adduced at the Level IV hearing, I find the following material facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievants comprise the entire third-grade faculty at Milton Elementary School (MES).

2. On January 11, 2002, Cabell County Superintendent of Schools David L. Roach delivered a memorandum to Grievants stating in part, “Although we encourage teachers to collaborate, share ideas and materials, even use the same format, we cannot permit a common lesson plan because it is not in the best interests of the children.”

3. The memorandum was the result of Superintendent Roach's investigation into a situation mentioned to him by Assistant Superintendent Dennis Miller. In October, 2001, Mr. Miller received a telephone call from an anonymous parent who was concerned that the third grade teachers at MES were using identical lesson plans in their individual classes.

4. Superintendent Roach advocates an approach to curriculum development that stresses pre-assessment of student needs before planning and instruction, with a post-instruction assessment of the students' mastery, which allows targeted development of instructional goals and objectives. He was concerned that the MES teachers, if using identical lesson plans for their different classes, were planning without pre-assessment.

5. After Mr. Miller mentioned the issue to him, Superintendent Roach broached the issue in a meeting with Director of Curriculum Mary Campbell, Coordinator of Assessment Sally Pipenbrink,

Curriculum Supervisor Jim Boggess and Curriculum Supervisor Allyson Schoenlein on November 2, 2001. (See footnote 2) 6. On November 5, 2001, the group of administrators met again, and Administrative Assistant for Elementary Education Mike O'Dell was also present. Superintendent Roach asked the group as a team to look into the issue and report back to him whether the MES third grade teachers' lesson plans reflected individualization for their classes that would show that the teachers were pre-assessing the needs of the different students in their different classes.

7. This team of administrators decided to visit Grievants' classrooms to observe their teaching and lesson planning.

8. On November 6, Ms. Campbell briefly observed the math classes of Ms. Arbaugh and Ms. Murrell and reviewed their lesson plans. The math lesson plans she reviewed were identical, and upon review of these teachers' plans for their other subjects, Ms. Campbell found them to also be identical.

9. In the normal course of his duties as curriculum supervisor evaluating the implementation of a new math program, Mr. Boggess had made several visits to Grievants' classrooms prior to the November 2, meeting. He also made a visit to Grievant Arbaugh's class in connection with a parent's complaint about a homework assignment. Because he had already recently observed Grievants, he did not make another trip to observe them again after the November meetings, and did not have any specific recollection as to whether Grievants' lesson plans had been identical when he observed them.

10. On November 9, 2001, Ms. Pipenbrink went to MES to meet with and interview Grievants, and she was invited to observe the classes of Grievants Arbaugh and Murrell. Prior to going to the school, she prepared a list of questions she wished to ask. [Level IV Grievants' Exhibit No. 1.] When she asked, “How does one plan fit all needs?”she was told by Grievants that one plan cannot fit all needs, but the individual teacher adapts the plan in her own classroom as she teaches it to meet the specific needs of her students. [Level IV Grievants' Exhibit No. 2.]

11. Ms. Pipenbrink also learned from Grievants that they collaborate as a group to share ideas as often as they can, and once they arrive at a general consensus regarding the plans, each of the teachers will create the week's lesson plans for one subject, and then they all copy and use that same plan in their own classes. Modification of the plan to meet the individual needs of each teacher's classes or specific students is done as the lesson is taught.

12. Then on November 20, 2001, the team met with Grievants again to discuss the lesson plan issue, and explained to them for the first time exactly what the investigation was attempting to determine.

13. On December 3, 2001, team members Mr. O'Dell, Mr. Burgess, Ms. Schoenlein and Ms. Pipenbrink again went to MES to meet with Grievants to discuss the lesson plan issue.

14. The team reported to Superintendent Roach that looking at Grievants' common lesson plans in isolation from their explanations as to how the plans are taught, the plans are not customized for each class based on preassessment of the needs of the students.

15. On December 12, 2001, Superintendent Roach met with all Cabell County school principals and asked them specifically if any of their teachers were using shared or common lesson plans. Only the principal of MES answered affirmatively. 16. Brenda Chapman, a first grade teacher at MES, used to meet on Fridays to collaborate with the other first grade teacher, but stopped doing so after the third grade teachers received the directive. The first grade teachers used shared lesson plans, but their plans were not identical - they had the same general themes, goals and ideas, but there were differences in the plans.

17. The fourth grade teachers at MES used shared lesson plans, but stopped doing so as soon as the third grade teachers received the directive from Superintendent Roach.

DISCUSSION

This is a non-disciplinary grievance in which Grievants bear the burden of proving their claims by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Grievants claim violations of their academic freedom, integrity and professional reputations, that their shared lesson plans are flexible, meet their students' needs and are reflective of team grade-level planning, that they have been singled out and treated differently than other teachers, and that

the undue stress and unfair treatment interfereswith their effective classroom instruction “and placed them in a negative employment situation,” all in violation of W. Va. Code §§ 18-29-2(a), (m), (n) and (o). (See footnote 3) Each of these four claims will be addressed in turn, but given the vigorous debate that arose after the Superintendent's directive was issued, some interpretation of the directive would be appropriate to explain the issues that are not under consideration as a part of this grievance, and why they are not. The undersigned Administrative Law Judge does not have jurisdiction to consider issues not raised in the grievance nor to grant relief based on claims not cognizable under the grievance procedure. Based on the facts, two grievable events occurred: Grievants were singled out for investigation into their lesson planning practices, and they were sent a directive from Superintendent Roach requiring them to write their own lesson plans. Grievants were not criticized by Respondent for ineffective teaching or planning, and their professional abilities were not called into question in any way.

Grievant's claim that Superintendent Roach's directive was an “action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.” As such, W. Va. Code § 18-29-2(a) incorporates such actions in the definition of “Grievance,” and the undersigned is empowered to determine whether the action is proper. Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995). Grievants claim that forcing them tochange their method of lesson planning would be a substantial detriment to, or interference with, their effective classroom instruction.

However, they produced no evidence that the directive is anything more than an inconvenience. Although an overwhelming abundance of evidence shows that the collaboration of these teachers is productive and enriches the learning experience of their students, the directive they complain of does not prohibit collaboration. In fact, it clearly states, “ [W]e encourage teachers to collaborate, share ideas and materials, [and] even use the same format[.]” The only thing it requires is that each teacher plan for her own class on the basis of that class' needs, and Grievants produced no evidence that suggests this type of pro-active planning would interfere with their effective classroom instruction.

Further, Grievants' argument that not being able to collaborate is a hindrance to their teaching is also invalid. Grievants stated that one of the greatest strengths of their system was the collaboration and teamwork that went into the lesson planning, allowing their skills to heterodyne their abilities and expertise for better plans than they could develop individually. However, Respondent agrees that

collaboration is desirable and Superintendent Roach's directive encourages, rather than quashes it.

Grievants claim their academic freedom has been violated. Academic freedom is a concept that arises under the guarantees of the first (See footnote 4) and fourteenth (See footnote 5) amendments to theConstitution of the United States and Article III, Section 7 of the West Virginia Constitution, (See footnote 6) but the concept has not been clearly defined as it applies to public school teachers in West Virginia. *See*, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989). "'Academic freedom is defined as 'liberty to pursue and teach relevant knowledge and to discuss it freely without restriction from school or public officials or from sources of influence.' The American Heritage Dictionary at 70.' Kilburn v. Bd. of Directors/W. Va. State College, Docket No. 94-BOD-1046 (Dec. 29, 1995)." McCoy v. Bd. of Dir./Southern W. Va. Community College. Docket No. 97-BOD-182 (Aug 18, 1998).

However, as the right to academic freedom is rooted in freedom of expression, it certainly does not confer in a teacher the unfettered prerogative to unregulated classroom conduct with no possible control by the school's administrators. It generally guarantees the teacher that she may not normally be compelled or constrained from expressing or teaching course content in the manner she deems best in her professional judgment. In this case, the Superintendent has not infringed on Grievants' academic freedom. His directive placed no restrictions on their freedom of expression, but instead regulated the process under which their lesson plans were made. In fact, he testified at Level IV that he did not object to the contents of the plans, only to how and in what order they are made. The directive was purely logistical rather than substantive, and does not impact on Grievants' federal and state constitutional rights.

Additionally, the law gives Superintendent Roach the authority to execute all the educational policies of Respondent and the State Board of Education. *See*, W. Va. Code§ 18-4-10. In addition, he is empowered to "exercise a multitude of powers and duties independent of the board." Hall v. Pizzino, 164 W. Va. 331, 263 S.E.2d 886 (1980). A number of these policies were placed in evidence by both parties. Level IV Grievant's Exhibit No. 4, a memorandum dated December 10, 2001 from the W. Va. Board of Education, Office of Education Performance Audits notes, "A county and/or school may institute a standardized lesson plan format or requirement[.]" As shown by Level II Respondent's Exhibit No. 1, Respondent has not instituted a formalized lesson plan format, but has directed that "lesson plans should be individual and appropriate to the needs of the specific teacher and students."

Superintendent Roach testified that under his administration, the County's educational philosophy is that “assessment drives instruction.” *See,* Level IV Respondent's Exhibit No. 1. Under this philosophy, teachers must first assess the needs of their specific classes, then develop an individualized lesson plan that is customized to those needs. Superintendent Roach's directive is consistent with that policy, and Grievants' shared lesson plan development is not. Since Superintendent Roach has the legal authority to direct the teacher's activities on this level, and his exercise of that authority is consistent with proper educational policies, it was not an arbitrary abuse of his authority that would be prohibited by law.

Grievants also claimed that their integrity and professional reputations have been damaged. Although Grievants understandably may feel that this has occurred, the evidence does not support such a finding. There is no evidence that anyone at any time questioned the integrity or professionalism of Grievants. Nobody questioned whether their students were learning effectively. The Superintendent's directive enumerated a numberof concerns with shared lesson plans, and it is understandable that Grievants assumed these were concerns with their teaching abilities. Perhaps the directive could have been written more diplomatically, but read in light of the evidence presented at the hearings, it is clear that Superintendent Roach's concerns were with the *concept* of shared lesson plans, not with the Grievants themselves (See footnote 7) .

Grievants allege harassment, which is defined in W. Va. Code § 18-29-2(n) as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See* Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98- 22-495 (Jan. 29, 1999). When Superintendent Roach learned that Grievants could be using common lesson plans, he directed the appropriate personnel to investigate and report back to him. These persons made several individual trips to the Grievants' classrooms to observe their teaching and to review their lesson plans. (See footnote 8) The harassment claim stems from the repeated observations, and not from the issuance of the directive,which was a one-time event. “A single incident does not constitute harassment.” Pauley,

supra; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998)

These observations, for this singular purpose, do not amount to continual disturbance, irritation or annoyance, constant criticism, or unreasonable performance expectations as necessary to sustain a harassment claim. This Grievance Board has found in the past that observing and accurately commenting on those observations by an administrator is not harassment. *See*, Rowe v. Kanawha County Bd. of Educ., Docket No. 99-20-368 (Mar. 20, 2001). Although Respondent admits there might have been better ways to gather the information needed to investigate whether Grievants were using shared lesson plans and how, it would have been worse had Superintendent Roach fired off a directive without first finding out what was going on. It is doubtful Grievants would prefer that he issue directives to them based on an unverified concern raised by a parent, without checking to see if the concern was valid.

The discrimination and favoritism claims of Grievants may be taken together. "W. Va. Code § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'" Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001). Favoritism is defined by W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Rice v. Putnam County Bd. of Educ., Docket No. 00-40-011 (May 4, 2000). In order to establish a claim of discrimination or favoritism, an employee must establish a *prima facie* case by a preponderance of the evidence. In order to meet this burden, Grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and
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> (c) that such differences were unrelated to actual job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989); Rice, *supra.*

Grievants were similarly situated to other teachers, the fourth grade teachers at MES in particular, who were at the same school and also use shared lesson plans. Although most of Grievants' witnesses testified they did not use shared lesson plans the same way Grievants did, this commonality is enough to meet factor (a) above. However, Grievants did not establish that they were treated differently. Although the directive was in the form of a memorandum addressed to Grievants, its terms apply equally to all teachers in all schools in Cabell County. Grievants are not being prevented from doing something that other teachers are allowed to do. As for the fact that Grievants were the only teachers investigated, they were the only ones complained about, and the only ones that Respondent knew were sharing common lesson plans.

This discussion is supported by the following legal conclusions:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievants bear the burden of proving their claims by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It maynot be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). "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. “Academic freedom is defined as `liberty to pursue and teach relevant knowledge and to discuss it freely without restriction from school or public officials or from sources of influence.' The American Heritage Dictionary at 70." Kilburn v. Bd. of Directors/W. Va. State College, Docket No. 94-BOD-1046 (Dec. 29, 1995). McCoy v. Bd. of Dir./Southern W. Va. Community College. Docket No. 97-BOD-182 (Aug 18, 1998).

3. Academic freedom does not confer in a teacher the unfettered right to unregulated

classroom conduct. Instead, it guarantees the teacher that she may not normally be compelled to or constrained from expressing or teaching course content in the manner she deems best in her professional judgment.

4. Grievants' academic freedom was not infringed by Superintendent Roach's directive.

5. "W. Va. Code § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual jobresponsibilities of the employees or agreed to in writing by the employees.'" Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001).

6. Favoritism is defined by W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Rice v. Putnam County Bd. of Educ., Docket No. 00-40-011 (May 4, 2000).

7. In order to establish a claim of discrimination or favoritism, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and
>
> (c) that such differences were unrelated to actual job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989); Rice, *supra.*

8. Grievants were not subject to discrimination or favoritism.

9. Harassment is defined in W. Va. Code § 18-29-2(n) as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." Rice, *supra*. "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland

v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. Id.; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998).

10. Grievants did not sustain their burden of proving the superintendent's directive or the investigation that lead to the directive constituted harassment.

For the foregoing reasons, this grievance is hereby **DENIED**.

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

Date: August 8, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Susan Hubbard, WVEA UniServ Consultant, represented Grievants, and Howard E. Seufer, Jr., Esq., of Bowles Rice McDavid Graff & Love, PLLC, represented Respondent.

Footnote: 2

This meeting was not called for this purpose.

Footnote: 3

The Code sections cited by Grievants are definitions of terms used in the grievance procedure for education employees, and do not actually prohibit anything, but only describe events which may be grieved. As such, they cannot be "violated" as claimed in the Statement of Grievance. Nevertheless, Grievants have clearly stated claims that the acts they describe fit these definitions and are therefore grievable.

Footnote: 4

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the fr4eedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

Footnote: 5

Section 1: ". . . No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law[.]"

Footnote: 6

"No law abridging the freedom of speech, or of the press, shall be passed[.]"

Footnote: 7

Superintendent Roach stated at the Level IV hearing that if the Grievants provided him with academic research or studies that supported their method of planning, he would be reconsider his position, although he would not be obligated to change it.

Footnote: 8

Curriculum Supervisor Jim Boggess also made several observation trips to the teachers' classrooms to observe their math classes, and once to Ms. Arbaugh's class to investigate a homework complaint, but these visits were not a part of the events giving rise to this grievance.