MARSHA SPANGLER,

Grievant,

v. **DOCKET NO. 03-06-375**

CABELL COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Marsha L. Spangler filed two grievances against her employer, Cabell County Board of Education, (Respondent). The first, referred to as the Barboursville Elementary grievance, was filed as a request for conference on June 10, 2003, and stated: “In that my planning period has been non-compliant with state code for the PAST 2 YEARS, I understand that I am entitled to be paid for each day over the past 2 years in which I worked an extra 30 minutes. That is approximately 180 days last year and 120 days this year, less absent and faculty senate days.” The second grievance, filed July 29, 2003, and referred to as the Nichols Elementary grievance, stated: “18A-4-14 School Laws of WV: Planning period out of compliance; planning period was split into 2 segments.” No particular relief was requested.

The Barboursville Grievance was partially granted at level one, and the Nichols grievance was granted at level one. Grievant appealed both grievances, and they advanced to level four, where they were consolidated and a hearing was held in the Grievance Board's Charleston office on January 28, 2004. Grievant represented herself,and Respondent was represented by counsel, Howard E. Seufer, Jr. of Bowles, Rice, McDavid, Graff, and Love. This matter became mature for decision on March 3, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is regularly employed by Respondent as a classroom teacher at Barboursville Elementary School (BES) and at Nichols Elementary School (NES).

2. During the 2001-2002 school year, at BES, Grievant's planning period began at 7:35 a.m. and ended at 8:20 a.m. For the 2002-2003 Grievant only worked at BES two days per week, and her planning period began at 7:30 a.m. Both years, her 45-minute planning period began 30 minutes prior to the "instructional day," the times in which students were in class, but she reported to work at the same time as all other teachers (for 2002-2003, that was at 7:30 a.m., and for 2001-2002, it was 7:35 a.m.).

3. Also during the 2002-2003 school year, Grievant taught for three days per week at NES. There, her planning period began at 8:00 a.m., the same time as the instructional day, but it was split; the first 15 minutes being from 8:00 to 8:15, and the remainder being from 10:30 to 11:00.

4. On May 22, 2003, BES Principal Virginia Parsons, in response to Grievant's complaint, adjusted Grievant's schedule so that her planning period began at 10:40 a.m. and ended at 11:25 a.m.

5. Grievant was notified at the end of the 2002-2003 school year that her planning period at Nichols for the 2003-2004 school year would be split, and she was requested to file a waiver of the right to a contiguous planning period. 6. Grievant refused to sign the waiver, and instead filed her second grievance. The level one decision of the Nichols grievance states that for the 2003-2004 school year, Grievant's planning period would not be split.

DISCUSSION

As a preliminary matter, Respondent objected to the level four hearing, and averred Grievant did not perfect a timely appeal. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997).

Grievant was sent notice on September 3, 2003, by letter from Superintendent David Roach, that Respondent voted to deny her Barboursville grievance at level three. This notice stated: "You may appeal this decision by completing the appropriate forms and timely delivering them to the West

Virginia Education and State Employees Grievance Board, 808 Greenbrier Street, Charleston, West Virginia 25311." Notice of denial at level three in the Nichols grievance was sent to her on November 18, 2003, and it included the same information as to how an appeal should be filed.

On December 12, 2003, the Grievance Board received a letter from Grievant, dated December 5, 2003 and postmarked December 11, 2003, appealing both grievances. In a letter accompanying the appeals, she related that she tried to appeal the Barboursville Grievance on September 5, 2003, by going to the Board Office and requesting a form, which she completed on the spot, and handed to Vickie Adkins, Professional Personnel Manager. She stated Ms. Adams took the form, made her a copy, and told her she would hear from the Grievance Board. She apparently faxed a letter to Ms. Adkins on December1, 2003 to find out the status of the Barboursville grievance and to appeal the Nichols grievance, and stated she made several unreturned phone calls after that.

West Virginia Code § 18-29-4(d) sets out the proper procedure for appealing a level three decision to level four. It states:

> (1) If the grievant is not satisfied with the action taken by the chief administrator or, if appealed to level three, the action taken by the governing board, within five days of the written decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to a hearing examiner as provided for in section five of this article, such hearing to be conducted in accordance with section six of this article within ten days following the request therefor: *Provided,* That such hearing may be held within thirty days following the request or within such time as is mutually agreed upon by the parties, if the hearing examiner gives reasonable cause, in writing, as to the necessity for such delay.

Grievant, who the statute unequivocally gives five days to appeal, and who was expressly told by Respondent to send her level four appeal directly to the Grievance Board, nevertheless gave her appeal to a person unconnected with the grievance process at the Board office, and did not actually file a proper appeal until 23 calendar days (See footnote 1) after she received the level three decision in her Nichols grievance, and 68 calendar days after the Barboursville level three decision. Respondent argues her appeal in both grievances was, therefore, untimely, and that the Grievance Board consequently no longer has jurisdiction to hear the appeals.

Grievant was supplied a standard Grievance Form, as developed by the Grievance Board. The instructions on this form state: **"Upon appeal, the Grievant <u>must</u> submit the grievance form and all lower level decisions to the West Virginia Education and StateEmployees Grievance Board, 808 Greenbrier Street, Charleston, West Virginia 25311**." 156 C.S.R. 1, Appendix B (Emphasis in

original). However, these instructions appear on a different page from the one that is actually used for the appeal, and there is no evidence Respondent supplied the instructions with the form. The forms contained in the record do not have the instructions attached, but there is no dispute that Superintendent Roach gave Grievant this same information when he informed her of the level three decision.

Taken as a whole, the facts support Respondent's argument. Grievant was instructed clearly and expressly by Respondent where to file her level four appeal. The grievance laws clearly state where and how a level four appeal should be made. Grievant chose to ignore these rules and clear instruction, and attempted to appeal her level three decision in her own way, albeit in a timely manner. However, the undersigned is inclined to give Grievant the benefit of the doubt that she made a good-faith effort to appeal her grievances properly, but is not unmindful of the irony of such decision, seeing that she is seeking to “punish” Respondent for its similarly inconsequential lapse in following proper procedure.

Turning to the merits of the case, this is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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.

Planning periods for classroom teachers are regulated by W. Va. Code § 18A-4-14, which states, in part:

> (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).

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. Craig v. Upshur County Bd. of Educ., Docket No. 00-49-034 (Aug. 11, 2000). Under a plain reading of the statute, Respondent was clearly in error both when it scheduled Grievant's planning period to begin before the instructional day, and when it split her planning period into two segments. However, Respondent remedied both situations immediately upon the filing of this grievance. Its actions were exactly what is contemplated by the grievance procedure's purpose of settling claims at the lowest possible level.

If a teacher is forced to relinquish his planning period in violation of W. Va. Code § 18A-4-14, he is to be compensated for that time period at his prorated daily rate of pay. *See* Collins v. Wayne County Bd. of Educ., Docket No. 99-50-535 (Feb. 23, 2000). While monetary recompense has been awarded in cases where a teacher has not been given a planning period, such is not the case here. In the instant case, Grievant was not denieda planning period, she was instead given the correct amount of time to plan, it was just organized poorly. While part of her planning period was outside the instructional day, it was within the period of time in which Grievant and all other teachers were ordinarily required to be at work and on duty, therefore Grievant did not establish that she performed extra work requiring additional compensation.

Grievant has nevertheless pressed on with her claim, seeking punitive damages she likens in her proposed findings of fact and conclusions of law to awards granted in wrongful death suits, in order to deter Respondent's “lawlessness.” This Grievance Board does not award tort like damages. Walls v. Kanawha County Bd. of Educ., Docket No. 98-20-325 (Dec. 30, 1998); Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-007 (June 30, 1997). In other words, this matter became moot after level one, and to grant Grievant the remedy she seeks would itself be a “lawless” act.

CONCLUSIONS OF LAW

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Heckler v. Randolph County Bd. of Educ., Docket No. 97- 42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997).

2. Respondent failed to prove Grievant did not make a good-faith effort to appeal her Grievances in a timely manner.

3. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 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.

4. 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. Craig v. Upshur County Bd. of Educ., Docket No. 00-49-034 (Aug. 11, 2000).

5. If a teacher is forced to relinquish his planning period in violation of W. Va. Code § 18A-4-14, he is to be compensated for that time period at his prorated daily rate of pay. *See* Collins v. Wayne County Bd. of Educ., Docket No. 99-50-535 (Feb. 23, 2000); Hardman v. Kanawha County Bd. of Educ., Docket No. 95-20-249 (Oct. 19, 1995); Smith v. Lincoln County Bd. of Educ., Docket No. 89-22-544 (Nov. 14, 1989); Cf., Taylor v. Kanawha County Bd. of Educ., Docket No. 96-20-406 (Feb. 28, 1997).

6. This Grievance Board does not award tort like damages. Walls v. Kanawha County Bd. of Educ., Docket No. 98-20-325 (Dec. 30, 1998); Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-007 (June 30, 1997). To award punitive damages would be contrary to law.

7. While Grievant did prove by a preponderance of the evidence that her planning periods were improperly scheduled, she did not establish that she was entitled to further relief.

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: March 15, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

W. Va. Code 18-29-2(b) defines "Days" as "means days of the employee's employment term or prior to or subsequent to such employment term exclusive of Saturday, Sunday, official holidays or school closings in accordance with section two, article five, chapter eighteen-a of this code." There is no evidence in the record indicating how many statutory days elapsed.