THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

ALICE RITTENHOUSE, et al.,

Grievants,

v. **Docket No. 07-21-336**

LEWIS COUNTY BOARD

OF EDUCATION,

Respondent.

D E C I S I O N

Grievants are employed as teachers by the Lewis County Board of Education ("LCBOE," "Respondent," or "employer"). (See footnote 1) Grievants filed their grievance on March 19, 2007. They complained that:

> As an inducement for teachers to attend evening parent-teacher conferences, LCBOE offered those who did so a day off on the day designated on the school calendar as a parent-teacher conference ("TP") day.
>
> Grievants attended either one or two evening parent-teacher conferences in the expectation of taking the TP day off. (See footnote 2)
>
> Due to the number of school days lost to bad weather in the 2006- 2007 school year, LCBOE had to convert the TP day to an instructional day.
>
> Grievants were then required to work on the day which had been promised as a

day off.

In lieu of an additional day off Grievants seek monetary compensation for the "extra day" (See footnote 3) they contend they worked.

The Level I administrator (the Principal) denied the grievance at that level on March 20, 2007, on the basis that he lacked authority to grant the relief requested. Grievants filed at Level II on March 21, 2007. They waived the statutory time periods, and a Level II hearing was conducted on May 4, 2007, before Grievance Evaluator Elizabeth Jane Palmer. The Level II Decision denying the grievance was issued on June 18, 2007.

Grievants filed at Level IV on June 25, 2007, and requested a decision based on the record developed below. The Respondent did not object to submission on the record, and the case became mature for decision on August 7, 2007, the deadline for the parties to submit proposed findings and conclusions. The case was transferred to the undersigned for administrative reasons on September 7, 2007.

Synopsis

During the 2006-2007 school year, to induce its teachers to attend parent-teacher conferences held after regular school hours and in the evening, LCBOE offered a day off to any teacher who attended the late conferences. The day off was to be taken on April 13, 2007, the day identified in the school calendar as a "TP" day (when parent-teacher conferences were scheduled during regular school hours). When the number of school days lost to weather required LCBOE to convert April 13 to an instructional day, LCBOErequired teachers who had attended the after-hours conferences to report for work as usual. The Grievants assert that by failing either to give them an alternative day off, or to compensate them, the LCBOE has engaged in prohibited discrimination. They assert that the original arrangement would have treated teachers who participated in the evening conferences the same as those who chose not to participate (both groups would put in a day of PT conferences). The Grievants maintain that requiring them to work on April 13, even though they had already done their “PT duty,” constituted unequal treatment.

LCBOE maintains that it had no choice but to adjust the school calendar, and that the Grievants should reasonably have expected, when they participated in the evening parent-teacher

conferences, that weather-related calendar adjustments might prevent LCBOE from honoring its offer. LCBOE also argues, in effect, that teaching is not a 9 to 3 job, that teachers are professional employees who are not entitled to overtime, and that attending evening PT conferences is akin to working at home on lesson plans, and therefore no more deserving of extra compensation than any other such work. Finally, LCBOE argues that it lacks statutory authority to make the requested payments.

West Virginia school law, as interpreted by the West Virginia Supreme Court of Appeals, prohibits discrimination in broad terms. The law supports the Grievants' position and requires that their grievance be granted.

After thorough review of the record, the undersigned makes the following Findings of Fact:

Findings of Fact

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1 1. Grievants were employed as teachers by LCBOE during the 2006-2007 school year. 2 2. During the 2006-2007 school year, to induce its teachers to attend parent- teacher conferences held after regular school hours and in the evening, LCBOE offered any teacher who attended the late conferences the opportunity to take off April 13, 2007, the day identified in the school calendar as a "TP" day, when parent-teacher conferences were conducted during regular school hours.

3 3. Grievants availed themselves of the opportunity LCBOE offered by attending either one (in the case of some Grievants) or two (in the case of other Grievants) of the parent-teacher conferences scheduled at late hours.

4 4. The Grievants did so in the expectation, based on LCBOE's representation, that they would be permitted to take a day off from work on the regular TP day.

5 5. On February 26, 2007, the LCBOE voted to alter the school calendar to recoup instructional days lost to weather and converted April 13, 2007, from a TP day to an instructional day. Level II Hearing Transcript, p. 28.

6 6. Required State Board of Education approval of the calendar changes did not occur until April 20, 2007. *Id*.

7 7. As a result of the conversion of April 13 from a TP to an instructional day, Grievants were not permitted to take it as a day off without using personal leave.

8 8. LCBOE failed to extend any alternative consideration to Grievants to make up for the lost day off.

Discussion

Burden of Proof

Because this grievance does not involve a disciplinary matter, the Grievants havethe burden of proving their case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, (See footnote 4) 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

There appears to be no significant factual dispute on this record. Although LCBOE's counsel expressed surprise that the lead Grievant did not testify at the Level II hearing, and although the presentation of testimony by a lone Grievant, Alan Strader, was noted in LCBOE's proposed findings and conclusions, LCBOE has not challenged the facts set forth above. This makes resolution of the grievance a matter of legal interpretation, rather than of resolving disputed facts. The question is whether the undisputed facts constitute a violation of the grievance laws by LCBOE.

Discrimination and Favoritism

Grievants rely on the prohibitions against discrimination and favoritism in thegrievance statutes. W. Va. Code § 18-29-2(m) (See footnote 5) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." W. Va. Code § 18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preference, exceptional or advantageous treatment of another or other employee."

> [T]o prevail in a claim for discrimination under W.Va.Code § 18-29-2(m), an employee must show that he or she has been treated differently from other employees and that the different treatment is not related to the actual job responsibilities of the employees and not agreed to in writing by the employee.

Bd. of Educ. of Tyler County v. White, 216 W. Va. 242, 605 S.E.2d 814, 820 (2004). (See footnote 6)

LCBOE's original offer of a day off created two categories of teachers: one category would be entitled to take April 13 as a day off; the other would have to report to work on that day. This discrimination, or different treatment, however, was job related, and it was fair. It accomplished the employer's legitimate objective of encouraging teachers to attend PT conferences at times more convenient to working parents; and because it recognized that the volunteering teachers, in effect, would have already worked their PT day, it gaveequivalent treatment to teachers who chose to work the special conferences, and those who chose not to. This was justifiable "discrimination."

LCBOE's decision to treat the offer as void when it became necessary to alter the school calendar, however, and particularly its decision not to offer alternative consideration (such as time off), set up a prohibited form of discrimination by creating categories of teachers which differed from the original ones: teachers who did not volunteer for the evening conferences (and therefore had to work on April 13); and teachers who volunteered and put in the extra time before April 13, but then had to work on April 13 anyway. The differences between the two latter categories of teachers were not job- related (nor were they agreed to in writing).

Respondent argues that the teachers should have anticipated the possibility of weather-related calendar amendments. Without explaining why the assumption is reasonable, Respondent's argument assumes the teachers should also have known they would lose their day off (along with any alternative consideration). It was the Respondent's offer, however. A more reasonable assumption, therefore, was that the Respondent would disclose contingencies which could void the offer. (See footnote 7)

In the submissions to this Board, LCBOE argues that it lacks statutory authority to make the payments the Grievants have requested, while the Grievants argue that no statute prohibits such payments. (See footnote 8) It is not surprising that no state statute contemplatesthese precise events. However, LCBOE does not directly counter the Grievants' contention that no statute prohibits payments directly. Respondent focuses instead on the statutes which required it to convert the TP day to an instructional day, the necessity of which the Grievants do not dispute.

LCBOE also maintains that attending TP conferences is akin to other "off-hours" teacher duties,

but this argument also misses the point. The school administration did not offer an inducement to teachers to do lesson plans at home; it chose to offer that inducement for attending evening PT conferences. It is not the Grievants who are attempting to put evening parent conferences in a special category. The school administrators did that.

Whatever the education statutes may say or not say about compensation in circumstances like these, however, the grievance statutes give this Board the power to fashion a remedy to right a wrong, and to make the grievants whole. *Graf v. West Va. Univ.*, 189 W. Va. 214, 220, 429 S.E.2d 496 (1992). *Spencer v. Bureau of Employment Programs*, Docket No. 97-BEP-139R (August 31, 2000) (extended discussion of the availability of monetary compensation to public employee grievants). There is precedent in the cited decisions, and others discussed in them, for a monetary award under the proper circumstances.

There is also precedent for awarding compensatory time off. In *Brooks, et al. v. McDowell County Board of Education*, Docket No. 03-33-226 (September 7, 2004), on a day of extremely icy weather conditions, the county school superintendent closed school for students and announced a 2-hour delay for employees. By the time he began to hearfrom employees that it was too hazardous to travel, it was too late for the superintendent to notify everyone not to report at all. As a result, some employees reported to work, including the *Brooks* grievants. The school administration did not require employees who failed to report for work to use their annual leave for the ice day.

In an argument comparable to that of the Lewis County Board of Education in this case, the Board of Education in *Brooks* focused on the superintendent's discretion to determine whether employees should report to work during inclement weather. Similarly, in this case the LCBOE focuses on the necessity of making up lost instructional days, and on the unchallenged correctness of the decision to alter the calendar to do so. In both cases, the Respondents' arguments miss the point that a decision correct on its own terms may nonetheless have a disparate and unfair impact on employees. The validity of the underlying action which creates a discriminatory impact does not excuse discrimination which fits the statutory definition. As a result, in *Brooks*, this Board awarded an additional day of personal leave to the employees who reported to work on the day of icy weather, to square their treatment with that given the employees who stayed home.

In *Taylor v. Kanawha County Board of Education*, Docket No. 96-20-406 (February 28, 1997), the grievant teachers were found not to have received statutorily mandated planning periods. The

decision in that case discussed prior Grievance Board authority in which monetary compensation was awarded for missed planning periods, (See footnote 9) but concluded that such relief was not mandatory and instead awarded the grievants compensatoryplanning time, to be given in a subsequent school year.

This Board's administrative law judges are authorized to "provide relief found fair and equitable in accordance with the provisions of this article." W. Va. Code § 18-29-5(b). *See Standifur v. Univ. of W. Va. Bd. of Trustees*, Docket No. 92-BOT-017 (Oct. 30, 1992); *Rexroat v. Boone County Bd. of Educ.*, Docket No. 91-03-233 (June 15, 1992). *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997).

Because the Grievants have prevailed on their claim of discrimination, it is appropriate to direct the Respondent to make them whole, either by awarding them compensatory time off in the current (2007-2008) school year, equal to the day or half-day which they would have earned under the original arrangement; or, in the alternative, to pay each Grievant compensation for the day or half-day to which they would been entitled under the original arrangement.

Conclusions of Law

1 1. In a non-disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). 2 2. W. Va. Code § 18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." W. Va. Code § 18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preference, exceptional or advantageous treatment of another or other employee."

> [T]o prevail in a claim for discrimination under W.Va.Code § 18-29-2(m), an employee must show that he or she has been treated differently from other employees and that the different treatment is not related to the actual job responsibilities of the

employees and not agreed to in writing by the employee.

Bd. of Educ. of Tyler County v. White, 216 W. Va. 242, 605 S.E.2d 814, 820 (2004).

3 3. The grievance statutes give this Board the power to fashion a remedy to right a wrong, and to make grievants whole. . *Graf v. West Va. Univ.*, 189 W. Va. 214, 220, 429 S.E.2d 496 (1992). *Spencer v. Bureau of Employment Programs*, Docket No. 97-BEP- 139R (August 31, 2000) (extended discussion of the availability of monetary compensation to public employee grievants).

4 4. This Board's administrative law judges are authorized to “provide relief found fair and equitable in accordance with the provisions of this article.“ W. Va. Code § 18-29- 5(b). *See Standifur v. Univ. of W. Va. Bd. of Trustees*, Docket No. 92-BOT-017 (Oct. 30, 1992); *Rexroat v. Boone County Bd. of Educ.*, Docket No. 91-03-233 (June 15, 1992). *Holly v. Logan Co. Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997).

5 5. *Graf, supra*, and *Spencer, supra*, held that a monetary award may be appropriate under the proper circumstances. *See Dennis v. Wetzel County Bd. of Educ*., Docket No. 95-52-166 (June 6, 1995); *Hardman, et al. v. Kanawha Bd. of Educ*., DocketNo. 95-20-249 (Oct. 19, 1995); *Smith v. Lincoln County Bd. of Educ*., Docket No. 89-22-544 (Nov. 14, 1989); *Ford v. Wood County Bd. of Educ*., Docket No. 54-86-06-1 (Aug. 8, 1986). There is also precedent for awarding compensatory time off. *Brooks, et al. v. McDowell County Board of Education*, Docket No. 03-33-226 (Sept. 7, 2004). *Taylor v. Kanawha County Board of Education*, Docket No. 96-20-406 (Feb. 28, 1997).

6 6. The Grievants prevail on their claim of discrimination because they have met their burden of proving by a preponderance of the evidence facts constituting discrimination or unequal treatment by Respondent.

Accordingly, the grievances are **GRANTED**. The Respondent is **DIRECTED** to make the Grievants whole, either by awarding them compensatory time off in the current (2007-2008) school year, equal to the day or half-day which they would have earned under the original arrangement for time off; or in the alternative to pay each Grievant compensation for the day or half-day to which they would been entitled under the original arrangement.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 18-29-7 (2006). Neither the West Virginia Public

Employees Grievance Board nor any of its administrative law judges is a party to such appeal, and they 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 on the 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 appropriatecircuit court.

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Thomas J. Gillooly

Administrative Law Judge

Date: November 6, 2007

Footnote: 1

In addition to Alice Rittenhouse, the other grievants are: Allen K. Strader; Jennifer S. Phillips; Susan Currence; Rita Sue Alkire; William P. King III; Nancy G. Colburn; Georganna Barrett; James Cook; Karen M. Pickens; Daniel Kuneff; Richard G. Woofter; Sonya Turner; Rose Mary Tomblyn; Melinda K. Wanless; Barbara C. Spaur; Martha Mae Danzig; Jeanie D. Piercy; Priscilla D. Swan; Jeff Wine; Chester Cutright; John H. Whiston; Lisa M. Arnold; Kimberly Foster; Cynthia Tanner; and Mary Wagoner.

Footnote: 2

Some Grievants apparently attended one parent-teacher conference; some attended two. The Grievants who attended two seek a full day's compensation. Those who attended only one seek a half-day's compensation.

Footnote: 3

Both parties recognize in their submissions to this Board that Grievants worked the same number of days as other teachers. Grievants' complaint is that they were denied the equivalent of a day (or half-day) of leave.

Footnote: 4

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.

Footnote: 5

In addition to their claim of discrimination and favoritism, or as part of it, the Grievants rely on State Board of Education Policy 2510, 126 C.S.R. 42, which in § 13.93 defines "Work Day" as "[t]ime allocated for the instructional day and other activities . . . that may not exceed eight clock hours." This reliance is misplaced, however, because Policy 2510 is a student-oriented policy which defines educational goals and objectives. There is no basis to conclude that Policy 2510 was intended to regulate teachers' working conditions. The only reference in the Policy to Chapter 18A of the West Virginia Code is to that chapter's definitional section. More important, Grievants are unquestionably professional employees who are not paid on an hourly basis.

Footnote: 6

Because the record does not establish the unavailability of funds to compensate Grievants for the lost day off, it is unnecessary to reach the question whether such unavailability would affect the outcome of the grievance, but White, supra, Syllabus Point 5, suggests that it would not.

Footnote: 7

The record does not establish why a program such as this, apparently in place for several years, was not reduced to writing.

Footnote: 8

LCBOE has also asserted that it has no funds to pay compensation. See Footnote 6.

Footnote: 9

Dennis v. Wetzel County Bd. of Educ., Docket No. 95-52-166 (June 6, 1995); Hardman, et al. v. Kanawha 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); Ford v. Wood County Bd. of Educ., Docket No. 54-86-06-1 (Aug. 8, 1986).