

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**DIANNE SCHIFANO,
Grievant,**

v.

DOCKET NO. 2009-0829-MonED

**MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

This grievance was filed by Grievant, Dianne Schifano, on December 23, 2008, against her employer, the Monongalia County Board of Education. The statement of grievance reads:

Grievant was mandated to attend an SAT Meeting during her individual planning time when two other times are available everyday for these. This is a violation of 18A-4-14, arbitrary and capricious, discriminatory¹ and/or clearly wrong.

As relief Grievant seeks:

to be compensated for loss of individual planning time and/or assurance that individual planning time will not be taken in the future in similar circumstances; to be made whole; and any other relief the grievance examiner deems appropriate.

A conference was held at level one, and the grievance was denied at that level. Grievant appealed to level two on February 17, 2009, and a mediation session was held at the Grievance Board's Westover office by Administrative Law Judge M. Paul Marteney

¹ Grievant did not identify any other employee who was treated in a different manner than she, and did not address this argument at the hearing or in her post-hearing written proposals. This claim is deemed abandoned and will not be addressed.

on March 19, 2009. An Order of Unsuccessful Mediation was entered on March 23, 2009, and Grievant appealed to level three on March 26, 2009. A level three hearing was held before the undersigned Administrative Law Judge on June 30, 2009, at the Grievance Board's Westover office. Grievant was represented by Frank Caputo, Staff Representative, AFT-West Virginia/AFL-CIO, and Respondent was represented by Jennifer S. Caradine, Esquire, Dinsmore & Shohl LLP. This matter became mature for decision on August 3, 2009, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant argued that Respondent acted in an arbitrary and capricious manner when a Student Assistance Team meeting was scheduled during her planning period on one occasion. She asserted that this meeting could have been scheduled during her free time at 8:00 a.m. or during her second planning period, which was a team planning period. The team spent this meeting planning for the needs of the student being discussed. Respondent did not violate W. VA. CODE § 18A-4-14(2) by scheduling this meeting during Grievant's planning period. Further, the Assistant Principal had tried to schedule this meeting at a time other than during Grievant's planning period, but had been unable to do so, and had only a few days left in which she could schedule the meeting. This was not unreasonable conduct.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant is employed by the Monongalia County Board of Education (“MBOE”) as a fifth grade classroom teacher at North Elementary School.

2. During the 2008-2009 school year she began her work day with free time from 8:00 to 8:30 a.m. She then had a planning period from 9:00 to 9:40 a.m. each day, and team planning time from 10:35 to 11:05 a.m. each day. In addition, on Mondays she had free time from 12:40 to 1:10 p.m., which could be used as an extra planning period, and Grievant considered it to be such.²

3. Grievant is a member of the fifth grade Student Assistance Team (“SAT”). The SAT members meet regularly to prepare instruction for certain students based on the academic, social, or behavioral needs of the students, and they develop interventions and modifications for the students.

4. Natalie Webb, Assistant Principal at North Elementary School, is responsible for coordinating the scheduling of SAT meetings. She tries to schedule these meetings during the team planning period for the fifth grade teachers, or at 8:00 a.m.

5. On Wednesday, December 17, 2008, an SAT meeting was held at 9:00 a.m. Ms. Webb had tried to schedule this meeting for 8:00 a.m. or at 10:35 a.m., but had been unable to do so. The meeting was first scheduled for December 8, 2008, at 8:00 a.m., then rescheduled to December 15, 2008, at 8:00 a.m. The meeting could not be held at 8:00 a.m. on December 17, 2008, due to a conflict with the schedule of the school

² The record does not reflect the length of the usual class period at North Elementary School.

psychologist, who needed to attend the meeting. The meeting had to be held before Christmas break, which began on Tuesday, December 23, 2008.

6. In attendance at the SAT meeting on December 17, 2008, were Grievant and two other fifth grade teachers who were team members, the school psychologist, a parent of the student being discussed, the school guidance counselor, and Ms. Webb. The group spent the entire meeting discussing the student's academic needs and the need for testing.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

Grievant argued that Respondent acted in an arbitrary and capricious manner when the SAT meeting was scheduled during her planning period, so that she lost this individual planning time, forcing her to work beyond her eight hour work day. She asserted that the SAT meeting could have been scheduled at 8:00 a.m. or 10:35 a.m., however, she did not demonstrate that this was indeed possible within the short time frame available. Grievant

did not state how much time she worked beyond the eight hour work day, nor did she explain what she did during the team planning period at 10:35 a.m.

Respondent pointed out that Grievant actually has two planning periods during each day, because in addition to her individual planning period, she also has a team planning period, which Respondent is not required to provide. In addition, she has free time at 8:00 a.m. each day, and at 12:40 p.m. on Mondays. When questioned about the fact that she also had free time from 8:00 to 8:30 a.m. which she could use as planning time, Grievant responded that she often had other meetings at that time, although she did not indicate whether she had any such meetings during the week in question.

Respondent also argued that individual planning periods are for the purpose of planning for the needs of the students, which is what took place at the meeting in question. Respondent submitted that SAT meetings can, by law, be scheduled during a teacher's planning period. Grievant does not really seem to dispute this, but rather pointed to the fact that Grievant has a specific block of time each day designated as a team planning period, and it was, *per se*, arbitrary and capricious conduct to schedule the SAT meeting for a time other than the team planning period.

W. VA. CODE § 18A-4-14(2) states, in pertinent part:

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).

(Emphasis added.) The first question presented here, is whether an SAT meeting falls within the language of this CODE Section, qualifying as completion of “necessary preparations for the instruction of pupils.” The Grievance Board has found that

W. VA. CODE § 18A-4-14 does not specify that the use of the planning period must always be solely up to the individual teacher. It says the planning period is “to be used to complete necessary preparations for the instruction of pupils.”

Jeffrey v. Cabell County Bd. of Educ., Docket No. 01-06-055 (July 31, 2001). In *Jeffrey*,

the Grievant was required to attend a weekly meeting called “Discussion Mondays” with other grade level teachers, the principal, and a literacy facilitator. The purpose of these meetings was to implement the “Balanced Literacy Program” to insure all students could read on grade level by the end of the third grade.

Teachers were instructed on how to teach the materials, and open discussions were conducted, and questions answered. The Administrative Law Judge found that “[i]t is clear ‘Discussion Mondays’ are for the planning of ‘instruction of pupils,’” noting that without “Discussion Mondays,” “teachers would be left on their own to plan and implement this new, complex, and important program.” The Administrative Law Judge also noted that W.

VA. CODE § 18A-4-14

states “[n]o teacher shall be assigned any responsibilities during this [planning] period.” The responsibilities that occur on “Discussion Mondays” are planning. Grievant is not being asked to take bus, hall, or lunch duty. He is not being asked to conduct a study hall while [h]e plans for his students, and he is not asked to cover in-school detention while he tries to complete his own work. He is actually being offered what seems to be a great help. An expert is assisting him to plan and implement a new, required, and important program.

Jeffrey, supra.

In *Fruth, et al., v. Putnam County Board of Education*, Docket No. 98-40-371 (December 3, 1998), the Administrative Law Judge concluded that “[t]he time Grievants

spent during their planning periods preparing IEP's for their students constitutes 'necessary preparations for the instruction of pupils.'"

There is no dispute that SAT meetings are for the purpose of preparing instruction for students, and that the December 17, 2008 meeting was for this purpose. Respondent did not violate W. VA. CODE § 18A-4-14 by requiring Grievant to attend an SAT meeting during her planning period on December 17, 2008.

The remaining issue is whether scheduling this meeting at 9:00 a.m., rather than at 8:00 a.m. or 10:35 a.m. constituted arbitrary and capricious conduct. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Ms. Webb's scheduling of the SAT meeting at 9:00 a.m. on December 17, 2008, was reasonable given the facts and circumstances facing her. It is clear from her testimony that she recognizes how important individual planning periods are to her teachers, and she took reasonable actions to try to schedule this meeting at a time other than 9:00 a.m. It was imperative that this meeting be held before Christmas break, which

was coming up quickly, and Ms. Webb's efforts to schedule the meeting at 8:00 a.m. on other days earlier in the month had failed. The facts presented do not show arbitrary and capricious conduct.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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. W. VA. CODE § 18A-4-14(2) requires that covered teachers be provided at least one planning period each day, within the instructional day, "to be used to complete necessary preparations for the instruction of pupils."

3. "W. VA. CODE § 18A-4-14 does not specify that the use of the planning period must always be solely up to the individual teacher. It says the planning period is 'to be used to complete necessary preparations for the instruction of pupils.'" *Jeffrey v. Cabell County Bd. of Educ.*, Docket No. 01-06-055 (July 31, 2001).

4. The scheduling of the SAT meeting during Grievant's planning period did not violate W. VA. CODE § 18A-4-14(2), as the team members were completing necessary preparations for the instruction of the student.

5. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

6. Ms. Webb's scheduling of the SAT meeting at 9:00 a.m. on December 17, 2008, was reasonable given the facts and circumstances facing her.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

Date: August 18, 2009

BRENDA L. GOULD
Administrative Law Judge