SUE ANN SHROYER,

Grievant,

v. **Docket No. 99-17-085**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Sue Ann Shroyer, Grievant, initiated a grievance at level one on December 9, 1998, alleging:

> Washington Irving Middle School Administrative Policy for the assignment of "In School Suspension" discriminates against me by assigning me "In School Suspension" duty. However, the Washington Irving Middle School Administration has failed to assign those same duties to 15 other staff members.
>
> Further, the Harrison County Board of Education is discriminating against me by failing to assign guidance and counseling staff personnel at Washington Irving Middle School at the same staff/student ratios as other Harrison County middle schools. I have more than 750 students as guidance counselor at Washington Irving Middle School. However, three other Harrison County full-time middle school counselors have fewer than 375 students. WV Code #18-29-2(m) (sic) which defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual responsibilities of the employees or agreed to in writing by the employees."
>
> Further, the Harrison County Board of Education has also violated WV Code #18-5-18b which states "school counselors shall be full-time professional personnel, shall spend at least seventy-five percent of work time in a direct counseling relationship with pupils, and shall devote no more than one fourth of the work day to administrative activities; provided, that such activities are counselor related." These ratios cannot be achieved with the administrative work load associated with 750 or more students.

As relief, Grievant has requested:

> 1. Student/counselor ratio comparable to other Harrison County Middle School counselors.

2. Reduction in the administrative work load to allow me to spend 75% of my time doing individual or group counseling.

3. Clarification of those counselor duties which are administrative.

4. Elimination of discriminatory practices in the assignment of additional duties which could be performed by any/all staff personnel.

The grievance was denied by Grievant's immediate supervisor on December 21, 1998. Upon appeal to level two, a hearing was held on January 15, 1999. The grievance was denied at that level in a written decision dated February 22, 1999. Level three consideration was waived and Grievant appealed to level four on February 25, 1999. A level four hearing was held on April 30, 1999, in the Grievance Board's office in Morgantown, West Virginia. Grievant was represented by William White of the West Virginia Education Association, and Respondent was represented by counsel, Basil Legg. This matter became mature for consideration on June 1, 1999, upon receipt of the parties' fact/law proposals.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by the Harrison County Board of Education (HCBOE) as a guidance counselor and is currently assigned to Washington Irving Middle School (WI).

2. On September 18, 1998, Grievant filed a level one grievance, alleging asfollows:

The Harrison County Board of Education has discriminated against me under WV Code #18-29-2(m) which defines discrimination as “any differences in the treatment of employees unless such differences are related to the actual responsibilities of the employees or agreed to in writing by the employees.” I have more than 750 students as guidance counselor at Washington Irving Middle School. However, three other Harrison County Middle School Counselors have fewer than 375 students.

The Harrison County Board of Education has also violated WV Code #18-5-18b which states “school counselors shall be full- time professional personnel, shall spend at least seventy-five percent of work time in a direct counseling relationship with pupils, and shall devote no more than one fourth of the work day to administrative activities; provided, that such activities are counselor related.”

Relief Sought:

1. Student/counselor ratio comparable to other Harrison County Middle School counselors.

2. Reduction in the administrative work load to allow me to spend 75% of my time doing individual or group counseling.

3. Clarification of those duties which are administrative.

3. The grievance described above was denied at level one by WI Principal Richard Drummond, who stated as follows:

Grievance denied. 1. Each Middle School has only one counselor. 2. See attached policy: Policy 2315 describes counseling duties for the 75%/25% time for counselors and related duties.

4. Grievant did not appeal Principal Drummond's decision to the next level of the grievance procedure.

5. Each Harrison County middle school employs one full-time guidancecounselor.

6. The approximate student enrollments for Harrison County middle schools, as of September, 1998, were as follows:

Washington Irving Middle School	736
Bridgeport Middle School	633
Lumberport Middle School	517

Gore Middle School	348
South Harrison Middle School	323
Salem Middle School	226

7. As of the 1998-1999 school year, Grievant's assigned duties included the following:

Two daily class periods providing in-class counseling services to eighth grade students

Providing counseling services to sixth and seventh grade students as needed, averaging approximately 50 minutes per day

Registering new students, including requesting records from past schools attended, providing all forms and information necessary to parents, checking health records and making sure a health card is completed, and answering any questions the student and/or his parents may have

When students leave WI, Grievant must copy their records and mail them to the student's new school

Administer testing and compile records of various achievement and standardized tests for WI students

Compile and maintain records for each student regarding grades, transcripts, test scores, and related materials

Work with outside agencies, such as hospitals and the Department of Health & Human Resources, when students require intervention for physical or behavioral problems,possible abuse or neglect by family, or need assistance with emotional difficulties

Work with eighth grade students in preparing a “five-year plan,” as required by state law and state board of education policies, which involves choosing courses and career directions for high school, and the plan must be completed and signed by the student's parents by the end of the eighth grade year

Monitor in-school suspension every other week

Other miscellaneous duties related to counseling responsibilities and student records

8. Beginning with the 1998-1999 school year, Principal Drummond implemented in-school suspension (I.S.S.), (See footnote 1) which requires that a teacher or staff member monitor all students in I.S.S. throughout each period of the school day.

9. The I.S.S. schedule implemented by Mr. Drummond placed the duty upon sixth grade teachers during periods one and two, eighth grade teachers during third and fourth periods, Grievant and the school librarian during fifth period and lunch, and seventh grade teachers during sixth and seventh periods.

10. Because of the large number of teachers at WI, the sixth, seventh and eighth grade teachers have I.S.S. duty for ninety minutes every six weeks.

11. Grievant and the school librarian have I.S.S. duty once every other week for eighty minutes. 12. Related arts teachers (See footnote 2) are not required to perform I.S.S. duty, because they have scheduled classes for six periods during the school day. Their planning period is at fifth period, followed by lunch. Therefore, if they were required to take I.S.S., they would not be

able to make up their required planning period or lunch.

10. The sixth, seventh and eighth grade teachers at W.I. have two full class periods as planning periods, one for team planning and one for individual planning. Their I.S.S. duty is scheduled during these planning periods. (See footnote 3)

11. Grievant and the librarian were placed on I.S.S. duty at fifth period and lunch, because their time throughout the day is not committed to scheduled classes, allowing them to take their planning or lunch periods at other times on the days they have I.S.S. duty.

12. Grievant and the librarian are the only available personnel to perform I.S.S. duty during fifth period and lunch, without losing their planning and lunch periods.

Discussion

Respondent contends that Grievant's claims are precluded in this case, because she grieved identical issues in her prior grievance in September of 1998, and also requested the same relief. When she did not appeal the denial of the grievance at level one, Respondent argues, that decision became final as to the issues asserted in it. Thepreclusion doctrine of res judicata may be applied by an administrative law judge to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." Liller v. W. Va. Human Rights Comm'n, 376 S.E.2d 639, 646 (W. Va. 1988). See also, Boyer v. Wood County Bd. of Educ., Docket No. 95-54-309 (Sept. 29, 1995); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995). This Grievance Board has applied the doctrine of res judicata to preclude grievants from relitigating issues which were resolved in prior grievance decisions. See Meeks v. Kanawha County Bd. of Educ., Docket No. 96-20-095 (Feb. 28, 1997); Woodall v. W. Va. Dept. of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994). See also Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975); Ramsey v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-478 (July 31, 1991).

With the exception of Grievant's allegations regarding I.S.S. duty, there is no question that the issues asserted in the instant grievance are the same as those involved in Grievant's prior grievance. However, the prior grievance was only addressed at level one, which consists of a conference between the grievant and his or her immediate supervisor, followed by a decision from the supervisor, who may not even have the authority to grant the relief requested. Evidence is not taken and

witnesses do not testify at level one. Accordingly, it cannot be said that the issues raised in this grievance have been “litigated,” as discussed in Liller, supra. Therefore, the prior level one decision is not res judicata with regard to the instant grievance.

Grievant generally alleges that she is simply unable to complete all of her duties, due to the large number of students at WI, and that a large portion of her activities areadministrative, rather than direct counseling of students. She believes that HCBOE is in violation of numerous state board of education policies and statutes and has discriminated against her.

A significant portion of Grievant's allegations relate to W. Va. Code § 18-5-18b, which provides, in part:

> School counselors shall be full-time professional personnel, shall spend at least seventy-five percent of work time in a direct counseling relationship with pupils, and shall devote no more than one fourth of the work day to administrative activities: Provided, that such activities are counselor related.

Grievant attempted to prove, through documents and her own testimony at level two, that she currently spends far more than the statutorily-mandated 25% of her time performing administrative duties. She contends that, except for her classes with the eighth graders, the as-needed counseling sessions with sixth and seventh graders, registering new students, and working with the 5-year plans, all of the duties described above are administrative. The undersigned finds that the evidence does not substantiate Grievant's allegations.

As authorized by W. Va. Code § 18-5-18b, the state board of education has adopted policies clarifying the duties of school counselors, specifically Policy 2315, 126 C.S.R. 67. Policy 2315 states, in section 4.2, that school counselors must spend “at least 75% of their time in a direct counseling relationship with pupils through the services identified in section 3 of this policy. (Emphasis added.) The counseling services are set forth in section 3.2, as follows:

> Orientation - A series of activities designed to help students who are in a newenvironment to become acquainted with the school, to know the staff and physical plant, to understand the structure of courses and requirements, to know school customs and activities, to become acquainted with one another, and to develop a sense of purpose and of belonging;

> Assessment - The organizing, collecting and managing of cumulative records, testing information and other procedures and techniques of assessing individual growth and performance. This service includes interpretation of assessment data to be available

for students, teachers, parents and administrators to assist them in decision-making;

Information - Collecting and disseminating accurate and current information that will assist students to make intelligent choices about school schedules, four-year plans, postsecondary (sic) education programs, and occupations;

Counseling - Individual or group interactions which employ techniques to assist students in working out solutions to academic, personal, and social problems;

Consultation - Interaction with parents, teachers, other educators and community agencies regarding strategies to help students;

Educational Planning - A process of providing students the assistance needed to select courses in the middle or junior high school years and to formulate their four-year educational plans that will enable them to make a successful transition from high school to postsecondary education or employment;

Placement - Organized procedures for locating appropriate employment or further training for students;

Follow-up - A systematic plan for maintaining contact with former students and obtaining data for evaluating the effectiveness of the guidance program.

A very large portion of Grievant's duties_easily 75%_are encompassed within the above categories. Grievant testified at level two that she believes the large amount of time she spends compiling and maintaining student records_25% of her time, by her estimate_ is purely administrative work. However, these activities, as described by Grievant, largely involve grades, transcripts, and test scores, which must be kept in an organized format inorder for Grievant to provide information to teachers, administrators, and other officials. She also keeps these records organized in a fashion which enables her to access a student's file when problems with that student arise, either academically or behaviorally. All of these activities are easily encompassed within the categories of “Assessment” and “Information,” as set forth in Policy 2315, Section 3.2, which have been delineated

as duties related to the direct counseling relationship with students.

Similarly, Grievant contends that her duties regarding the administration of tests and maintenance of test results, working with outside agencies, and the copying and dissemination of students' records are administrative duties. Once again, “organizing, collecting and managing . . . records [and] testing information” is encompassed within “Assessment” in Policy 2315. Working with outside agencies when students have problems can be defined as “Consultation” under the policy. The only area which is, perhaps, questionable may be involved in copying and assembling students' records when they leave WI. However, as the proper custodian of such records, it does not seem improper for Grievant to be responsible for disseminating this information when students transfer to other schools. If not encompassed within the “Information” category of Section 3.2, these duties would at least be considered administrative duties related to counseling.

As observed by Grievant's own representative during his cross examination of her principal, Mr. Drummond, at the level two hearing, categorization of Grievant's duties within the confines of Policy 2315 involves “a judgment call. . . . I mean this isn't cast in stone.” L II Tr. at 173. Indeed, determination of whether duties are purely administrative or are related to a “direct counseling relationship” involves a fair amount of subjectivity. Nevertheless, through Policy 2315, the state board of education has defined categories of duties which are encompassed within the two areas of direct counseling and related administrative duties. (See footnote 4) Even at the level two hearing, Grievant conceded that some areas she had categorized as administrative were not, such as registering new students. She had also neglected to include as-needed counseling of sixth and seventh graders in her calculations. The undersigned finds that Grievant has failed to prove, by a preponderance of the evidence, that more than 25% of her duties are administrative, and W. Va. Code § 18-5-18b has not been violated.

At level four, Grievant introduced evidence regarding “Senate Bill 300" which was passed by the legislature in 1996. That bill set forth various goals of the state's educational system relating to students' academic success, particularly regarding college preparation. Grievant contends that the provisions of that bill, which amended various sections of the West Virginia Code, and resulted in the creation of several state board policies, have greatly increased the duties of guidance counselors. She also asserts that the goals of these various policies and statutes are not being met, because of the multitude of other duties she must perform. However, the undersigned fails to understand how

these allegations relate to the instant grievance. Grievant has not been accused of not completing her duties or of not performing well as a counselor. On the contrary, Principal Drummond testified at level two that Grievant is quite competent in her duties, has never shown any disciplinary or performance problems, and that he is satisfied with her work. While it is commendable that Grievant is so concerned with the state school system's ability to meet broad-range goals, as set forth in Senate Bill 300 and the policies resulting from it, it is not her responsibility to single-handedly accomplish these goals. The undersigned does not find anything in these allegations which supports Grievant's claims regarding the 75/25 statute or her alleged disproportionate number of students.

As to the ratio of students to counselors in the county's middle schools, Grievant claims that HCBOE's assignment to her of over 700 students, while some counselors have barely half that number, is discriminatory. W. Va. Code § 18-29-2(m) defines "discrimination" to mean "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." Under this Board's holding in Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989), in order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that she has, to her detriment, been treated by her 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 responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Steele, supra, at 15. Once a grievant establishes a prima facie case of discrimination under Code § 18-29-2(m), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Deal v. Mason County Bd. of Educ., Docket No.96-26-106 (Aug. 30, 1996); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1990); Steele, supra. Thereafter, Grievant may demonstrate

that the offered reasons for disparate treatment are merely pretextual. See Tex. Dept. of Community Affairs, supra; Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Grievant introduced no evidence whatsoever regarding the duties of the other counselors to whom she has compared herself. Accordingly, it is virtually impossible to determine whether the number of students at WI, in and of itself, has resulted in discrimination against Grievant. Therefore, the undersigned cannot find that Grievant has established a prima facie case of discrimination. Grievant argues that the previous Grievance Board decision of Hickman v. Webster County Bd. of Educ., Docket No. 96-51- 050 (June 14, 1996) is dispositive of this issue. In that case, the administrative law judge did find that a school counselor's large caseload was discriminatory as compared with other counselors in the county. However, that case differed with the instant case in one significant regard_the school board conceded that the grievant's caseload was disproportionate and had caused her difficulty in performing her duties. That situation does not exist here. The evidence submitted fails to demonstrate that Grievant's caseload has affected her performance as compared with the other counselors.

Finally, Grievant contends that Principal Drummond's assignment to her of I.S.S.duties has been accomplished in a discriminatory fashion, particularly with regard to the related arts teachers, who do not have to do it at all. Although Grievant has arguably established a prima facie case of discrimination, the undersigned finds that HCBOE has provided a legitimate, non-discriminatory explanation for the I.S.S. assignments. Principal Drummond explained that the I.S.S. duties were assigned in a fashion so as to avoid depriving teachers of their required planning and lunch periods. Accordingly, because of their dedicated class periods for six periods per day, related arts teachers could not feasiblely make up their I.S.S. duty time at any other time during the day, without sacrificing lunch or planning periods. Similarly, the other teachers were assigned to I.S.S. duties during their two consecutive planning periods, so that at least one planning period could be preserved. Only Grievant and the librarian were available to perform I.S.S. duty during fifth period and lunch, while still being able to make up their planning periods and lunch at other times during the day. Therefore, it appears that Principal Drummond planned the schedule as logically as possible within the constraints of the law, and his motivations were not discriminatory toward Grievant.

In accordance with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. The preclusion doctrine of res judicata may be applied to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." Liller v. W. Va. Human Rights Comm'n, 376 S.E.2d 639, 646 (W. Va. 1988). 2. A level one decision is not res judicata as to a later grievance, because the issues have not been “litigated.” See Liller, supra.

3. School counselors are to spend at least seventy-five percent of work time in a direct counseling relationship with pupils, and shall devote no more than one fourth of the work day to administrative activities related to counseling. W. Va. Code § 18-5-18b.

4. Grievant failed to prove, by a preponderance of the evidence, that she spends more than 25% of her work time performing administrative responsibilities.

5. In order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that she has, to her detriment, been treated by her 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 responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989) at 15.

6. Grievant failed to establish a prima facie case of discrimination regarding the number of students assigned to her as a counselor at Washington Irving Middle School.

7. Grievant established a prima facie case of discrimination regarding the assignment of in-school suspension duties at WI Middle School.

8. Once a grievant establishes a prima facie case of discrimination under Code § 18-29-2(m),

the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Deal v. Mason County Bd. of Educ., Docket No.96-26-106 (Aug. 30, 1996); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1990); Steele, supra.

9. HCBOE established legitimate, non-discriminatory reasons for its method of assignment for I.S.S. duties to employees at Washington Irving Middle School.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Harrison County, and 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.

Date: July 22, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Mr. Drummond testified that he was directed to implement I.S.S., but he did not specify whether the directive came from the state or county level.

Footnote: 2

The parties apparently assumed that it is commonly known what a "related arts teacher" is, and it was not explained in the record.

Footnote: 3

Since only one planning period is required by law, it is assumed that these teachers do not have to "make up" their I.S.S. time with an additional planning period.

Footnote: 4

Grievant has made no allegation that Policy 2315 exceeds the statutory authority of W. Va. Code § 18-5-18b.