PENNY COPLIN,

Grievant,

v. **DOCKET NO. 03-46-077**

TAYLOR COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Penny Coplin filed this grievance on December 6, 2002, alleging violations of W. Va. Code §§ 18-5-18b, 18A-4-7a and W. Va. State Board of Education Policy 2315, and stating:

> The Taylor County Board of Education posted a "Counselor/Teacher" position for Anna Jarvis Elementary School. The posting was for a full-time professional and required a West Virginia Counselor Certificate and a West Virginia Teacher Certificate. The teacher duties listed on the posting included small group instruction/remediation, study skills, and behavior/character education.
>
> The posting is in violation of West Virginia Code 18-5-18b. The code specifically states that "school counselors shall be full-time professional personnel" spending seventy-five percent of work time in a direct counseling relationship and one fourth of the work day to administrative activities.
>
> The remedy I seek is for the Taylor County Board of Education [Respondent] to post the counseling portion of the position requiring only a valid West Virginia Counselor Certificate. If I am the successful candidate upon reposting I also request any back pay and benefits due me for the time I would have been in the position.

Having been denied at levels one and two, level three was waived, and Grievant appealed to level four, where the parties agreed to submit the matter for decision based on the lower-level record. Grievant is represented by Don Craft, WVEA UniServ Consultant, and Respondent is represented by Basil R. Legg, Jr., Esq. This matter became mature for decision upon the filing of the parties'

proposed findings of fact and conclusions of law on April 25, 2003.

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

FINDINGS OF FACT

1. Grievant is employed by Respondent as a half-time school counselor assigned to Flemington Elementary School, Hepzibah Elementary School and Pruntytown Elementary School.

2. On November 15, 2002, Respondent posted a vacancy notice for a unique Counselor/Teacher position at Anna Jarvis Elementary School (Exhibit No. 1). Attached to the vacancy notice were job descriptions for both Teacher and Counselor. The notice stated:

Counselor/Teacher

> Valid West Virginia Counselor Certificate including grades K-4 required. Valid West Virginia Teacher Certificate including grades K-4 required. Teacher duties will include small group instruction/remediation, study skills, and behavior/character education.

(See Attached Job Descriptions)

3. Respondent posted the Counselor/Teacher position because it wanted to implement a new program for “at risk” and disruptive students who would otherwise be excluded from class for behavioral or other reasons. 4. Grievant bid on the posted job, but was not awarded the position because she only had the required counseling certification, and not the required teaching certification. The successful candidate had both required certifications.

5. Anna Jarvis Elementary already has a full-time guidance counselor on staff.

6. The Counselor/Teacher is available if another teacher needs help to get a child out of the classroom so she can continue with instruction. The Counselor/Teacher is able to help identify budding problems by monitoring students in the mornings, at lunch, and between classes, and to intervene when there is an apparent problem. She provides instruction to students who have been removed from their regular classrooms for being disruptive and to students who need help mastering a particularly troubling concept. She also assists the teacher regularly assigned to monitor attendance.

7. Respondent anticipated the counseling certification to be useful for a teacher who needs interventional skills to provide both academic and developmental guidance.

DISCUSSION

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. Grievant contends that a guidance counselor position is legally incompatible with a teacher position, in that counselors are required to spend the majority of their time counseling, and the rest of their time on counseling-related administrative tasks, leaving no time for instructional duties. She also contends Counselor and Teacher positions are philosophically incompatible, in that a counselor refrains from disciplinary actions that teachers must undertake. Respondent argues it is not in violation of W. Va. Code § 18-5-18b because Anna Jarvis Elementary School already has a full-time counselor available to meet the normal counseling needsof the students. Its interpretation of that section is that a school must, at least, have a counselor with no additional duties.

The disputed W. Va. Code section, 18-5-18b, states, in pertinent part:

> (a) A school counselor means a professional educator who holds a valid school counselor's certificate in accordance with article three of this chapter.
>
> (b) Each county board shall provide counseling services for each pupil enrolled in the public schools of the county.
>
> (c) The school counselor shall work with individual pupils and groups of pupils in providing developmental, preventive and remedial guidance and counseling programs to meet academic, social, emotional and physical needs; including programs to identify and address the problem of potential school dropouts. The school counselor also may provide consultant services for parents, teachers and administrators and may use outside referral services, when appropriate, if no additional cost is incurred by the county board.
>
> (d) The state board may adopt rules consistent with the provisions of this section that define the role of a school counselor based on the “National Standards for School Counseling Programs” of the American school counselor association. A school counselor is authorized to perform such services as are not inconsistent with the provisions of the rule as adopted by the state board. To the extent that any funds are made available for this purpose, county boards shall provide training for counselors and administrators to implement the rule as adopted by the state board.

. . .

> (f) 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.

. . .

In addition, as authorized by W. Va. Code § 18-5-18b(d), the West Virginia Board of Education has adopted Policy 2315, which states in pertinent part:

> 1.1. Scope. -- This policy sets the requirements for Pre-K-12 comprehensive developmental guidance and counseling programs forschools in West Virginia that reflect the American School Counselor Association National Standards for School Counseling Programs model.

. . .

> 6.4. School counselors are highly qualified as demonstrated by the possession of a master's degree in school counseling and a school counseling certificate valid in West Virginia.
>
> 6.5. School counselors spend at least 75% of their time in a direct counseling relationship with pupils.
>
> 6.6. School counselors devote no more than 25% of their time to counselor- related administrative activities and counseling activities of a clerical nature.

126 W. Va. C. S. R. 67.

The Grievance Board has held that "W. Va. Code § 18-5-18b and Board Policy [2315] require school counselors to spend at least 75% of work time in a direct counseling relationship with pupils and no more than 25% of work time in performing counseling related administrative duties." Hartley and Curry v. Lincoln County Bd. of Educ., Docket No. 99-22-201 (July 29, 1999). In that case, full-

time counselors were required to spend more time on administrative tasks than on counseling other students, something clearly impermissible under both statute and rule. Under that ruling, a Counselor/Teacher position would be impossible due to the mandated work time requirements.

However, nothing in evidence in this case suggests that the Counselor/Teacher position at issue is equivalent to the "school counselor" position addressed by W. Va. Code § 18-5-18b and Board Policy 2315. Those regulations are *pari materia*, and must be construed with reference to each other. In that context, a "school counselor" is the educator responsible for the comprehensive developmental guidance and counseling program of the school. Anna Jarvis Elementary School already has a full-time school counselor, and the Counselor/Teacher position has no such responsibilities. This newposition, combining the expertise and training of both a teacher and a counselor to perform a unique and innovative set of duties does not violate either the Code or the Policy.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. 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.

2. "W. Va. Code § 18-5-18b and Board Policy [2315] require school counselors to spend at least 75% of work time in a direct counseling relationship with pupils and no more than 25% of work time in performing counseling related administrative duties." Hartley and Curry v. Lincoln County Bd. of Educ., Docket No. 99-22-201 (July 29, 1999).

3. A "school counselor" as used in W. Va. Code § 18-5-18b and 126 W. Va. C. S. R. 67 is the educator responsible for the comprehensive developmental guidance and counseling program of the school.

4. A Counselor/Teacher position that is not responsible for the comprehensive developmental guidance and counseling program of the school but which requires the certification of both a

counselor and a teacher is not prohibited by W. Va. Code § 18-5-18b and State Board of Education Policy 2315.

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 Taylor 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: May 15, 2003 _____

M. Paul Marteney

Administrative Law Judge