

WEST VIRGINIA PUBLIC EMPLOYEES' GRIEVANCE BOARD

**BILLIE PERSINGER,
Grievant,**

v.

Docket No. 2020-0289 MerED

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

DECISION

Billie Persinger, Grievant, filed this grievance against her employer the Mercer County Board of Education ("MCBE"), Respondent, protesting the duties she is being required to perform. The original grievance was filed on September 6, 2019, and the grievance statement provides:

WV § 18-5-18b (d)(e)&(f) WV Department of Education Policy 2315 3.1 and 4.1 including 4.1.e. Sat and 504 coordinator duties not aligned with National Standards for School Counseling Programs and is being required to perform routine clerical duties. Also, WV § 18A-4-14 Duty free lunch includes walk time. Entire thirty scheduled minutes should be free of student supervision.

Relief requested:

504 and SAT coordinator duties reassigned as well as routine clerical work. Entire schedule for lunchtime should be free of student supervision requirement.¹

A conference was held at level one on October 3, 2019, and the grievance was denied at that level by written decision on October 9, 2019. Grievant appealed to level two on October 29, 2019, and a mediation session was held on September 29, 2020. Grievant appealed to level three on October 12, 2020. A level three hearing was held before the undersigned Administrative Law Judge on April 27, 2021, via Zoom

¹ At the level three hearing and pursuant to her fact/law proposals, Grievant confirmed the portion of her grievance pertaining to a 30-minute duty-free lunch period is no longer at issue. Thus, the issue will not be addressed further by this decision.

conferencing at the Grievance Board's Charleston office. Grievant appeared and was represented by Jessica Morgan, WV Education Association. Respondent appeared by Dr. Deborah Akers, Superintendent, and was represented by counsel Malorie N. Morgan, Esquire, Brewster Morhous PLLC. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on or about May 28, 2021, on receipt of the last of these proposals.

Synopsis

Grievant, a school counselor for Mercer County Board of Education, alleges she is being required to perform duties which are noncompliant with regulating policy and/or statute. Grievant points to the "Comprehensive Developmental School Counseling Model Reference Guide" as the mandate for school counselor's assignments.

WEST VIRGINIA CODE §18-5-18b and West Virginia Department of Education Policy 2315 sets out an array of requirements for school counseling programs. Grievant did not establish by a preponderance of the evidence that Respondent has exceeded recognized constraints on the parameters of her employment. School Counselors should spend 80% of time providing direct services for students and no more than 20% performing indirect services. It is understood and duly recognized that excessive duties could and would affect the percent of work time a School Counselor could effectively participate in a direct counseling relationship with pupils. Nevertheless, it is not established by a preponderance of the evidence that Respondent has exceeded recognized constraints

on the parameters of Grievant's employment as a school counselor. Accordingly, this Grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Billie Persinger, Grievant, is employed by Mercer County Board of Education, Respondent, as a school counselor at Sun Valley and Athens Elementary School.
2. Grievant's time is divided between Sun Valley School and Athens School, both elementary schools located in Mercer County, West Virginia.
3. West Virginia Code §18-5-18b and West Virginia Department of Education Policy 2315² sets out requirements for school counseling programs. Each also outlines to some degree a county board's responsibilities regarding school counseling.
4. A school counselor means a professional educator who holds a valid school counselor's certificate in accordance with §18A-1-1. Each county board shall provide counseling services for each pupil enrolled in the public schools of the county. 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

² West Virginia Code of State Rules § 126 CSR 67, West Virginia Board of Education Policy 2315, Comprehensive School Counseling Programs set forth requirements for PreK-12 Comprehensive School Counseling Programs in West Virginia Schools. W. VA. CODE ST. R. § 126-67-6

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. See W.Va. Code §18-5-18b, School counselors in public schools.

5. School counselors shall be full-time professional personnel, shall spend at least 80 percent of work time in a direct counseling relationship, and shall devote no more than 20 percent of the workday to administrative activities: Provided, that such activities are counselor related. W.Va. Code §18-5-18b (f) and WVDE Policy 2315

6. In association with Grievant's employment, Grievant is the Student Assistance Team (SAT) Coordinator and the 504 Team Coordinator.³ Grievant further performs data entry for registration of all students, coupled with coordinating paperwork and data entry of all new students. See L3 testimony and L1 Decision.

7. The state education board may adopt rules consistent with the provisions of West Virginia Code §18-5-18b 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 rules as adopted by the state board. See W.Va. Code §18-5-18b.

³ Student Assistance Team 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. Generally speaking, a 504 Team is comprised of people who are familiar with the student and who understand the evaluation data and special services options.

8. WVDE Policy 2315, W. VA. CODE ST R § 126-67-6, 6.2 provides that, school counselors spend their time planning, designing, managing, facilitating, delivering, and evaluating a comprehensive school counseling program that benefits all students in accordance with the West Virginia School Counseling Model, Policy 5100, and W.Va. Code § 18-5-18b.

9. The phrase "direct counseling relationship with pupils," set forth in W.Va. Code §18-5-18b (f), has been found by the West Virginia Supreme Court to be subject to different meanings or interpretations and thus is therefore ambiguous. See *Shroyer v. Harrison County Bd. Of Educ.*, 211 W.Va. 215, 546 S.E.2d 425 (2002)

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant filed this grievance alleging certain duties that she is required to perform are noncompliant with policy and/or state statute. Grievant alleges that the duties she is required to perform do not align with the Comprehensive Developmental School Counseling Model Reference Guide. Respondent emphasizes and strongly highlights

that the "Comprehensive Developmental School Counseling Model Reference Guide" is a reference guide and not law.

Grievant believes certain of the duties she is being required to perform could and/or should be completed by some other school personnel. Grievant alleges that data entry and clerical record-keeping are inappropriate activities for a School Counselor.⁴ In a nutshell, Grievant's grievance is twofold; she believes she is being asked to perform duties which are counter to her station as a Counselor (administrative /clerical activities) and/or the number of duties she is being expected to perform are prohibiting her from efficiently performing legitimate and productive School Counseling duties. Grievant highlights that Counselors should spend 80% of time providing direct services for students and no more than 20% performing indirect services. See W.Va. Code § 18-5-18b (f).

Grievant wants school administrators to formally do something about the tasks that she believes are improper and/or detrimental to her ability to perform her readily recognized counseling duties more proficiently. Grievant cites WWDE Policy 2315, W.

⁴ The specific duties Grievant believes to be noncompliant with policies include acting as the SAT coordinator which requires grievant to attend SAT meetings and complete the summary check sheet during the discussion. Grievant also acts as the NAEP Test Coordinator. If the principal is out of the building, Grievant is expected to report any test irregularities to the county office. Grievant is the special education designee. During IEP meetings, if the principal is not present at the time signatures are collected, Grievant is expected to sign the IEP as a designee. Grievant is also acting as a 504 Coordinator. At the conclusion of the 504 meeting, Grievant is expected to make a copy of the 504 Plan and send it to the Central Office via PEDS. Grievant completes data entry at Athens School and is expected to enter new student data into WVEIS and drop students that are transferring. This entry includes entering the student's schedule. The principal and/or secretary also completes some of the entries. At Sun Valley, no data entry is completed by the counselor. Grievant is expected assist with Pre-K Registration at Athens School. She is expected to provide information to parents through working at one of the "stations" parents rotate through. There are no duties for PreK at Sun Valley. Cumulation of information provided pursuant to L1 decision, L3 testimony and PFOF.

VA. CODE ST. R. § 126-67-4, 4.1 which among other provisions provides each county board of education shall ensure that the Comprehensive School Counseling Program (CSCP) is aligned with the West Virginia School Counseling Model. Grievant relies heavily upon a very proactive application of the counseling model and examples the model labels as inappropriate duties for counselors. Grievant's desired interpretation is not shared by Respondent. Nor is the undersigned persuaded Grievant's myopic interpretation is a proper application of the principles being promulgated for a Comprehensive School Counseling Program.⁵

The Comprehensive Developmental School Counseling Model Reference Guide includes several statements that focus on duties of the counselor including, "The school counselor facilitates systemic efforts to support personalized student planning, responsive services and student supports to assist students in overcoming barriers to school success and maximize each student's potential." Also, "... school counselors must collaborate with other stakeholders to improve student academic performance". Further, "The counselor must participate in school-wide efforts to improve student supports (e.g., involvement in academic support teams, support for personalized learning,

⁵ Grievant's highlights one cited reference model. Grievant neglects to account for several other referenced materials Respondent is also intended to align its Comprehensive School Counseling Programs (CSCP). For example purposes; the very next provision, conveniently not cited by Grievant, provides each county board of education shall ensure the Counseling Program is aligned with applicable WVBE policies: WVBE Policy 5100, Approval of Educator Preparation Programs; WVBE Policy 5310, Performance Evaluation of School Personnel; Policy 4373, Expected Behavior in Safe and Supportive Schools; Policy 2520.19, West Virginia College-and Career-Readiness Dispositions and Standards for Student Success for Grades K-12, and Policy 2510, Assuring the Quality of Education: Regulations for Education Programs. See W. VA. CODE R § 126-67-4, 4.1.f. Grievant's proposed interpretation/application of the role of a School Counselor truly limits the instrumental role an effective Counselor could play in the school setting.

literacy planning, school-wide strategic planning, dropout prevention, retention and attendance, smooth transitions, ensure parental involvement, prevention and intervention programs, continuing education, career guidance).” Also contained within the Comprehensive Developmental School Counseling Model Reference Guide, responsibilities include the coordination of programs, such as SAT meetings and case management. Grievant’s narrow reliance on the highlighted model’s example of proposed inappropriate duties is misplaced. The “Comprehensive Developmental School Counseling Model Reference Guide” is a reference guide and not the law.

W.Va. Code § 18-5-18b and WVDE Policy 2315 sets forth the requirements for school counseling programs. The state board may adopt rules consistent with the provisions of the statute 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 rules as adopted by the state board. The undersigned is not persuaded Grievant’s desired interpretation is proper.

It is improper to interpret the Comprehensive Developmental School Counseling Model Reference Guide, to provide a complete and binding bar against a School Counselor from performing any and all administrative/clerical duties. Included within the glossary of the WVDE Professional School Counseling Glossary are counseling-related administrative activities that include, counseling activities of a clerical nature such as data entry, the filing of student records and forms, and the duplication of documents and materials for distribution when combined with counseling related administrative activities.

The undersigned is mindful and does not take lightly Grievant's secondary argument that the number of duties, not related to direct counseling, tends to strain the prescribed formula for a School Counselor's activity. This contention is concerning. The phrase "direct counseling relationship with pupils," set forth in WV CODE § 18-5-18b (f), has been found by the West Virginia Supreme Court to be subject to different meanings or interpretations and is therefore ambiguous. See *Shroyer v. Harrison County Bd. Of Educ.*, 211 W.Va. 215, 546 S.E.2d 425 (2002).

W. Va. Code St. R. §126-67-6.2 states, "School counselors spend their time planning, designing, managing, facilitating, delivering, and evaluating a comprehensive school counseling program that benefits all students in accordance with the West Virginia School Counseling Model, Policy 5100, and W.Va. Code § 18-5-18b". The activities described by Grievant tend to fall within the purview of WVDE Policy 2315. Grievant failed to establish that she is required to perform duties which are in and of themselves outside the realm of permissible duties of a School Counselor. It is not perceived that the duties identified by Grievant are *per se* impermissible activity for a School Counselor. Further, Grievant infers the duties tend to press upon the 80-20 formula but does not establish it as a fact or prove any such violation is due to Respondent's actions as opposed her own ineffective management of time.

The activities described by Grievant are not in conflict with the reference guide when read in its entirety. Contained within the Comprehensive Developmental School Counseling Model Reference Guide, responsibilities include the coordination of programs, such as SAT meetings and case management. The activities highlighted by

Grievant are not found to conflict with controlling statute, rule and/or regulation. See W.Va. Code § 18-5-18b and WVDE Policy 2315. However, it is understood and duly recognized that excessive duties could and would affect the percent of work time a School Counselor could effectively participate in a direct counseling relationship with pupils. Nevertheless, it is not established by a preponderance of the evidence that Respondent has exceeded recognized constraints on the parameters of Grievant's employment as a school counselor. Counselors should spend 80% of time providing direct services for students and no more than 20% performing indirect services. W.Va. Code § 18-5-18b(f) It is not established that Respondent's demanded conduct of Grievant would mandate she violate recognized constraints on the parameters of counseling.

The duties that Grievant is expected to complete are not established to be in violation of controlling state statute and policy reviewed *in totum*.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant has the burden of establishing her grievance by a preponderance of the evidence. See W. VA. CODE ST R §156-1-3. *Burden of Proof* Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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). Where the

evidence equally supports both sides, the party bearing the burden has not met its burden.
Id.

2. West Virginia Code § 18-5-18b and West Virginia Department of Education Policy 2315 (W. VA. CODE ST. R. § 126-67-6) sets forth requirements for school counseling programs.

3. “School counselors shall be full-time professional personnel, shall spend at least 80 percent of work time in a direct counseling relationship with pupils, and shall devote no more than 20 percent of the workday to administrative activities: Provided, That such activities are counselor related.” W.Va. Code § 18-5-18b(f)

4. The phrase “direct counseling relationship with pupils,” set forth in W.Va. Code § 18-5-18b (f), has been found by the West Virginia Supreme Court to be subject to different meanings or interpretations and is therefore ambiguous. *See Shroyer v. Harrison County Bd. Of Educ.*, 211 W.Va. 215, 546 S.E.2d 425 (2002).

5. It is not established by a preponderance of the evidence that the duties identified by Grievant are impermissible activities for a School Counselor.

6. It is not established by a preponderance of the evidence that Respondent has violated identifiable provision of applicable governing rule, regulation or statute pertaining to school counseling.

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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *a/s/o* 156 C.S.R. 1 § 6.20 (2018).

Date: July 9, 2021



Landon R. Brown
Administrative Law Judge