CLYDE PETERS, .

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Grievant, .

.

v. . Docket No. 94-DOE-043

.

RALEIGH COUNTY BOARD OF EDUCATION .

AND WEST VIRGINIA DEPARTMENT OF .

EDUCATION, .

.

Respondents. .

D E C I S I O N

This is a grievance by Clyde Peters (Grievant), a Guidance Counselor employed by the Respondent Raleigh County Board of Education (RCBE) at Park Junior High School (PJHS), alleging discrimination in violation of W. Va. Code § 18-29-2. In particular, Grievant contends that West Virginia Department of Education Policy 5310, as further implemented by RCBE Policy GBI-R, improperly requires guidance counselors to be evaluated under the same criteria applicable to administrators.

This grievance was initiated on December 23, 1993 and immediately waived to Level II. A hearing was held at Level II on January 25, 1994 and a Level II decision denying the grievance was rendered on January 27, 1994. J Ex 5. RCBE elected to waive consideration at Level III (J Ex 5) and the matter was elevated to Level IV on February 7, 1994. Following a series of continuances granted for good cause, an evidentiary hearing wasconducted in this Board's Beckley office on April 15, 1994. (See footnote 1) The West Virginia Department of Education was joined as an essential party under Rule 4.11 of the Procedural Rules of the Education and State Employees Grievance Board, over its objection, and participated in the hearing at Level IV. Upon receipt of post-hearing submissions from all parties, this matter became mature for decision on May 19, 1994.

BACKGROUND

Grievant is currently certified as a counselor, 1-12, (See footnote 2) and has been employed as a Guidance Counselor for 28 years. He initially heard a rumor through "the grapevine" that counselors were going to be evaluated as administrators in the Spring of 1993. Grievant spoke to the Principal at PJHS, Richard Davis, who was unable to confirm or deny this rumor. Grievant then approached Doug Richmond, a fellow American Federation of Teachers (AFT) member who served as AFT building representative for PJHS, to obtain clarification of this policy. Mr. Richmond pursued the matter with Dwight Dials, RCBE's Superintendent of Schools, who agreed to "look into it" toward the end of May 1993 but did not respond before the end of the 1992-93 school year.

Grievant resumed his inquiry through Mr. Richmond in late September to early October 1993. Mr. Dials again provided no direct response, indicating that he was preoccupied with a levy election. Following the levy election in November 1994, Grievant conducted an informal poll of guidance counselors in Raleigh County at Mr. Dials' request. This poll, according to Grievant, resulted in nearly all of the counselors expressing apreference for being evaluated as guidance counselors rather than as administrators. After communicating this information to Mr. Dials through Mr. Richmond, Grievant was advised that Mr. Dials had agreed to explore the possibility of obtaining a waiver from the State Department of Education. This inquiry generated a December 7, 1993 memorandum from Tony Smedley, Coordinator of the Office of Professional Development and Recognition for the West Virginia Department of Education, addressing the subject of "Evaluation Procedures for Administrators and Professional Service Personnel" as follows:

> Several issues have arisen regarding the evaluation of administrators and professional service personnel for the 1993-94 school year. According to Policy 5310: Performance Evaluation of School Personnel, administrators are defined as principals, vice-principals and central office administrators. Professional service personnel are defined as athletic trainers, counselors, education audiologists, school nurses, school psychologists, social service and attendance personnel, and speech language pathologists. All personnel in these categories are to be evaluated using the process outlined in Section 15- 18 of the policy. These individuals are to be evaluated on mutually established written goals.
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> Listed below are procedures that must be implemented in order to comply with Policy 5310 for administrators and professional service personnel:

1) School personnel and their immediate supervisor will mutually establish annual written goals for their performance evaluation.

2) The goals (at least two) shall be related to the job responsibility.

3) The immediate supervisor and school personnel will meet at least once annually to review progress toward the established goals.

4) The immediate supervisor will schedule an

evaluation conference with school personnel to

share findings and prepare the written report.

5) School personnel shall receive a copy of the evaluation within five working days.

Please note that the process mentioned above is very similar to Phase I of the Professional Growth and Development Cycle (goal setting) for teachers.

Another issue that some personnel are having difficulty understanding is the portfolio. The portfolio is an option for teachers, but required for administrators and professional service personnel. The teacher's portfolio is used to document commendable job performance; whereas, the portfolio for administrators and professional service personnel is used to validate progress or completion of the mutually established goals.

Lastly, librarians are to be evaluated using the process for teachers (Section 1-14). Librarians have a teaching certificate, and their program of study is library science.

If you have any questions regarding the evaluation process for teachers, professional service personnel, or administrators please give me a call at 558- 2702.

J Ex 4.

Grievant was particularly aggrieved at the reference to librarians being evaluated as teachers since counselors also hold teaching certificates. Grievant filed the instant grievance at Level I shortly after receiving the above-quoted memorandum.

Grievant noted that RCBE Policy GBI-R, which was enacted to implement Policy 5310 at the local level, contains sample job descriptions for classroom teachers and administrators but does not contain a job description for guidance counselors. J Ex 4 at 28-29. Likewise, State Department of Education Policy 5310 does not contain any specific criteria or job objectives relating to guidance

counselors. Grievant indicated that he wanted to be evaluated under criteria established for guidance counselors. However, Grievant acknowledged that as of the date of the Level IV hearing, he had not yet had a conference with his immediate supervisor to discuss mutual goals for the 1993-94 school year. (Under RCBE Policy GBI-R, the immediate supervisor is responsible for the employee's evaluation. J Ex 3 at 4.) Moreover, Grievant was not aware of any RCBE guidance counselor who hadmet with his immediate supervisor to set goals in accordance with the Policy 5310 evaluation process.

Grievant further testified that he had never seen a position description for his current guidance counselor position at PJHS developed in accordance with RCBE Policy GBI-R. Likewise, there was no evidence that Grievant had been evaluated under Policy 5310 or Policy GBI-R as of April 15, 1994.

Tony Smedley, who is Coordinator of the Office of Professional Development and Recognition for the West Virginia Department of Education and who wrote the memorandum quoted above, testified in regard to the development of Policy 5310. Mr. Smedley stated that Policy 5310 was initially developed and subsequently amended to comply with W. Va. Code § 18A-2-12, which provides, in pertinent part, as follows:

> (a) The state board of education shall adopt a written system for the evaluation of the employment performance of personnel, which system shall be applied uniformly by county boards of education in the evaluation of the employment performance of personnel employed by the board.
>
> (b) The system adopted by the state board of education for evaluating the employment performance of professional personnel shall be in accordance with the provisions of this section. Professional personnel means professional personnel as defined in section one, article one of this chapter. In developing the professional personnel performance evaluation system, and amendments thereto, the state board shall consult with the professional development project of the center for professional development created in section three, article three-a of this chapter. The center shall actively participate with the state board in developing written standards for evaluation which clearly specify satisfactory performance and the criteria to be used to determine whether the performance of each professional personnel meets such standards.
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> The performance evaluation system shall contain, but shall not be limited to the following information:

(1) The professional personnel positions to be evaluated, whether they be teachers, substitute teachers, administrators, principals, or others;

(2) The frequency and duration of the evaluations, which shall be on a regular basis and of such frequency and duration as to insure the collection of a sufficient amount of data from which reliable conclusions and findings may be drawn;

(3) The purposes of the evaluation, which shall serve as a basis for the improvement of the personnel in their assigned duties, serve as an indicator of satisfactory performance for individual professional personnel and serve as documentation for a dismissal on the grounds of unsatisfactory performance, and serve as a basis for programs to increase the professional growth and development of professional personnel;

(4) The standards for satisfactory performance for professional personnel and the criteria to be used to determine whether the performance of each professional meet such standards and other criteria for evaluation for each professional position evaluated; and

(5) Provisions for a written improvement plan, which shall be specific as to what improvements, if any, are needed in the performance of the professional and shall clearly set forth recommendations for improvements, including recommendations for additional education and training during the professional's certification process.

* * *

W. Va. Code § 18A-1-1, referenced in 18A-2-12(b) above, provides the following pertinent definitions:

(a) "School personnel" shall mean all personnel employed by a county board of education whether employed on a regular full-time basis, an hourly basis or otherwise. School personnel shall be comprised of two categories: professional personnel and service personnel.

(b) "Professional personnel" shall mean persons who meet the certification and/or licensing requirements of the State, and shall include the professional educator and other professional employees.

(c) "Professional educator" shall be synonymous with and shall have the same meaning as "teacher" as defined in section one [§ 18-1-1], article one, chapter eighteen of this Code. Professional educators shall be classified as:

(1) "Classroom teacher": The professional educator who has direct instructional or counseling relationship with pupils, spending the majority of his time in this capacity.

(2) "Principal": The professional educator who as agent of the board has responsibility for the supervision, management and control of a school or schools within the guidelines established by said board. The major area of such responsibility shall be the general supervision of all the school and all school activities involving pupils, teachers, and other school personnel.

(3) "Supervisor": The professional educator who, whether by this or other appropriate title, is responsible for working primarily in the field with professional and/or other personnel in instructional and other school improvement.

(4) "Central office administrator": The superintendent, associate superintendent, assistant superintendent, and other professional educators, whether by these or other appropriate titles, who are charged with the administering and supervising of the whole or some assigned part of the total program of the county-wide school system.

(5) "Other professional employee" shall mean that person from another profession who is properly licensed and is employed to serve the public schools and shall include a registered professional nurse, licensed by the West Virginia board of examiners for registered professional nurses and employed by a county board of education, who has completed either a two- year (sixty-four semester hours) or a three-year (ninety-six semester hours) nursing program.

Mr. Smedley noted the State Department of Education initially promulgated policies numbered 5310 through 5315 in the Spring of 1985. These policies provided for evaluation of school personnel under five separate categories governing teachers, administrators, professional support personnel, service personnel, and supervisors of administrators. Guidance counselors were covered by Policy 5313 applicable to "Central Office/Professional Support Personnel Responsibilities and Performance Standards." R Ex 1. Policy 5313 gave local boards of education substantial discretion in the system they used to evaluate guidance counselors and other professional personnel. Mr. Smedley further testified that in 1990 the legislature enacted W. Va. Code § 18A-2-12, "Performance Evaluations of School Personnel," calling for a uniform system of evaluating the performance of school personnel. A committee was subsequently appointed by the State Superintendent of Schools to make appropriate

revisions to Policy 5310. A policy for evaluating teachers was established through Sections 1-14 of revised Policy 5310 in December 1991. That policy was subsequently supplemented through the addition of Sections 15-18 governing administrators. These amendments became effective on August 20, 1992, but implementation was delayed until the 1993-94 school year. Professional service personnel, such as guidance counselors, were included in the "administrator" category.

Mr. Smedley explained that the evaluation process contained in Sections 15-18 of Policy 5310 is largely generic and readily adaptable across the spectrum of professional school personnel from speech pathologist and nurse to principal and guidance counselor. The evaluation process calls for each employee to meet with his or her immediate supervisor and set at least two mutually agreeable goals which the employee will strive to achieve during the remainder of the school year. Thus, each employee may have different goals tailored to their specific job situation. Mr. Smedley indicated that the committee decided that this process promoted the uniformity called for in § 18A-2-12 better than establishing separate procedures for each category of employment. Grievant cites to W. Va. Code § 18-5-18b, "School Counselors in Public Schools," in support of his contention that counselors must be evaluated separately from administrators. That statute provides as follows:

> A school counselor means a professional educator who holds a valid school counselor's certificate in accordance with article three of chapter eighteen-a [§ 18A-3-1 et seq.] of this code.
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> Each county board of education, by the school year one thousand nine hundred eighty-seven - eighty-eight, shall provide counseling services for each pupil enrolled in the public schools of the county.
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> 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 may also 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.
>
> The state board may adopt rules and regulations regarding the activities of the school counselor, and the school counselor is authorized to perform such services as are not inconsistent therewith. Each county board of education shall develop a comprehensive drop-out prevention program utilizing the expertise of school counselors and any other appropriate resources available.

> School counsellors 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.
>
> Nothing herein shall prohibit a county board from exceeding the provisions of this section.

Grievant argues that evaluating guidance counselors in the same manner as administrators is contrary to § 18-5-18b since the foregoing statute limits the amount of time guidance counselors are permitted to spend on administrative activities.

DISCUSSION

It is apparent that the legislature, in enacting W. Va. Code § 18A-2-12, delegated responsibility for developing a uniform method of evaluating professional employees in the public schools to the State Department of Education. It is well-settled law in West Virginiathat "interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." Syl. Pt. 4, Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp, Inc., 277 S.E.2d 613, 614 (W. Va. 1981). See Bailey v. Bd. of Educ., 321 S.E.2d 302 (W. Va. 1984); Detch v. Bd. of Educ., 145 W. Va. 722, 117 S.E.2d 138 (1960). When W. Va. Code §§ 18A-2-12 and 18-1-1 are read in pari materia, it is clear that the legislature authorized the Department of Education to develop a performance evaluation policy that applies to all "professional personnel," including teachers, administrators, guidance counselors and other certified or licensed employees, with the exception of school service personnel. Grievant has offered no persuasive evidence or argument to show that Department of Education Policy 5310 or RCBE Policy GBI-R, as they are presently written, are inherently unsuitable for evaluating Grievant or other guidance counselors, using the same generic procedures that are specified for school administrators. Thus, Grievant has failed to demonstrate that these policies are inconsistent with § 18A-2-12.

Further, the limitation on guidance counselors performing administrative duties contained in § 18-5-18b does not preclude their inclusion with "administrators" under the generic evaluation system promulgated by the Department of Education through Policy 5310. Moreover, since Grievant has

never been evaluated nor had performance goals established under these policies, this grievance involves a hypothetical situation requiring this Grievance Board to render an advisory opinion, contrary to our established policy and precedent. W. Va. Educ. & State Employees Grievance Bd. Procedural Rules § 4.18. See e.g., Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Pascoliv. Ohio County Bd. of Educ., Docket Nos. 91-35-229/239 (Nov. 27, 1991); Friend v. Nicholas County Bd. of Educ., Docket No. 35-88-053-4 (Apr. 28, 1988).

Grievant is also alleging discrimination under W. Va. Code § 18-29-2(m) which provides: "'Discrimination' means 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 Grievance Board's holding in Steele v. Wayne County Board of Education, (See footnote 3) a grievant must demonstrate the following in order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m):

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his 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.

Grievant's reliance on § 18-29-2(m) is misplaced in that he is essentially claiming that he is being treated the same as other employees, in particular, school administrators, while contending that he and other professional personnel employed as guidance counselors should be treated differently by being evaluated separately from administrators. Thus, Grievant's theory is inconsistent with the second prong of the Steele test since he is being treated in a manner that is substantially the same as other employees. Accordingly, Grievant has failed to establish a prima facie case of discrimination. See Williams v. Lincoln County Bd. of Educ., Docket No. 93-22-386 (Mar. 7, 1994). In addition to the foregoing discussion, the following findings of fact and conclusions of law are made in this matter.

FINDINGS OF FACT

1. Grievant is currently licensed as a counselor, 1-12, and is presently employed by the Raleigh County Board of Education (RCBE) as a Guidance Counselor at Park Junior High School.

2. Grievant has been employed as a school counselor for 28 years.

3. The West Virginia Department of Education amended Policy 5310 entitled "Performance Evaluation of School Personnel" by adding Sections 15-18, "Evaluation Process for Administrators (Principals, Vice Principals, and Central Office Administrators)," effective August 20, 1992.

4. Sections 15-18 of Policy 5310 establish a generic process for employees and their supervisors to mutually develop annual written goals related to that employee's job responsibility which are then used in evaluating the employee's performance.

5. In December 1993, Grievant became aware of a memorandum from the West Virginia Department of Education dated December 7, 1993, which indicated that "professional service personnel," including guidance counselors, would have their performance evaluated for the 1993-94 school year using the same process applicable to school administrators under Department of Education Policy 5310.

6. As of April 15, 1994, Grievant had not been evaluated under Department of Education Policy 5310 or its local counterpart, RCBE Policy GBI-R. Likewise, Grievant hadnot been presented with a job description or met with his immediate supervisor to discuss mutually acceptable goals as called for under the aforementioned policies.

CONCLUSIONS OF LAW

1. In a grievance alleging discrimination, Grievant has the burden of proving his allegations by a preponderance of the evidence. Wyatt v. McDowell County Bd. of Educ., Docket No. 92-33-312 (Apr.21, 1993); Steele v. Wayne County Bd. of Educ., Docket No. 89- 50-260 (Oct. 19, 1989).

2. Grievant failed to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m) in regard to the actions of the State Department of Education under Policy 5310 and RCBE under Policy GBI-R proposing to evaluate guidance counselors under generic evaluation procedures which are also applicable to school administrators and other professional employees. See Williams v. Lincoln County Bd. of Educ., Docket No. 93-22-386 (Mar. 7, 1994); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

3. W. Va. Code § 18A-2-12 requires the West Virginia Department of Education to develop a

uniform performance evaluation system for professional personnel as defined by W. Va. Code § 18A-1-1. As the agency charged with the administration of § 18A-2-12, the Department of Education's interpretation is entitled to great weight unless clearly erroneous. Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp, Inc., 277 S.E.2d 613, 614 (W. Va. 1981). See Bailey v. Bd. of Educ., 321 S.E.2d 302 (W. Va. 1984); Detch v. Bd. of Educ., 145 W. Va. 722, 117 S.E.2d 138 (1960). 4. Grievant failed to demonstrate that either West Virginia Department of Education Policy 5310 or RCBE Policy GBI-R, as they apply to evaluating the performance of school guidance counselors, are inconsistent with W. Va. Code § 18A-2-12.

5. Since Grievant had not yet been evaluated under either Policy 5310 or GBI-R, his grievance is substantially hypothetical and speculative in nature, calling for an advisory opinion from this Grievance Board. The Grievance Board does not render advisory opinions. W. Va. Educ. & State Employees Grievance Bd. Procedural Rules § 4.18. See Bryant v. Fayette County Bd. of Educ., Docket No. 91-13-198 (Mar. 13, 1992); Lewis v. Greenbrier County Bd. of Educ., Docket No. 91-13-198 (June 12, 1991).

Accordingly, the Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: September 27, 1994

Footnote: 1

Prior to that hearing, this matter was reassigned to the undersigned from another Administrative Law Judge for administrative reasons.

Footnote: 2

Grievant is also certified to teach social studies, 7-12, and elementary education, 1-9.

Footnote: 3

Docket No. 89-50-260 (Oct. 19, 1989).