RAMONA HARTLEY and

PAMELA CURRY,

Grievants,

v.

DOCKET NO. 99-22-201

LINCOLN COUNTY BOARD OF EDUCATION,

Respondents.

D E C I S I O N

Grievants, Ramona Hartley and Pamela Curry, filed the following grievance against their employer, the Lincoln County Board of Education ("Board") on April 26, 1999:

> Counselors have been transferred from counselor to counselor/teacher status which makes circumstances impossible for counselors to perform required duties. In addition, Lincoln County BOE has brought mental health counselors into some of the schools which reduces the need for all the school counselors in the schools. If the mental health counselors were not there, we contend there would be a need for more counselors, not less.
>
> Furthermore, the Lincoln County BOE has violated the following [by] allowing this to happen: Lincoln County BOE policy 8-19.00 dealing with counselor work day, Title 126 Legislative Rule WV BOE Series 67 Policy 2315, WV BOE Policy 2510 Section 5.19, WV BOE Policy [2]2320 Sections [5]5.6.19, 5.8, 5.8.2, 5.10.6, 5.10.12, 5.10.14 and WV Code 18-5-18b and 18A-3-1.
>
> Relief sought: To be reinstated to full-time counselors at Guyan Valley High School and for the [b]oard to stop contracting counselor's positions. (See footnote 1)

A level two hearing took place on May 13, 1999, and a decision denying the grievance was rendered by the Superintendent's designee, Charles S. McCann, on May 14, 1999. The grievance was by-passed at level three, and Grievants appealed to level four on May 20, 1999. The parties agreed to submit the grievance on the record developed at the level two hearing. The deadline for the parties' proposed findings of fact and conclusions of law was July 6, 1999, at which time the

grievance was mature for decision. Grievants were represented by Anita L. Mitter, Representative, West Virginia Education Association, and the Board was represented by James Gabehart, Esq.

FINDINGS OF FACT

1. Ramona Hartley, Grievant, is employed as a full-time counselor at Guyan Valley High School, Lincoln County.

2. Pam Curry, Grievant, is employed as a full-time counselor at Guyan Valley High School, Lincoln County.

3. High school counselors are required to spend 75% of their work time in direct counseling with students, and only 25% of work time in indirect services or administrative duties relating to counseling.

4. Grievants spend considerably less than 75% of their work time involved in direct counseling with students.

5. Grievants have repeatedly asked for additional secretarial support to handle many tasks more clerical than administrative in nature. (i.e. photocopying, typing, filing, scheduling, answering routine questions from parents and teachers.) 6. After a visit to Guyan Valley High School, the State Department of Education reported, “Counselor says that she spends only 10% of her time counseling students.”

7. After receiving this information, Guyan Valley High School Principal A. Edward Smith directed Grievant Curry to state in writing the reason for asserting this claim.

8. Grievant Curry responded to this request in writing in a letter dated January 8, 1998.

9. No change occurred as a result of the letter to the principal.

10. In 1999, due to a continued decrease in countywide student enrollment and fewer funded staff positions, Guyan Valley High School was directed to reduce staff.

11. Subsequently, in March, 1999, Grievants and all other Lincoln County high school counselors received a transfer from counselor status to counselor/teacher status for the 1999-2000 school year.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

Grievants contend that they should be reinstated to full-time counselor status, rather than the counselor/teacher status to which they have been transferred for the 1999-2000 school year. Grievants allege that there is not ample time to do both the job of a counselor and a teacher. In fact, the record provides that Grievants' duties as counselors haveincreased over the years and they have been provided no additional clerical or administrative help to allow them to perform their statutory obligations as counselors.

W. Va. Code § 18-5-18b 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.

Board Policy 8-19.00 mirrors the aforementioned Code language regarding a counselor's work day. The evidence supports the conclusion that Grievants are spending more than 25% of work time on administrative duties thus diluting their abilities to deliver a quality guidance program as required.

Since the record supports the conclusion that Grievants are unable to perform their statutory obligations, it is arbitrary and capricious to transfer them into a position where they will have more duties.

County boards of education have discretion in matters relating to the hiring, transfer and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interest of the school, and in a manner which is not arbitrary and capricious. State ex. Melchiori v. Bd. of Educ., 188 W. Va. 575, 425 S.E.2d 251 (1992). The Board is in an awkward position. With the decrease in countywide enrollment, it is forced to make cutbacks in professional personnel. The difficult decision is how to do that. In this case, the Board obviously tried to salvage jobs instead of going through an undesirable RIFing process. While this act may have been commendable, it does not create the desired effect required of West Virginia public schools. The Board alleges that there

is nothing which prohibits a county board from utilizing “split” positions to provide school counseling services to its students. This argument is based upon Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995), and Harmon v. Mingo County Bd. of Educ., Docket No. 95-29-447 (Mar. 29, 1996). Preston upholds the posting of a .40 counselor position and Harmon upholds teaching duties assigned to a grievant hired as a “counselor/teacher”. Neither of these cases addresses the provision of Code § 18A-5-15b which states that “school counselors shall be full-time professional personnel.” It is unclear why that provision was not raised or discussed in those cases, but the language of the statute speaks clearly that counselors are to be full-time. The further breakdown of their duties into 75% and 25%, further supports the intention that counselors spend 100% of their time performing counseling duties.

CONCLUSIONS OF LAW

1. In a non-disciplinary matter, it is incumbent upon a grievant to prove all the elements constituting his or her grievance by a preponderance of the evidence. Procedural Rules of the W.Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (April 30, 1997); Hanshaw v. McDowell County Bd. Of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. W. Va. Code § 18-5-18b and Board Policy 8-19.00 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. Grievants are unable to meet these requirements in the current school setting. Therefore, it is arbitrary and capricious to transfer them to a job classification where the duties will be increased.

3. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interest of the schools, and in a manner which is not arbitrary and capricious. State ex. Melchiori v. Bd. of Educ., 188 W. Va. 575, 425 S.E.2d 251 (1992). While the transfer was procedurally performed in compliance with W.Va. Code § 18A-2-7, the decision by the Board to make the transfer was arbitrary and capricious based upon W. Va. Code § 18-5-18b and Board Policy 8- 19.00.

Accordingly, this grievance is **GRANTED**. The Board is hereby ordered to reinstate Grievants to

their former positions as full-time Counselors for the 1999-2000 school year.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Lincoln 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: July 29, 1999

Footnote: 1 *Relief sought by the Grievants included a prohibition on the Board's ability to contract counselor's positions. This issue was not discussed and no evidence was offered; therefore, this Administrative Law Judge makes no finding in regards to this issue.*