KAREN LOCKETT,

Grievant,

v. **Docket No. 01-10-477**

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievant, Karen Lockett, filed this grievance against her employer the Fayette County Board of Education ("FCBOE" or "Board") on May 11, 2001. Her Statement of Grievance states:

> I am not being paid appropriately in violation of WV Code 18-29-2(m) and (o) and/or 18A-4-5a.
>
> Relief Sought: Placement on the salary schedule for previous years of work experience as other vocational teachers receive plus pre-judgement interest.

This grievance was denied at Level I and Level II, Respondent waived Level III, and Grievant appealed to Level IV on August 14, 2001. A Level IV hearing was held on October 23, 2001. This case became mature for decision on November 19, 2001, after receipt of the parties' proposed Findings of Fact and Conclusions of Law. (See footnote 1)

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

Findings of Fact

1. Grievant is employed as a Business Education teacher at the Fayette Plateau Vocational-Technical Center ("FPVTC"). 2. From 1967 to 1973, Grievant worked as a clerk/typist for two different companies for approximately seven and one half years.

3. Grievant was first hired as an elementary teacher by Respondent for the 1986-1987 school year.

4. Grievant later transferred to a middle school to teach the fifth grade.

5. In 1988, Grievant applied for and received a transfer to an Oak Hill High School position on the basis of her professional teaching certification in Business Education/Business Math.

6. In 1998, Grievant applied for and received a transfer to a position at FPVTC on the basis of her professional teaching certification in Business Education/Business Math.

7. Placement into a vocational business education position, whether at the vocational school or at a high school, requires the successful applicant to possess a professional teaching certificate received through a four-year degree program. Several other areas of vocational education, such as Home Economics and Industrial Arts, require teaching certifications.

8. Many vocational teachers can only qualify to teach in vocational areas, such as electronics, welding, and carpentry, through their work experience. There are no teaching degrees or baccalaureate programs in these areas. Individuals who are hired to fill these positions must possess experience in the area to be taught and take 21 hours of college instruction to learn how to teach. These teachers then receive a vocational permit which allows them to teach in the vocational setting. These teachers are required to renew their permits at regular intervals with follow-up course work. 9. Teachers who acquire vocational permits receive credit for their prior work experience, and are required to surrender years of prior work experience to determine where they will be placed on the teachers' salary scale. For example, a welder with seventeen years of experience, who meets all the other requirements, must surrender two to six years of

prior work experience. His placement on the pay scale is determined after this subtraction. The number of years the welder would give up would be determined by when he was hired, as the number required has decreased over the years. The number of years required for surrender at the time Grievant was hired was six.

10. There is no vocational permit for business education. Work experience cannot qualify an applicant for a teaching position in this area.

11. Because Grievant was hired on the basis of her professional teaching certification, she was not required to surrender any years of work experience.

12. Grievant performs "like assignments and duties" as the other vocational teachers at FPVTC, certified and non-certified.

13. Although there are some differences in the required duties at FPVTC, Grievant is required to teach the course content mandated by the Instructional Goals and Objectives ("IGO's"), and this same content is taught in other business courses in other high schools in the county.

14. Contrary to Grievant's assertion, teachers on vocational permits do not receive a supplement; they receive a salary based on the teachers' pay scale, utilizing their degree level and years of experience. (See footnote 2) 15. No teacher at FPVTC receives credit for both years of prior work experience and their degree. No vocational teacher in FCBOE receives this double credit.

16. Mr. Frank Aylor is a masonry teacher at FPVTC. He also holds a professional teaching certificate in Physical Education. He applied for and received the FPVTC position on the basis of his work experience, but was required to surrender the requisite years of prior work experience to obtain his vocational permit. (See footnote 3)

17. The requirements and regulations relating to vocational permits and vocational certification are contained in 126 C.S.R. 136 §§19 & 20. (See footnote 4)

Issues and Arguments

Grievant argues she should receive the supplement paid to non-certified vocational teachers pursuant to W. Va. Code § 18A-4-5a, as she performs "like assignment and duties" as the other vocational teachers at FPVTC. Grievant also asserts the payment of the supplement to the non-certified, vocational teachers and not to her, is a form of discrimination and favoritism.

Respondent asserts FPVTC non-certified, vocational teachers are not paid a supplement, but their salaries are based their years of experience as applied to the certified teachers' salary scale. Further, Respondent maintains Grievant is not entitled to any additional compensation, as she is paid appropriately for her years of teachingexperience and degree level on this same scale. Respondent notes Grievant was hired for the position of business teacher at FPVTC based on her teaching certification, which is required for the assignment. Accordingly, Grievant is not similarly situated to the vocational teachers, as her position requires certification, and theirs do not. Further, Grievant has not been required to surrender work experience credit in order to obtain a vocational permit as are the non-certified teachers within vocational education.

Discussion

___As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "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.

I. "Like Assignments and Duties" One of Grievant's key arguments is that she performs the same duties as the teachers on vocational permits at FPVTC, and that FCBOE is in violations of W. Va. Code § 18-4-5(a) "County salary supplements for teachers." This statute states in pertinent part:

> County boards of education in fixing the salaries of teachers shall use at least the state minimum salaries established under the provisions of this article. The board may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements.
>
> Counties may fix higher salaries for teachers placed in special instructional assignments, for those assigned to or employed for duties other than regular instructional duties, and for teachers of one-teacher schools, and they may provide additional compensation for any teacher assigned duties in addition to the teacher's regular instructional duties wherein such noninstructional duties are not a part of the scheduled hours of the regular school day. Uniformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county. . . .

It should be noted that FCBOE does not dispute Grievant performs "like assignments and duties" as all the other vocational teachers assigned to FPVTC, whether they have a degree to teach the subject or have a vocational permit. Respondent views these as her duties as a teacher within the school setting.

Grievant states the second paragraph should be applied as she fills a "special instructional assignment." This argument is without merit. Grievant teaches the same content, using the same IGO's as business teachers in other FCBOE high schools. While the length of the class period might be different, and the content may be placed or

arranged within the courses differently, it is still the same content. Test. Principal Dean Lockett, Level IV Hearing. Additionally, Grievant may have some, limited duties that are different from other Business Education teachers, but this was not clearly proven, nor wasit at all clear the amount of time these different duties might take. The remaining evidence is clear. Grievant does perform "like assignments and duties" as other vocational teachers and other Business Education teachers.

The next issue to address is whether the teachers on vocational permits receive a supplement. Respondent says they do not; they receive a salary just like all other teachers based on state statutes and Board policy. W. Va. Code § 18A-4-2 sets out the "State minimum salaries for teachers," and teachers with vocational permits are paid from this scale. In 1974, FCBOE adopted a vocational teachers' pay schedule which based vocational teachers' pay on the county teachers' salary schedule. Six years of job related experience was to be subtracted from the prior work experience, and job related experience greater than six years, earned prior to employment, was accepted as years of experience and applied to the county teachers' salary schedule. Grievant did not demonstrate that teachers who instruct on a vocational permit receive any supplements in addition to those received by certified, professional teachers. Accordingly, this Code Section does not apply. See Robbins v. McDowell County Bd. of Educ., 186 W. Va 141, 411 S.E.2d 466 (1991).

Further, while Grievant did establish she engages in "like assignments and duties," just like all other vocational teachers both certified and non-certified, these actions are exactly what is required in her position as a teacher at the vocational school. Grievant also engages in "like assignments and duties" as other business teachers in the county, and she is paid on the same scale as all other degreed, vocational teachers. W. Va. Code § 18A-4-15 states "[t]he board may establish salary schedules which shall be in excess of the state minimums" and these are "to be uniform throughout the county as to theclassification of training, experience, responsibility and other requirements." FCBOE

has developed a method to pay both professional and non-certified vocational teachers based on these factors, and all employees are treated uniformly.

II. Discrimination and Favoritism

Grievant also charges she is the victim of discrimination and favoritism prohibited by W. Va. Code §§ 18-29-2(m) and (o). 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." Similarly, W. Va. Code § 18-29-2(o) defines "favoritism" to mean "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of discrimination and/or favoritism under W. Va. Code §§ 18-29-2(m) and (o), 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 the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her; and,
>
> (c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a grievant establishes a prima facie case of discrimination under W. Va. Code § 18-29-2(m), or favoritism under W. Va. Code § 18-29-2(o), the employer is provided an

opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the grievant may show the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Grievant has not met her burden of proof and established a prima facie case of discrimination and/or favoritism. The facts demonstrate two things. One, Grievant is not similarly situated to the teachers who work under a vocational permit. Her position requires her to have a teaching certification in order to be qualified to teach in her subject area. The teachers to whom she compares herself cannot even obtain a degree in their assigned vocational area. Grievant could not be hired to fulfill the duties of her position on the basis of work experience alone. Accordingly, Grievant is not similarly situated to these teachers.

Two, the evidence demonstrates all teachers at FPVTC, who are required to have a degree in order to teach in their assigned area, are treated exactly the same as Grievant. Further, all teachers at FPVTC are paid on the basis on the teachers' salary scale. No vocational teacher, at any time, has ever received credit for both years of work experience and years of teaching experience. It should be noted Grievant never surrendered any years of work experience as a vocational permit teacher would be required to do, and noone has required her to do this. Additionally, in her arguments, Grievant has ignored the fact the vocational permit teachers are required to do this, and she has not.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the

burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "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 § 18-4-15(a) requires boards of education to compensate employees uniformly in paying "additional salary increments or compensation for all persons performing like assignments and duties within the county. . . . "

3. Grievant did not prove non-certified, vocational teachers receive an additional supplement not received by other teachers.

4. Grievant did not demonstrate she had been placed in a special instructional assignment, as her duties are basically the same as all other certified business education teachers. 5. 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."

6. W. Va. Code § 18-29-2(o) defines "favoritism" to mean "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

7. In order to establish a prima facie case of discrimination and/or favoritism under W. Va. Code §§ 18-29-2(m) and (o), 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 the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her; and,

(c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

8. Once a grievant establishes a prima facie case of discrimination under W. Va. Code § 18-29-2(m), or favoritism under W. Va. Code § 18-29-2(o), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the grievant may show the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't ofCommunity Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

9. Grievant has not met her burden of proof and established a prima facie case of discrimination and/or favoritism. She is not similarly situated to non-certified vocational teachers, nor do they receive a pay supplement she does not.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Fayette 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: December 28, 2001

Footnote: 1

Grievant was represented by Attorney James Haviland, and Respondent was represented by Attorney Erwin Conrad.

Footnote: 2

It is possible the teachers' salary scale is higher than the compensation required by statute. If this is considered a supplement, then all teachers, both certified and non-certified, receive the same supplement.

Footnote: 3

Apparently, if the successful applicant for the vocational position has a degree in some area, the number of years of experience to be deducted is decreased.

Footnote: 4

It is noted these regulations identify Grievant's area of Business Education as requiring professional certification, and teachers in other areas, such as welding, auto mechanics, and electronics, are issued a vocational license or permit.