RICHARD GOFF, .

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Grievant, .

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v. . Docket No. 93-DOE-446

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WEST VIRGINIA DEPARTMENT OF EDUCATION, .

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Employer. .

D E C I S I O N

Richard Goff (hereinafter Grievant) filed this appeal with the Grievance Board on October 25, 1993, challenging the adverse decisions he had received on his complaint at the lower levels of the grievance procedure for education employees, West Virginia Code §18-29-1, et seq. His grievance is that the State Board of Education (hereinafter Respondent) has discriminated against him, as that term is defined in Code §18-29-2(m), with regard to the salary it established for his position in comparison to the salaries paid other similarly situated employees. A level four hearing was held in this matter on February 22, 1994, and the case became mature after the submission of post-hearing briefs received on or before March 31, 1994. The majority of facts are not indispute. The following findings of fact set forth below are derived from the evidence developed at both the level two and four hearings.

Findings of Fact

1. Grievant is employed by the Respondent as a Coordinator of Auditing within its Office of Child Nutrition. There are currently eight other coordinators within this office.

2. Grievant was hired into his current position in 1989 at a salary of $27,400.00. Grievant's current salary is $38,634.00

3. Grievant was neither required to hold a professional teaching certification issued pursuant to W.Va. Code §18A-3-2b at the time he was awarded his current title nor is he currently required to be so certified.

4. Grievant has worked seven years for the State of West Virginia and over four years for Respondent. For purposes of discussion, Grievant has seven years of relevant service. (See footnote 1)

5. In May 1992, Grievant earned a Master's Degree in Business Administration from the West Virginia College of Graduate Studies (now the West Virginia Graduate College). At that time he requested that he be paid consistent with the Kanawha County Salary Schedule and his request was denied.

6. Respondent employs 79 individuals classified as coordinators. Of these 79 positions, 67 have the minimum requirement that the incumbent must have held a professionalteaching license or certification at the time the position was filled.

7. Respondent has not created a salary schedule for use in setting the salaries for the remaining 12 coordinator positions which do not have a licensing or certification requirement nor has it adopted any specific standards to utilize in arriving at the salaries for these positions.

8. The Kanawha County Board of Education has adopted a Coordinators' Salary Schedule which it utilizes in determining the salaries for individuals employed as coordinators. This pay scale is based upon the employees' term of employment, years of service and degree level. (See footnote 2) Respondent has adopted this Kanawha County Salary Schedule as its own for purposes of establishing the salary for the incumbents in the 67 positions discussed in finding number 6. On this pay scale, the minimum degree level is that of a masters degree.

9. Seven of the coordinator positions in Grievant's office are paid based upon the pay scale discussed in finding number 8.

10. Respondent considers that an Adult Basic Education Permit is equal to other professional certificates and licenses for pay purposes under the scale discussed in finding number 8.

11. Pursuant to Respondent's records, five employees who do not possess a current professional license, certification or permit are paid pursuant to the pay scale discussed above.

Further, four of the 69 coordinators paid consistent with the Kanawha County Salary Schedule do not possess a masters degree.

12. Respondent has not established any set standards for use in determining which coordinator positions require certification or licensure.

13. The following is a list of those coordinators (names omitted) who are not paid pursuant to the Respondent's salary schedule, along with their respective salaries, years of service and educational level:

Name	Salary	Years Service	Degree level
1.	$42,008.00	5	BS
2.	$41,436.00	15	BA
3.	$41,165.00	1	MA
4.	$40,529.00	10	HS
5.	$40,436.00	7	BS
6.	$40,392.00	?	MA
7.	$40,385.00	5	MA
8.	$40,100.00	15	BA
9.	$38,991.00	20	AS
10.	$38,841.00	13	BS
11.	$38,634.00	6	BS
12. (Gr.)	$38,634.00	7	MA

Employee number 11 is the other coordinator assigned to the Child Nutrition Program who is not paid consistent with the Kanawha County Salary Schedule.

14. According to the above chart, three of Respondent's coordinators who have fewer years of service and a lower educational degree than Grievant are paid the same or more than Grievant.

15. In December 1988, an employee who was hired into the position of Coordinator of Data Management, which position did not require certification or licensure, had his salary changed to be consistent with Respondent's salary schedule for licensed coordinators as a result of a reclassification. The minimum requirements for this position have not changed.

Parties' Positions

Grievant's case is based upon two arguments. First, he contends that Respondent has arbitrarily and capriciously established licensing requirements for various coordinator positions without reference to any developed criteria. Secondly, he avers that once the decision is made that a coordinator position need not have such a minimum requirement, it again acts arbitrarily and capriciously in setting the initial salary for that position without correlating said salary to the salary for any other similar position. This second "administrative decision" is the basis for Grievant's claim of discrimination.

Respondent asserts that each coordinator performs different duties and has different responsibilities; therefore, it contends that it is not unreasonable for it to establish minimum requirements which include licensure or certification for some but not all coordinator positions. With regard to the salary issue,Respondent asserts that it has the discretion to set the salaries for its positions, so long as there is no existing statutory provision which mandates what the salaries must be or guides it in exercising such discretion. It alleges that it establishes the salaries for coordinator positions which do not have a licensing requirement by reference to the various market conditions which are thought to exist at the time the position in question is posted and filled. Respondent denies that it has discriminated against Grievant in any manner with regard to the salary it established for his position. Grievant's first contention will now be discussed.

Discussion

Generally, an agency's decision can be classified as arbitrary and capricious if it did not base the decision upon factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). Grievant has not successfully proven by a preponderance of the evidence that Respondent arbitrarily or capriciously established minimum requirements for sixty-seven of its coordinator positions.

It is not unreasonable to require an incumbent to have a professional license in order to be qualified for a position. The possession of such a credential can establish that an incumbent has certain knowledge or skills necessary for performance within aposition even though the incumbent

does not actually work in the field for which he/she is licensed. Further, the fact that this individual may let his/her license lapse does not mean that he/she no longer possesses the knowledge or skills which were deemed relevant by the employer at the time of the hiring. Perhaps Grievant could have been able to successfully challenge Respondent's practice in this regard had he presented evidence to compare and contrast the day-to-day duties required of various coordinators in those positions which require certification. Such evidence could support an argument that no relationship exists between the possession of a professional license or certification and the performance of the duties of the coordinator; however, no such evidence was offered. Given Respondent's justifications for its actions, it cannot be determined that it arbitrarily or capriciously established minimum requirements for its sixty-seven coordinator positions at issue under the standard pronounced in Bedford. Further, no evidence has been presented to support the conclusion that Respondent's failure to establish the same minimum requirements for the other twelve coordinators' positions was an abuse of discretion.

With regard to Grievant's second argument, "discrimination" is defined by W.Va. Code §18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employee or are agreed to in writing by the employee." With this case, as in many others, the issue raised is whether the employer's action can be classified asdiscriminatory under the grievance statute. The troubling question presented in discrimination cases under the grievance procedure statute is whether W. Va. Code §§18-29-2(m) was intended to prohibit "any or all" differences in the treatment of employees, no matter how de minimis the difference, unless such differences are related to the actual responsibilities of the position or are agreed to in writing. (See footnote 3)

The well-settled Plain Meaning Rule of statutory construction is that the clear and express language of a statute cannot be interpreted by a court, as only statutes which contain language that admits of more than one meaning can be interpreted. State v. Boatright, 399 S.E.2d 57 (W.Va. 1990). In State v. Epperly, 135 W.Va. 877, 65 S.E.2d 488 (1951), Syl. pt. 2, our Supreme Court recognized that "a statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." (Emphasis added). While this well-recognized principle of law is cited frequently, it is often difficult to apply because the initial inquiry as to whether the language is ambiguous can be troublesome.

Each time a court attempts to apply a statute to a given set of facts that court is interpreting the

words of the statutory provision regardless of whether the language used is arguably clear and unambiguous. See, Sutherland on Statutory Construction,Chapter 45.03. Ambiguity is found to exist when the language is difficult to comprehend, or lacks clearness or definiteness. Brown v. Lukhard, 330 S.E.2d 84 (Va. 1987). Generally, a court may find that a statute is clear and unambiguous by interpreting the words used in a literal sense, when doing so brings about the result thought to be intended by the legislature. However, a court may not construe a statute strictly to include within a statute what the legislature did not intend. Derengowski v. United States, 404 F.2d 778 (8th. Cir. 1968); Canal Randolph Anaheim, Inc. v. Wilkoski, 103 Cal. App. 3d 388, 162 Cal. Rptr 30 (1980). A strict construction should not mean that a strained construction is applied if such is inconsistent with the intent of the legislature. City of Ann Arbor v. University Cellar, Inc., 401 Mich 279, 258 N.W. 2d 1 (1977). Finally, remedial statutes are generally liberally construed to effectuate the purpose for which they were enacted. See, Lewis v. Gatson, 382 S.E.2d 51 (W.Va. 1989).

While an initial reading of the definition of discrimination could lead one to conclude that it is clear and unambiguous as to the Legislature's intended meaning, further consideration given to the impact which would result if the words used were to be given their literal meaning necessitates a finding that the definition is unclear and ambiguous with regard to the phrase " **any differences** in treatment." This Grievance Board is not convinced that the Legislature intended for all de minimis or reasonably justified differences in treatment of employees amounts to discrimination under the grievance procedure; therefore, it is determined that thecited definition of discrimination is unclear and ambiguous and the words used cannot be given their literal meaning. Therefore, the undersigned may resort to the rules of statutory construction in order to construe the language in question.

The primary objective of statutory interpretation is, of course, to determine the purpose or intent of the Legislature; in determining such intent the first step is to examine the statute and to give the words of the statute their common, ordinary and accepted meaning. The undersigned concludes for a number of reasons that this provision was not intended to prohibit all differences in the treatment of employees that is not related to the actual job responsibilities of the employees or agreed to in writing. (See footnote 4) If one were to apply this definition literally in a salary disparity claim, and perhaps in other factual settings, an absurd or irrational result would occur, i.e., all covered employees with the same job responsibilities would have to be paid the same salary. This would require a covered employer to pay newly-hired and existing employees the same salary, regardless

of their education, experience or tenure, because these individual factors do not relate to the actual job responsibilities. Secondly, employers would not be able to defend their decisions by offering legitimate business reasons for the differences if those offered reasons do not directly relate to the employees' "actual job responsibilities." Surely, the Legislature did not intend thisresult. The rule applied by the Supreme Court of Appeals in Syllabus Point 2 of Pristavac v. Westfield Ins. Co., 400 S.E.2d 575 (W. Va. 1990), is clearly applicable to the legal issue presented in this case:

> It is the duty of a court to construe a statute according to its true intent, and give it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.

Thirdly, other statutes and regulations reveal that the Legislature could not have intended to mandate the payment of an identical salary to all employees having the same actual job responsibilities. These specific statutes and regulations are a better indicator of legislative intent concerning the compensation of public employees than general definitions contained in the remedial grievance procedure statute. For example, W. Va. Code §18A-4-2 establishes a state minimum salary level for teachers. The minimum salary level is based upon years of experience and educational degree level, two personal characteristics unrelated to actual job responsibilities. Similarly, W. Va. Code §18A-4-8a establishes a minimum salary schedule for service personnel based upon years of employment. (See footnote 5) Under this same provision, employees of county boards of education who work at least three and one-half hours per day must be paid under the same pay scale as other full-time employees. Section 5 of the Administrative Rules of the WestVirginia Division of Personnel, which has been approved by the Legislature pursuant to the procedures set forth in the State's Administrative Procedures Act, also specifically authorizes State agencies to pay differing entry level salaries to new employees based upon prior experience, training or market conditions. Arguably, even the annual increment statute, W. Va. Code §5-5-2, conflicts with a literal interpretation or application of W. Va. Code §18-29-2(d). (See footnote 6) Not only has the Legislature specifically allowed public employers to pay state and county employees differing salaries based upon such factors as years of service and degree level, in some instances it has mandated that such be the case.

A conclusion that subsection 2(m) was not intended to prohibit all differences in treatment of

employees unrelated to actual job responsibilities or agreed to in writing is consistent with numerous Grievance Board decisions in which employees have been required to establish a prima facie case of discrimination. In past cases, this Grievance Board has utilized a "burden of proof" or "evidentiary" test in order to help it determine if an employee has been the subject of discrimination. Under this test, in order for Grievant to prove that Respondent set his salary in adiscriminatory manner, he must first establish a prima facie case of discrimination by showing that:

> (a) he is similarly situated, in a pertinent way, to one or more employee(s);
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> (b) 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) such differences were unrelated to the actual job responsibilities of the Grievant and/or the other employee(s) and were not agreed to in writing by the Grievant. [Emphasis added}.

Steele v. Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). The above test was adapted from the one used by the Supreme Court in cases wherein it has analyzed wrongful discharge and suspect class discrimination cases. See, W.Va. Inst. of Tech. v. Human Rights Com'n, 383 S.E.2d 490 (W.Va. 1989); K-Mart Corp. v. Human Rights Com'n., 383 S.E.2d 277 (W.Va. 1989).

In order for Grievant to establish a prima facie case, he must first establish that he is similarly situated to one or other employees for purposes of making a salary comparison. As noted, Respondent employs 79 coordinators, 67 of which maintain the "licensed" status and who are paid according to the Kanawha County Salary Schedule. Consistent with the discussion earlier, this requirement has already been determined to be reasonable. Of the remaining twelve coordinators not paid according to this scale, one is employed within Grievant's Program. This employee (No. 11, Finding #13) has six years of service, a Bachelor's Degree, and is paid the same salary as Grievant. However, Grievant is not contending that he has been treated differently than any of these twelve employees.

Based upon Grievant's claim, he cannot be similarly situated to those coordinators who are paid on the pay scale and who were hired into positions which required licensure because this distinction

inherently contrasts with Grievant's situation. He was hired into a position which did not require the incumbent to be licensed. Grievant has established that at least one other coordinator has had his salary changed to coincide with that required by the Kanawha County Salary Schedule without the minimum requirements for his position having been changed. This employee testified that when he was first hired as a coordinator, he was not required to have a professional license or certification. In this regard, he is similarly situated to Grievant. This employee did not testify that his title has ever changed although he stated that his job duties continually change as he considers himself a "utility person." Based upon the evidence of the differences between these two employees, Grievant has established a prima facie case of discrimination.

The burden now shifts to Respondent to introduce evidence that the difference between Grievant's salary and the salary of this other coordinator is either based upon a legitimate, non-arbitrary reason, or related to the actual job responsibilities of his position. Respondent's sole witness in support of its case was William Luft, an Associate State Superintendent for two years. Mr. Luft stated that he has some general responsibility for salaries. He testified that if a coordinator position is somehow "rationally related" to a teaching field then it is determined that thatposition should require certification as a minimum job requirement. Further, he stated that the salaries established for non-certified coordinator positions are determined at the time the job is posted according to Respondent's view of the value or "relative worth" of the position. He testified that when the salaries for these positions (non-certified positions) are determined, the salary schedule adopted by Kanawha County is considered as having no relevance. He concluded that the differences in the various coordinators' job descriptions justify any salary disparities at issue. Respondent offered no evidence to justify why this one coordinator's salary was changed.

The general statements made by Mr. Luft do not explain the differences in treatment between Grievant and this other employee. The difference in treatment cannot be based upon the fact that this other coordinator's position has certain minimum requirements or that the position is "rationally related" to any field of teaching because there is no evidence that the nature of this coordinator's position has changed. Also, Respondent's argument that not all coordinators perform similar work is unpersuasive as Grievant has established that the nine coordinators within his office perform similar work. The only other reason offered by Respondent for the difference in treatment was that it pays coordinators based upon some subjective relative worth of the position. This articulated reason was

only given to explain why coordinators who are not required to be licensed professionals are paid what they are paid; it cannot justify the decision to pay this one coordinator underthe salary schedule without the licensing requirement being imposed upon him while other coordinators are not treated the same. The relative worth of the position should not have changed unless the duties of the position and minimum requirements were changed, indicating that the position had more value to Respondent. Therefore, Grievant's prima facie case of discrimination has not been rebutted.

While it is true that Grievant's concerns at issue herein are based upon a differing managerial philosophy, Grievant has still established that he has been treated differently than at least one other similarly situated employee of Respondent without any apparent justification. Further, this difference in treatment is not trivial or de minimus. Grievant presented evidence sufficient for the undersigned to find by a preponderance of the evidence that he has been discriminated against and Respondent has not offered a legitimate reason in support of this difference. Therefore, Grievant must prevail on the merits of his claim and the only remaining issue is one of the remedy.

The foregoing discussion of the facts of the case and of the law applicable to those facts is hereby supplemented by the following appropriate conclusions of law.

Conclusions of Law

1. "Discrimination" is defined by W.Va. Code §18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employee or are agreed to in writing by the employee."

2. Grievant has established by a preponderance of the evidence that Respondent discriminated against him in establishing the starting salary for his position inconsistent with the manner in which it has determined the salary for at least one other similarly situated employee.

3. Grievant has failed to establish that Respondent has arbitrarily or capriciously required various coordinators within its employ to have a professional license or certification at the time these positions were filled.

Accordingly, this grievance is hereby **GRANTED** and Respondent is **ORDERED** to change Grievant's salary consistent with the discussion presented in this case. Respondent is also **ORDERED** to make the appropriate back pay determinations based upon the difference between what he would have been paid in accordance with the Kanawha County Salary Schedule and the

salary he was paid at the time he was hired, plus interest.

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

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ALBERT C. DUNN, JR.

Administrative Law Judge

Date: September 9, 1994

Footnote: 1*This finding is partly based upon the fact that Respondent has not challenged Grievant's computation of his years of service.*

Footnote: 2*W.Va. Code §18A-4-18, states as follows:*

> *Personnel employed by the state department of education who are required to hold a teaching certificate shall receive a salary that is at least equal to the salary paid to comparable professional personnel employed by the county board wherein their office is located, minus the six hundred dollars authorized pursuant to section two [§ 18A-4-2] of this article for classroom teachers with twenty years of experience.*

The issue of whether Respondent has properly interpreted this provision as allowing it to pay coordinators who have an Adult Basic Education Permit consistent with the Kanawha County scale need not be addressed due to holdings in the case.

Footnote: 3*Discrimination is defined in the same manner under W.Va. Code §29-6A-1, et seq., the Grievance Procedure for State Employees.*

Footnote: 4 *First, it should be noted that although both grievance procedure statutes define discrimination, they do not expressly prohibit discriminatory treatment of employees.*

Footnote: 5 *This section also provides that an additional ten dollars per month shall be added to the minimum monthly pay of each service employee who holds a high school diploma or its equivalent.*

Footnote: 6 *It is well established that where two statutes appear to conflict, they should be construed, if reasonably*

possible, to give force and effect to each one. To the extent that two statutes are in conflict, however, the specific statute prevails over the more general one. E.g., Penton v. City of Norfolk, 428 S.E.2d 309 (Va. App. 1993).