

MARGARET McFARLAND,

Grievant,

v. DOCKET NO. 96-42-214

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Margaret McFarland (Grievant), a professional employee, [\(See footnote 1\)](#) filed this grievance against employer, the Randolph County Board of Education (Respondent), on April 12, 1996. She alleges that her professional county supplement was reduced 12.5%. She asserts that Respondent's act shows favoritism because only professional county supplements were cut, while county supplements received by service personnel were not cut. [\(See footnote 2\)](#) Discrimination is also alleged because at least one professional employee's supplement was not likewise reduced.

On April 19, 1996, Grievant's immediate supervisor denied relief at Level I because he did not have the authority to grant the relief sought. On May 2, 1996, Superintendent Larry Prichard denied the grievance at Level II. An evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia, on August 28, 1996. This case became mature for decision on October 7, 1996, upon receipt of Respondent's post-hearing submission.

The following findings of fact are derived from the record.

FINDINGS OF FACT

1. Grievant, a Health Program Specialist/School Nurse, is a professional employee and her county supplement was reduced 12.5%, \$275, by Respondent on March 31, 1996.
2. The county supplement of all professional employees, except for three professionals, Rodney Taylor, Brenda Lloyd, and Sandy Williams, was reduced 12.5% by Respondent on March 31, 1996. This error was not discovered by Respondent until after the statutory deadlines to reduce salary supplements had passed. Respondent intended to reduce all professional supplements by 12.5%.

3. Superintendent Prichard testified that he would recommend to Respondent, in accordance with salary/supplement reduction deadlines mandated by the Code, a 12.5% supplement reduction for Mr. Taylor, Ms. Lloyd, and Ms. Williams in the Spring of 1997.

4. County supplements of service personnel were not reduced.

DISCUSSION

A prima facie showing of favoritism ([See footnote 3](#)) or discrimination ([See footnote 4](#)), under W. Va. Code §18-29-3, consists of a grievant establishing:

(a) that she is similarly situated, in a pertinent way, to one or more other employees(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.

If the grievant successfully proves a prima facie case, a presumption of discrimination exists, which respondent can rebut by articulating a legitimate reason for its action. ([See footnote 5](#)) However, a grievant may still prevail if she can demonstrate the reason proffered by Respondent was mere pretext. See, W. Va. Inst. of Technology v. WVHRC & Zavareei, 383 S.E.2d 490 (W.Va. 1989); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990); Steele v. Harrison County Bd. of Educ., Docket No. 91-17-054 (Apr. 30, 1991); Britner v. W. Va. Dept. of Health and Human Resources, Docket No. 91-DHS-059 (June 13, 1991). ([See footnote 6](#))

Grievant alleges Respondent showed favoritism toward service employees since only professional supplements were reduced. However, Grievant failed to prove that she was "similarly situated" to service personnel. "All positions of employment with a county board of education in West Virginia must be classified as either 'professional' or 'service.'" See Opin., W.Va. Atty. General,

January 22, 1975." Brewer v. Mercer County Bd. of Educ., Docket No. 89-27-580 (June 29, 1990); Pugh v. Hancock County Bd. of Educ., Docket No. 90-15-024 (July 12, 1990). By operation of West Virginia Code professional and service personnel are not similarly situated. The Code requires county boards of education to treat these two groups differently in many areas. Professionals and service personnel are not similarly similar. Therefore, Grievant failed to prove by a preponderance of the evidence that favoritism occurred in this case.

However, even if Grievant proved the above elements of discrimination, Respondent articulated a legitimate reason for its action. Superintendent Larry Prichard testified the reduction in professional supplements was necessary because of a large budget deficit. He chose to reduce on professional supplements this year, but he did not want to go into "hacking and whacking mode." Next year, he anticipates reducing county service supplements, if necessary. Superintendent Prichard also testified that this was only one way he intends to attack the deficit, that the deficit is not correctable "overnight," and that the reduction in professional supplements was enough to balance the budget for the year.

Grievant also asserts that Respondent discriminated against her when it inadvertently failed to reduce the county supplements of Mr. Taylor, Ms. Lloyd, and Ms. Williams. Even though Grievant established a prima facie case of discrimination, Respondent articulated a legitimate reason which was not pretextual.

Ms. Lloyd is a vocational teacher, and all vocational teachers receive county supplements. However, she does not teach at either a high school or vocational school. She teaches at a middle school, and was, therefore, overlooked.

Ms. Williams, also a vocational teacher, receives a vocational supplement. However, she used to be a regular school nurse, and she did not receive a county supplement in that position. Erroneously, Respondent failed to consider Ms. Williams in her current position.

Mr. Taylor, teacher and half-time Dean, receives a county supplement for his Dean position. He was overlooked possibly because he was listed as a teacher, [\(See footnote 7\)](#) not a Dean, and because his Deanship became effective at the beginning of the current school year.

Therefore, even though Grievant might be accurate in her assessment that Respondent has a "very confusing, disorganized way they apparently have for keeping track of which employees get

supplements," these types of errors do not constitute discrimination. The Undersigned will not invalidate Respondent's budgetary measures merely because three people, out of approximately ninety-three, were overlooked.

Grievant alleged for the first time in her post-hearing submission the issue of whether any supplement reduction violated W. Va. Code §18A-4-5a. This would be a new and different grievance. See, W. Va. Code §18A-29-3(j). Furthermore, to allow grievant to advance this legal theory, at such a late date in these proceedings, and without Respondent having the opportunity to respond, would not be proper and would be manifestly unfair. This claim, therefore, will not be addressed. Crites v. Webster County Bd. of Educ., Docket No. 95-51-313 (Feb. 26, 1996).

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995).

2. Professional personnel is defined in W. Va. Code §18A-1-1(b) as "persons who meet the certification and/or licensing

requirements of the State, and shall include the professional educator and other professional employees.

3. Service personnel is defined in W. Va. Code §18A-1-1(e) as "those who serve the school or schools as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, school lunch, and as aides.

4. "All positions of employment with a county board of education in West Virginia must be classified as either 'professional' or 'service.' See Opin., W.Va. Atty. General, January 22, 1975." Brewer v. Mercer County Bd. of Educ., Docket No. 89-27-580 (June 29, 1990); Pugh v. Hancock County Bd. of Educ., Docket No. 90-15-024 (July 12, 1990).

5. By operation of West Virginia Code professional and service personnel are not similarly situated.

6. Favoritism is defined in W. Va. Code §18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

7. Discrimination is defined in W. Va. Code §18-29-3(m) as "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."

8. Grievant did not show by a preponderance of the evidence that Respondent engaged in any form of favoritism or discrimination prohibited under W. Va. Code §18-29-2.

Accordingly, the grievance is **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Randolph 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.

DATED: November 15, 1996_____

JEFFREY N. WEATHERHOLT
ADMINISTRATIVE LAW JUDGE

[Footnote: 1](#)

W. Va. Code §18A-1-1(b) provides:

"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.

[Footnote: 2](#)

W. Va. Code §18A-1-1(e) provides:

"Service personnel" shall mean those who serve the school or schools as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, school lunch, and as aides.

[Footnote: 3](#)

W. Va. Code §18-29-3(o) provides:

"Favoritism" means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

[Footnote: 4](#)

W. Va. Code §18-29-3(m) 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.

[Footnote: 5](#)

While the burden of production may shift, the overall burden of proof never does. See, Texas Dept. of Comm. Aff. v. Burdine, 450 U.S. 248 (1981).

[Footnote: 6](#)

The analysis is the same under both W. Va. Code §18-29-2 and W. Va. Code §29-6A-2.

[Footnote: 7](#)

Respondent does not provide a county supplement to non- vocational teachers.