CHARLES HUSS,

Grievant,

v. **Docket No. 96-RS-483**

WEST VIRGINIA DIVISION

OF REHABILITATION SERVICES,

Respondent.

D E C I S I O N

Grievant, Charles Huss, grieves two issues. One, the failure of the Division of Rehabilitative Services ("DRS") to grant him a retroactive pay increase, and two, DRS's refusal to utilize his five and one half years of professional experience in Ohio to adjust his salary as a teacher at the Rehabilitation Center ("Center"). Grievant requests as relief that he receive a retroactive pay increase from April 1, 1995, to December 31, 1995, and 18 years of credit for his Ohio "teaching" experience. This grievance was denied at Levels I and II, and denied, in part, and granted, in part, at Level III. Grievant was granted a retroactive pay increase back to January 1, 1996, by the Level III Decision. (See footnote 1) Grievant appealed to Level IV, and a hearing was held on January 28, 1997. This case was to become mature for decision on January 31, 1997, upon the submission of the Level III exhibits, as the parties elected not to submit proposed findings of fact and conclusions of law. (See footnote 2)

Issues

Grievant presents two issues. One, whether DRS incorrectly denied his retroactive pay increase from April 1, 1995, through December 31, 1995. Two, whether Grievant should be granted five and on half years of teaching experience for his experience in Ohio, even though he did not posses a teaching certificate.

After a through review of the record, the Undersigned makes the following findings.

Findings of Fact

1. Grievant has been employed by DRS since January 3, 1983. He started his employment with DRS as a teacher of the visually impaired. He became certified as a teacher for the first time, when the West Virginia State Department of Education granted him certification in Adult Basic Education on May 23, 1995.

2. In 1989, Grievant was promoted to a Rehabilitation Supervisor (See footnote 3), but was to maintain a 50% teaching load. The majorityof Grievant's teaching during this time was in the Low Vision Driving Program ("LVDP"). He supervised the work of five to six teachers in the Blind Unit at the Center.

3. During the early 90's and continuing through 1994, the LVDP at the Center had difficulty with the Division of Motor Vehicles ("DMV") accepting and testing its graduates. Because of this impasse, DRS asked Grievant to concentrate his time on gaining Legislative approval of the LVDP. Grievant agreed. This change in duties resulted in Grievant spending little time in teaching from April 1, 1995, to December 31, 1995, and the majority of Grievant's time was spent in working with the West Virginia Legislature at DRS's request.

4. Grievant taught approximately 42 hours from April 1, 1995, through December 31, 1995. For twelve weeks in the Summer of 1995, Grievant also supervised the work of an Intern. This supervision included some teaching, and utilized a total of three to four hours a week of Grievant's time. Level II Trans. at 69; Level IV, Grievant's Exh. 1.

5. On November 9, 1995, Grievant was notified he would be reclassified to a Teacher II on January 1, 1996. Grievant was not reclassified until April 1, 1996.

6. Because of budgetary constraints, funding for the salary increases was not available until April 1, 1995.

7. In 1993, the West Virginia Legislature amended W. Va. Code § 18A-4-17 to provide salary adjustments for various professionals at DRS, beginning July 1, 1994. DRS teachers were tobe paid on the scale of the county school district in which they worked; thus, Center teachers would be paid on the Kanawha County School system's pay scale. At first, DRS thought that to remain employed and to receive the increased salary, a Center instructor would be required to be a certified teacher. Several non-certified teachers were notified they would be "let go." Finally, an agreement between all parties involved allowed the Center's teachers to be "grandfathered" in at the Kanawha County School system's pay scale, whether they were certified or not. The only teaching experience that

could count for these non-certified teachers would be the years at the Center. If the non-certified Center teacher had verified, certified, teaching experience with another state school system, these additional years of teaching experience could count in calculating the salary increase.

8. Grievant's five and one half years of experience in Ohio were as a professional in the area of orientation and mobility. Although he was a certified professional in this area, he was not certified as a professional teacher.

Discussion

Both of the issues raised in this grievance must be answered in the negative. In terms of the retroactive pay increase from April 1, 1995, to December 31, 1996, the record is clear that DRS credited Grievant with 13 years of teaching experience, even though from 1989 on, he only taught approximately fifty per cent of the time and was classified as a supervisor. His Position Description Form indicates he functioned in a supervisory capacity. Hispromotion to the supervisory position resulted in a pay increase over his prior teacher's salary at the Center.

Grievant was aware, in 1993, that the Legislature had agreed to pay the teachers at the Center on the Kanawha County School system's pay scale, a change long sought and lobbied for by the teachers at the Center. He was also aware if he did not obtain a change in the law or DMV's interpretation of it, the LVDP where he taught could not continue. Indeed, this program stopped accepting students in 1995. Although it is commendable that Grievant wished to fight for a program he believed benefitted visually impaired people, it is also clear Grievant taught very little from April 1, 1995, to December 31, 1995. Thus, this time cannot be added to the thirteen years already granted to the Grievant.

As for the second issue, W. Va. Code § 18A-4-17(a) governs the

requirements for a teacher at the Center and states:

> [T]eachers employed at the state division of rehabilitation services facilities shall be required to be certified, licensed or trained and/or shall meet other eligibility classifications as may be required by the provisions of the chapter and by the state board regulations for comparable instructional personnel who are employed by county boards of education, and shall be paid at the equivalent rate of pay of teachers as set forth in section two [§ 18A-4-2] of this article . . . .

Initially, DRS interpreted this Code Section to mean that non- certified teachers could not be retained at the Center. A meeting with the West Virginia Legislative Oversight Commission on

Education Accountability, the Secretary of Education and the Arts, DRS's administration, and the Center teachers' representatives resulted in all agreeing the non-certified teachers at the Centercould be "grandfathered" in, would be allowed to count their non- certified teaching experience at the Center, and would not have to meet the stated requirements. (See footnote 4) Grievant Exh., Packet No. 2, August 8, 1995 Memo from Director William Dearien.

This interpretation and compromise allowed the Center to retain several staff members. Of course, Center teachers could count prior, certified teaching experience from other states just like other state teachers are allowed to do. See W. Va. Code §§ 18A-4-1 & 18A-4-2. What Grievant wants, is to be allowed to count additional, non-certified experience from Ohio. Because this experience was not as a certified teacher, these years cannot be counted as years of certified teaching experience. There is no language in the statute to allow that interpretation.

Center teachers wanted to be treated like this state's county school teacher in terms of pay scale, and now they are. One of the results of granting this equality is that now these same teachers must be treated like their peers in meeting other requirements. Requiring teaching experience from another state to meet the certification requirements of that state before it can be counted to meet teaching experience requirements in West Virginia cannot be seen as an incorrect interpretation of the Code Section and cannot be viewed as arbitrary and capricious.

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

Conclusions of Law

1. In a non-disciplinary action, the grievant has the burden of proving his case by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Grievant has failed to demonstrate DRS violated any rule, regulation, or statute, or acted in an arbitrary and capricious manner, by failing to give him a retroactive pay increase to April 1, 1995, through December 31, 1995, as Grievant was not performing the duties of a teacher during that time period.

3. Grievant has failed to demonstrate DRS violated any rule, regulation, or statute, or acted in an arbitrary and capricious manner, by failing to grant him an additional five and a half years of teaching experience for his non-certified experience as an Orientation and Mobility Specialist in

various locations in Ohio.

Accordingly, this grievance is **DENIED**.

Of course, Grievant's retroactive pay increase to January 1, 1996, granted in the Level III Decision, will not be disturbed.

Any party or the West Virginia Division of Personnel may appeal this decision to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: July 31, 1997

Footnote: 1

Grievant still seeks the retroactive pay increase from April 1, 1995, to December 31, 1995.

Footnote: 2

These exhibits were rerequested in July 1997, and were to be received on July 21, 1997, but were not. As the Undersigned noted the documents submitted by Grievant at Level IV were repetitious of many documents submitted below, and this grievance had been pending for some time, this Decision was made on the extensive evidence of record.

Footnote: 3

During the state-wide reclassification project, Grievant was reclassified as a Rehabilitation Office Supervisor.

Footnote: 4

New teachers at the Center would be required, in most incidences, to be certified.