DAVID YOST,
Grievant,

v. **Docket No. 06-13-083**

GREENBRIER COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

David Yost ("Grievant"), employed by the Greenbrier County Board of Education ("GCBE") as a teacher, filed a level one grievance on January 10, 2006, in which he alleged errors in his salary and employment term. For relief, Grievant seeks a ten-day extension of his employment term, and credit for military and industrial experience. After the grievance was denied at levels one and two, an appeal was made to level four on March 7, 2006. Grievant, represented by Ben Barkey, West Virginia Education Association Organization Development Specialist, and GCBE counsel Erwin Conrad, agreed to submit the grievance for decision based upon the level two record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before May 30, 2006.

The following facts have been derived from a preponderance of the evidence made part of the level two record, including a transcript of the evidentiary hearing conducted at that level.

Findings of Fact

1. Grievant was employed by GCBE on September 19, 2005, and is assigned as an instructor of Building and Construction Trades for the county vocational education program. Grievant is employed under a standard 200-day employment contract.

2. Grievant has a Bachelor's degree in Industrial Technology and a Master's degree in Aeronautical Science. Grievant does not hold teaching certification.

3. Prior to his employment with GCBE, Grievant accrued twenty years of military service in the United States Air Force. During this period Grievant served as a navigator, a flight crew member, and in numerous other assignments. Grievant had not engaged in teaching or construction work prior to his military service.

4. In 1997, Grievant created Yost Construction Company which he operated for approximately five years. He then worked for another construction company for six months. After recovering from surgery, Grievant established another company in 2003. The record does not specifically identify the nature of this company which Grievant operated until he was employed by GCBE.

5. At the time he was hired Grievant believed that he would receive one year of credit for every three years of experience he had earned in the military and private sectors.

6. Three vocational teachers are currently the beneficiaries of private sector experience credit for salary purposes. Two of the employees were hired before 1985, and the third employee was granted the credit erroneously.

7. Vocational instructors are employed under 200-day contracts, but are granted employment extensions of ten or twenty days, if necessary, to complete their programs.

8. Grievant's program is completed within the standard 200-day employment term.

9. To receive a Vocational Teaching Permit in Industrial and Technical Specializations, an applicant must have completed eight thousand clock hours, or four

years of experience in the occupation, or hold a bachelor's degree in the area and complete three years, or six thousand clock hours of work experience.

10. At the time he was hired, Grievant's salary was based on his Master's degree with zero years of experience.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 (2004); *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. "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 Res.*, Docket No. 92-HHR-486 (May 17, 1993). Grievant argues that GCBE's failure to grant him experience credit received by other vocational teachers is discriminatory. GCBE denies that it engaged in discrimination.

W. Va. Code § 18-29-2(m) defines discrimination 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." An employee attempting to prove discrimination under the education statute need only establish that he was treated differently from a similarly-situated employee, and the action was neither job-related nor agreed to by the grievant. *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (W. Va. 2004).

The minimum salary schedule for teachers, set forth in *W. Va. Code* § 18A-4-2, does not address experience credit for vocational instructors. Neither the State Department of Education nor GCBE has adopted a policy relating to this issue; however, early in the development of the vocational program GCBE granted experience credit to vocational instructors who did not have a degree. Specifically, after the number of hours/years used to secure a permit were deducted from the employee's total experience, three additional years of experience were credited as one year of teaching experience for salary purposes. GCBE has discontinued this practice within the past decade, but two employees continue to receive the benefit.

Because Grievant is not similarly-situated to those employees who do not hold a Bachelor's degree in the subject area they teach, he has failed to prove discrimination. However, even if Grievant should be entitled to experience credit, there is no evidence that he taught or engaged in construction work during his military career, and this time would not be considered. Regarding his construction experience, it does not appear that he has three additional years of experience after surrendering three years to secure a teaching permit. Because Grievant does not have the requisite additional years of experience, he would not qualify for the experience credit.

Addressing the matter of the extended employment term, Grievant does not assert that additional time is necessary for the completion of his program. Again, Grievant has offered no evidence that he is similarly-situated to a vocational instructor who is granted an extension, and has failed to prove discrimination.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 (2004); *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.

2. *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."

3. " An employee attempting to prove discrimination under the education statute need only establish that he was treated differently from a similarly situated employee, and the action was neither job related nor agreed to by the grievant. *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (W. Va. 2004).

4. Grievant has not met his burden of proof and established that he was treated differently than a similarly-situated employee.

Accordingly, this grievance is **DENIED**.

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

DATE: JULY 10, 2006

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SUE KELLER
SENIOR ADMINISTRATIVE LAW JUDGE