

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JOSEPH MIKER,**

**Grievant,**

**v.**

**Docket No. 2022-0581-MonED**

**MONONGALIA COUNTY BOARD OF EDUCATION,**

**Respondent.**

**DECISION**

Grievant, Joseph Miker, filed this grievance on January 24, 2022, against his employer, Monongalia County Board of Education, alleging discrimination, favoritism, uniformity of pay and responsibilities for like assignments. Grievant requested experience pay of previous experience. A level one conference was held on March 7, 2022. The grievance was granted in part following a discussion and offer by Respondent to award Grievant ten years of experience as set out in Decision dated March 16, 2022. A level two mediation was conducted on May 9, 2022. A level three evidentiary hearing was held before the undersigned on August 18, 2022. Grievant appeared in person and by his representative, Thomas Bane, The West Virginia Education Association. Respondent appeared by its attorney, Jennifer S. Caradine, Legal Counsel, Monongalia County Board of Education. This matter became mature for consideration upon receipt of the last of the parties' Findings of Fact and Conclusions of Law proposals on September 19, 2022.

**Synopsis**

Grievant is employed by the Monongalia County Board of Education as a heating, ventilation, and air conditioning teacher. Grievant's starting salary was based on 28 years

of experience for private sector work in the field. An audit conducted in 2013 concluded that Grievant was improperly paid for these years of experience. No action was taken by Grievant at that time. In December of 2021, Grievant obtained a Bachelor's degree and was awarded a pay increase consistent with the salary schedule. Grievant then sought 28 years of work experience. The record established that the initial years of experience had been awarded in error. Grievant's private sector experience did not comply with the statutory definition for years of experience for salary computation. In addition, Grievant provided no evidence to support his allegation of discrimination and favoritism. This grievance is denied.

The following Findings of Fact are based on the record of this case.

### **Findings of Fact**

1. Grievant is employed by the Monongalia County Board of Education as a heating, ventilation, and air conditioning ("HVAC") Career and Technical Education ("CTE") teacher at Monongalia Technical Education Center ("MTEC").

2. Prior to his employment with Respondent, Grievant worked in the private sector for an HVAC wholesale company. Grievant indicated that he started in 1984 at the warehouse, then moved to counter, then to assistant manager, and manager. Grievant served in a management capacity since 1986, managing a store front, conducting product ordering, and distribution. Grievant did not conduct servicing and installation of HVAC equipment.

3. Grievant began his current position at the start of the 2012-2013 school year.

4. Grievant's salary was based on his certification from the West Virginia Department of Education as a CTE instructor, plus 28 years of experience, and a \$3,000 annual stipend to further his education. Two other employees receive this stipend, and it is not authorized by policy or law.

5. During an audit of the Monongalia Technical Education Center program conducted in the spring of 2013, a finding was made that Grievant was improperly paid for experience without possessing a bachelor's degree. As a result, the experience pay was revoked from Grievant's salary, and he was required to pay back the amount that had already been paid to him.

6. In December of 2021, Grievant was awarded a Board of Regents Bachelor of Arts degree. Pursuant to West Virginia Board of Education Policy, his salary on the salary schedule went from a bachelor's degree to a master's +45, or a pay increase of over \$5,000 annually, effective December 17, 2021. Grievant then sought his 28 years of experience credit. Respondent reviewed his work history and denied the request. Grievant was awarded 10 years of experience for pay purposes beginning with the date of his latest CTE certificate endorsement of December 17, 2021, by the level one evaluator.

7. Respondent does not have a policy directing experience credit, but the practice has been that experience credit is granted only after the CTE teacher earns a bachelor's degree. In addition, the experience credit is granted only when the CTE teacher has verified prior experience as a certified teacher or working in the specific area. The credit is not based on knowledge, but rather on actual experience.

8. No other CTE teachers employed by the Monongalia County Board of Education are receiving experience credit for experience in sales and management positions.

9. In addition to Grievant, other CTE teachers working for the Monongalia County Board of Education who have submitted insufficient or irrelevant requests for experience credit have been denied.

### **Discussion**

This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

It is undisputed that Grievant is a valued employee and committed to the instruction of his trade. Grievant was initially found to be fully qualified for his teaching position based on the Department of Education V10-Verification of Work Experience. Grievant was credited with 28 years of experience at Sid Harvey Industries. The record established that the years of experience had been awarded in error.<sup>1</sup> There is no evidence in the record that Grievant's experience of 28 years were daily teaching duties, although some unknown amount of that time may have been in an advisory or instructional capacity for

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<sup>1</sup> Prior mistakes do not create an entitlement to future incorrect reimbursement. *Stover v. Div. of Corr.*, Docket No. 04-CORR-259 (Sept. 24, 2004); *Pugh v. Hancock County Bd. of Educ.*, 95-15-128 (June 5, 1995).

employees and contractors on behalf of the company. Grievant's private sector experience did not comply with the statutory definition for years of experience for salary computation. WEST VIRGINIA CODE § 18A-4-1(1) states, "Years of experience' means the number of years the teacher has been employed in the teaching profession, including active work in educational positions other than the public schools . . ."

While it was somewhat difficult to understand Grievant's basis for his claim at the level three hearing, Grievant's Statement of Grievance alleges discrimination and favoritism in seeking an award of twenty-eight years of work experience. Discrimination and favoritism have specific definitions for purposes of the grievance process. Discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) that he or she has been treated differently from one or more similarly-situated employee(s);
- (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) that the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional

or advantageous treatment of a similarly situated employee unless agreed to in writing or related to actual job responsibilities.” W. VA. CODE § 6C-2-2(h).

Grievant provided no evidence to support his allegation of discrimination and favoritism. The record was developed by Respondent to support a finding that no CTE teachers are paid based on a same or similar employment history of Grievant. The record also supports a finding that CTE teachers are required to have “in the field” experience doing the day-to-day work in the area for which they are teaching. Nothing in the record of this case establishes that Grievant has been the victim of discrimination or favoritism.

Respondent has no policy governing the granting of experience credit. Counsel for Respondent indicates that it must rely on past practice. “A deviation from past practice simply represents one of a number of factors to be considered when determining if a discretionary decision by an employer is arbitrary and capricious. *Bell v. Department of Trans/DOH*, Docket No. 2008-0826-CONS (July 8, 2009). CTE teacher must have experience as a certified teacher with a bachelor’s degree, or experience in the field during the work on a day-to-day basis and a bachelor’s degree. In the instant case, Grievant worked in the warehouse, then in a management capacity for a wholesale, managing a store front, and distribution. The record is clear that Grievant was not in the installation and repair operation on a day-to-day basis. Respondent followed its own practice of denying experience credit where the CTE teacher was not conducting installation and maintenance in the area they teach.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Discrimination is defined as “any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. Favoritism is defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee

unless agreed to in writing or related to actual job responsibilities.” W. VA. CODE § 6C-2-2(h).

4. Grievant provided no evidence of discrimination or favoritism.

5. Respondent followed its own practice of denying experience credit where the CTE teacher was not conducting day-to-day operations in maintenance and installation in the area they teach. While Grievant disagrees with Respondent, he has not proven that Respondent reached a decision that was so implausible that it cannot be ascribed to a difference of opinion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Intermediate Court of Appeals.<sup>2</sup> Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

**Date: November 1, 2022**

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**Ronald L. Reece**  
**Administrative Law Judge**

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<sup>2</sup>On April 8, 2021, Senate Bill 275 was enacted, creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend W. VA. CODE § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.