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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**  
ARCH A. MOORE, JR.  
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**ANTHONY VanDYKE**

v.

Docket No. 33-88-098

**MCDOWELL COUNTY BOARD OF EDUCATION**

D E C I S I O N

Grievant, Anthony VanDyke, was employed by the McDowell County Board of Education until the end of the 1987-88 school term.<sup>1</sup> He filed a grievance on March 28, 1988 alleging he had been misclassified as a Plumber I. A Level II hearing was held April 21, 1988 and a decision at that level was adverse to the grievant. At Level III the Board voted to uphold the findings of the hearing officer at Level II. A Level IV hearing was held July 13, 1988.

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<sup>1</sup>Grievant lost his position when the Board initiated a reduction in force during the 1987-88 school term. That action is not contested in the present grievance.

The parties essentially do not dispute the facts giving rise to the grievance. Grievant was previously employed by the Board as a custodian and in October 1986 he applied for and was awarded the position of plumber in the maintenance department. He was assigned to a maintenance crew headed by Mr. Everett Roberts, who was classified as a mason. Grievant entered into his new job on October 13, 1986 and his duties were primarily those of a drywaller/plasterer until March 28, 1987 when he filed his grievance.<sup>2</sup> Only occasionally was he assigned tasks related to plumbing during this period of time. Mr. VanDyke contends his duties and responsibilities were comparable to those of a mason and he should have been classified as such and compensated accordingly. He requests as relief the difference in salaries for the two positions and reclassification as a mason for the purposes of the preferred recall list.

The Board generally concedes grievant was not performing the duties of a plumber but characterizes his position during the period of time in question as a "helper" who only assisted Mr. Roberts in drywalling and plastering jobs which were in no way associated with masonry projects. The Board's additional assertion that the grievant did not object to the responsibilities placed upon him in a timely manner is dispositive of the grievance and the merits of the opposing positions need not be reached.

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<sup>2</sup>The parties agree that at that time Mr. VanDyke was assigned duties normally associated with a plumber position.

The testimony of the grievant at both the Level II hearing and Level IV hearing indicates he was aware on the first day in his new position that his duties were in no way associated with plumbing, yet he continued performing essentially the same duties for over one and one-half (1½) years before objecting to his classification. W.Va. Code, 18-29-4 does allow a school employee to file a grievance within fifteen days of the latest occurrence of a continuing grievable practice but that provision does not grant the employee a right to acquiesce in the practice and later disclaim it. The West Virginia Education and State Employees Grievance Board, following the holding in Maynard v. Board of Education of the County of Wayne, 357 S.E.2d 246 (W.Va. 1987), has previously held that when an employee is aware of a possible violation of his rights and does not timely pursue a resolution of the matter or show valid reason for a delay in excess of the timelines for filing a grievance, such matter is untimely and barred by the doctrine of laches. Earls v. Cabell County Board of Education, Docket No. 06-86-360-1; Zban v. Cabell County Board of Education, Docket No. 06-87-010; Smith v. West Virginia School of Osteopathic Medicine, Docket No. BOR88-051-4. Grievant's testimony indicated he was not engaged in any communications with his superiors to obtain a more suitable classification prior to the filing of his grievance. Moreover, his testimony revealed he had never made any objections prior

to that time to the imposition of duties which he felt placed him in a higher pay scale.

In addition to the foregoing, the following findings of fact and conclusions of law are made.

#### FINDINGS OF FACT

1. In October 1986 the grievant, Anthony VanDyke, applied for and received the position of Plumber I with the McDowell County Board of Education.

2. On October 13, 1986 grievant entered into his duties of his position, which primarily consisted of drywalling and plastering in the renovation of existing school buildings.

3. Grievant's duties remained essentially the same until March 28, 1988, when he filed a grievance alleging he was working out of classification.

#### CONCLUSIONS OF LAW

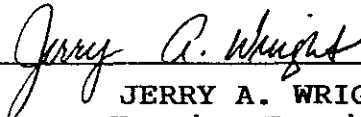
1. An employee must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of expenditure of public funds, and when said employee fails to show a valid reason for a delay in excess of the timelines for filing a grievance contained in W.Va. Code, 18-29-1, et seq., such matter is untimely and barred by the

doctrine of laches. Maynard v. Board of Education of the County of Wayne, supra; Earls v. Cabell County Board of Education, supra; Zban v. Cabell County Board of Education, supra; Smith v. West Virginia School of Osteopathic Medicine, supra.

2. Grievant's failure to make objection to the imposition of duties inconsistent with a Plumber I position in October 1986 or show a valid reason for his delay in filing a grievance over the action constitutes laches and precludes consideration of the matter.

Accordingly, the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of McDowell County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of said decision. (W.Va. Code, 18-29-7) Please inform this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

  
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JERRY A. WRIGHT  
Hearing Examiner

Dated: October 18, 1988