THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARK O'DELL,
Grievant,

v. **Docket No. 2020-0671-NicED**

NICHOLAS COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Mark O'Dell, is employed by Respondent, Nicholas County Board of Education. On December 3, 2019, Grievant filed this grievance against Respondent stating,

> The Respondent is crediting and paying David Francisco, a CTE teacher, with approximately 24 years of experience. Grievant, a CTE teacher, believes that the Respondent may be paying Mr. Francisco for years of experience in excess of Respondent's Policy GCDA which limits CTE teachers a maximum of 8 years of experience for "verified work experience, related to their teaching duties…". Grievant alleges a violation of West Virginia Code 18A-4-5a, 6C-2-2(d), and Respondent's Policy GCDA.

For relief, Grievant seeks "payment for an equivalent number of years for verified work experience if Mr. Francisco is receiving payment for verified work experience in excess of 8 years, retroactive and prospective wages, benefits, and an award of interest on all monetary sums."

Following the January 3, 2020 level one conference, a level one decision was rendered on January 22, 2020, denying the grievance. Grievant appealed to level two on January 28, 2020. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on July 13, 2020. A level three hearing was held on October 16, 2020, before the undersigned at the Grievance Board's Charleston, West

Virginia office via video conference. Grievant was represented by by counsel, John Everett Roush, AFT-WV/AFL-CIO. Respondent was represented by counsel, Melissa Adkins. This matter became mature for decision on November 17, 2020, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a career and technical education teacher. Upon his hire, Grievant was given years of experience credit on the state minimum salary schedule for industry work experience capped at eight years pursuant to Respondent's policy. A newly-hired employee, who previously worked for another county board of education, received uncapped industry experience based on Respondent's practice of accepting the years of experience reported from another county board of education without application of its own policy. This practice constitutes discrimination and favoritism; however, Grievant failed to prove facts necessary to provide a remedy. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a career and technical education ("CTE") teacher at the Nicholas County Career and Technical Center and has been so employed since the 2014 – 2015 school year.

2. Respondent's policy, *Employment of Career and Technical Program Instructors*, governs the calculation of "years of experience" for CTE teachers. The policy states, "Instructors holding WVDE professional teaching certification will receive

their current West Virginia years of experience" and "Instructors employed with business and industry experience will receive their years of verified work experience, related to their teaching duties, up to and including eight (8) years of experience."

3. Upon his hire, pursuant to the policy, Grievant was credited with eight years of experience based on his industry experience.

4. Respondent hired David Francisco as a probationary CTE teacher in the 2019 – 2020 school year.

5. Mr. Francisco had previously been employed as a CTE teacher by the Braxton County Board of Education from the 2014 – 2015 school year through the 2018 - 2019 school year.

6. Upon his hire, the Braxton County Board of Education credited Mr. Francisco with nineteen years of experience based on his industry experience.

7. When processing new employees who previously worked for another county board of education, Respondent requests the years of experience from the other county board and credits the new employee with that experience without further review.

8. For Mr. Francisco, Respondent credited him with twenty-four years of experience as certified by the Braxton County Board of Education without regard to its own policy that caps industry 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. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Grievant argues that the acceptance of Mr. Francisco's industry years of experience in excess of Respondent's policy violated the uniformity provisions of West Virginia Code § 18A-4-5a and constituted discrimination or favoritism. Respondent argues Grievant has failed to prove Respondent discriminated against him and failed to present evidence of his qualifying work experience.

The "uniformity provision" appears in the West Virginia Code as follows: "County boards of education in fixing the salaries of teachers shall use at least the state minimum salaries established under the provisions of this article. The board may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements. . . ." W. VA. CODE § 18A-4-5a(a). It is unclear if this provision applies in this case. Respondent's policy is similar to the one considered by the West Virginia Supreme Court of Appeals in *Lockett v. Fayette Cty. Bd. of Educ*., 214 W. Va. 554, 591 S.E.2d 112 (2003) (*per curiam*), in which the Court found the uniformity provision did not apply. The *Lockett* grievant was a vocational teacher who held a professional teaching certificate and was placed on the state minimum salary schedule based on her education and teaching experience, without credit for industry experience. The *Lockett* respondent had a policy which granted years of experience for placement on the state minimum salary schedule to vocational teachers who did not hold a professional teaching certification. The *Lockett*

grievant argued this violated the uniformity provisions of West Virginia Code § 18A-4-5a. In rejecting this argument, the Court stated,

> Simply put, uniformity of pay within the meaning of the provision of West Virginia Code § 18A-4-5a that pertains to salary supplements does not require uniformity of pay with regard to the setting of vocational teacher's salaries in general. Separate uniformity of pay provisions are set forth in West Virginia Code § 18A-4-5a that require county pay schedules to be uniform "as to the classification of training, experience, responsibility and other requirements." W.Va. Code § 18A-4-5a. If anything, this case aptly demonstrates the uniformity that is required by this statutory provision as vocational certified instructors do not receive an experience credit for non-teaching work experience and permitted instructors do, for the reasons discussed above. *Because there is no salary supplement at issue in this case, there is consequently no violation of the uniformity in pay provisions that pertain to such salary supplements.*

Id. at 561, 591 S.E.2d at 119 (emphasis added). Like *Lockett*, Respondent's policy does not constitute a salary supplement but, instead, determines how it will place an employee on the state minimum salary schedule.

Regardless, Grievant also argues that Respondent's actions are discrimination or favoritism, which require a similar analysis. "'Discrimination' means 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). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h).

Grievant and Mr. Francisco are both employed by Respondent as vocational teachers at the Nicholas County Career and Technical Center who received credit for industry experience as years of experience for salary purposes. The Respondent's decision to credit Mr. Francisco additional years of experience for his industry experience had nothing to do with his job responsibilities but was simply a result of its practice to accept the years of experience provided by another county board of education without review or application of its own policy. Grievant did not agree to this difference in treatment in writing. This is discrimination and favoritism.

Respondent argues it properly accepted Mr. Francisco's years of experience as certified by the Braxton County Board of Education and therefore did not discriminate against Grievant. In support, Respondent cites two prior Grievance Board decisions regarding the calculation of years of experience.

Respondent cites *Zain v. Wetzel County Board of Education,* Docket No. 52-86-251-2 (Aug. 12, 1986) for the argument that it could not deny Mr. Francisco the experience credit that had been previously awarded by the Braxton County Board of Education. *Zain* does not apply. In *Zain*, the grievant had been awarded experience credit by another county, which the respondent had recognized upon its hire of the grievant. After the grievant had worked for the respondent for approximately five years, the West Virginia State Tax Department ("WVSTD"), in an audit of the respondent, determined the grievant's experience did not qualify. The WVSTD based this determination on a West Virginia Attorney General opinion, which stated that a teacher who sought experience credit for her experience as a teacher's aide was not entitled to credit for that experience. The respondent removed the experience credit and required

the grievant to reimburse a year of "overpayment." The Grievance Board determined that the respondent's actions were improper because the state tax department had misapplied the West Virginia Attorney General opinion and the respondent's action in removing the credit after Grievant had been employed for five years was untimely. Specifically, regarding the West Virginia Attorney General opinion, the Grievance Board found that it did not apply because the experience credit for vocational teachers was different because of the special regulations relating to vocational teachers.

Respondent also cites *McKisic v. Dep't of Educ*., Docket No. 2013-2262-CONS (Nov. 20, 2014). *McKisic* involved the state Department of Education ("DOE"), which was required by statute to pay its educational personnel the equivalent of the daily rate of pay of the comparable position in the public schools of the county where the institution is located. The *McKisic* grievant had not been awarded industry experience credit when employees located in two other counties had been awarded such credit. The Grievance Board determined that this difference in treatment was because the county in which Grievant worked did not have a consistent, documented practice whereas the two other counties had a consistent practice which had been documented in writing to the DOE. Consequently, the Grievance Board determined the DOE's practice to be reasonable. *McKisic* does not apply to this case. *McKisic* involves a different statute than those at issue here and specifically requires pay to be set based on the county of location for a statewide agency. It is not discrimination for different counties to pay differently because counties have been given the authority to establish their own salary schedules by West Virginia Code § 18A-4-5a. In this case, it is not a

statewide agency but a county accepting another county's salary schedule to its own employee.

Essentially, in citing these cases, it appears Respondent attempts to show a lack of discriminatory intent. As Grievant's counsel points out, Respondent's lack of discriminatory intent is not relevant. Intent is not one of the elements of discrimination/favoritism for grievance purposes. Whether Respondent believed it was justified in not applying its policy to Mr. Francisco does not change the result that it applied its policy to Grievant and not Mr. Francisco, who were similarly-situated employees.

Grievant argues he is entitled as relief to an experience credit equal to that of Mr. Francisco. This is not an appropriate remedy. The discrimination in this instance was in the failure to apply the policy equally to Mr. Francisco and Grievant, which permitted Mr. Francisco to receive an industry experience credit greater than the policy allowed. Granting Grievant the same amount of experience without regard to whether he actually has the same amount of experience could result in a windfall to Grievant. If there was no injury to Grievant as a result of the failure to apply the policy to Mr. Francisco then no relief would be appropriate. Nor would the remedy be as Respondent suggests, which would be to order the removal of the excess experience credit from Mr. Francisco as Mr. Francisco is not a party to this case.

Respondent asserts Grievant failed to prove he had verified work experience relating to his teaching duties beyond what he was credited.[1] Grievant did not place

[1] Grievant asserts Respondent should not be permitted to raise this argument as it was not raised at level one of the grievance procedure, citing a recent circuit court decision in another grievance case. In the decision Grievant cites, the circuit court

into evidence any documentation of his work experience or teaching duties. The only evidence offered on these facts is the brief testimony of Grievant. Although Grievant's counsel asserts Grievant is employed as a "Building Construction Instructor," Respondent asserts and Grievant testified that he teaches Carpentry. Therefore, Grievant must prove his years of experience in Carpentry.

While sworn testimony could certainly be sufficient to prove experience, in this instance, Grievant's testimony was vague. On direct, Grievant testified he had worked for a construction company from 1985 until he started his own construction company in 1990. Grievant started as a laborer mixing mortar and worked as a laborer until he became foreman in 1989. Grievant received his journeyman electrician's license in 1990 and his master's plumbing license in 2005. Regarding his work with his own company, he stated that "we built two homes a year" until he started as a teacher with Respondent in 2014. Grievant also worked as a substitute bus driver from 2001 – 2006, as a full-time bus driver from 2006 – 2014, as a maintenance worker for Headstart from 2011 – 2012, and as Head Basketball Coach for Richwood High School from 2012 – 2016.

On cross examination, Grievant provided some limited additional detail, stating that, although he started out mixing mortar and his duties varied from day to day, it was "more times than not" carpentry such as framing structures and pouring concrete. However, Grievant admitted it takes 4000 hours of experience to obtain a journeyman's

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determined it was error for the administrative law judge to consider new allegations raised by the grievants at level three that had not been raised in their level one filing. Respondent's assertion that Grievant failed to prove a necessary element of his claim is not equivalent to a grievant's failure to properly amend his/her claim to include new allegations.

electrician license, which would indicate that his primary duties were not carpentry during that time. As to Grievant's duties once he started his own business, Grievant offered no testimony as to what percentage of his time was spent in actual carpentry as opposed to running his business or performing electrical or plumbing work. In addition, of that time, Grievant also worked as a full-time bus operator for eight years, as a substitute bus operator for five years, as a coach for 2 years, and as maintenance for a year. Thus, in the later years of his business, Grievant's business overlapped with other jobs, which would have limited the time he had available for carpentry through his business. Therefore, it is not clear from the evidence presented how many years of relevant experience Grievant possesses making it impossible to grant as a remedy additional years of industry experience credit. Failure to prove facts necessary to grant a remedy can defeat a grievance claim. *See Buchanan v. Mercer County Bd. of Educ.,* Docket No. 2019-0051-MerED (Oct. 11, 2018); *Cook v. Lincoln County Bd. of Educ.,* Docket No. 2012-0106-LinED (Dec. 4, 2012).

The following Conclusions of Law support the decision reached.

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. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "'Discrimination' means 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). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h).

3. Grievant proved Respondent's failure to apply its own policy to a newly-hired employee, who previously worked for another county board of education, was discrimination and favoritism.

4. Failure to prove facts necessary to grant a remedy can defeat a grievance claim. *See Buchanan v. Mercer County Bd. of Educ.,* Docket No. 2019-0051-MerED (Oct. 11, 2018); *Cook v. Lincoln County Bd. of Educ.,* Docket No. 2012-0106-LinED (Dec. 4, 2012).

5. Grievant failed to prove how many years of relevant experience he possesses making it impossible to grant as a remedy additional years of industry experience credit.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* 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 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 civil action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: January 8, 2020

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Billie Thacker Catlett
Chief Administrative Law Judge