

**DORIS DEAL,**

**Grievant,**

**v.**

**Docket No. 96-26-106**

**MASON COUNTY BOARD OF EDUCATION,**

**Respondent.**

### **DECISION**

Doris Deal (Grievant), employed by Respondent Mason County Board of Education (MCBE) as a special education aide, complains that she is not being compensated in accordance with W. Va. Code § 18A-4-5b because she has not received credit for work experience with a prior employer, as was granted to other MCBE employees. Her grievance was initiated at Level I on January 29, 1996, and waived to Level II where a hearing was conducted on February 13, 1996. Following denial at Level II in a decision issued by the Superintendent's designee, Suzanne Dickens, on February 14, 1996, Grievant appealed to Level III. MCBE waived participation on March 4, 1996, and Grievant appealed to Level IV on March 8, 1996. A Level IV evidentiary hearing was held in this Board's office in Charleston, West Virginia, on June 4, 1996. This matter became mature for decision upon receipt of the parties' post-hearing arguments on July 11, 1996.

The relevant facts necessary for resolution of this case are substantially undisputed, and the following findings of fact are appropriately made from the record developed through Level IV.

### **FINDINGS OF FACT**

1. Grievant is employed by the Mason County Board of Education (MCBE) as a special education aide assigned to Point Pleasant High School.
2. Grievant's duties as an aide include:

- a. Maintains a high level of ethical behavior and confidentiality of information about students as is expected of a fully licensed teacher.
- b. Works with individuals or small groups of students to reinforce learning of material or skills initially introduced by the teacher.
- c. Guides independent study, enrichment work, learning centers, etc.[,] set up and assigned by the teacher.
- d. Aids individual children with toileting, feeding, grooming, and other self-help areas as directed by the teacher.
- e. Assists with large group activities as drill work, reading about, story telling, i.e., Peabody and Duso Lessons.
- f. Assists the teacher in devising special strategies for reinforcing material or skills based on students' needs, interests, and abilities as planned by the teacher.
- g. Checks and records student attendance, and collects and records collection of monies when assigned by the teacher.
- h. Checks notebooks, corrects papers, supervises testing, and/or make-up work as assigned by the teacher.
- i. Keeps bulletin boards and other classroom learning displays up-to-date at the direction of the teacher.
- j. Operates and cares for equipment used in the classroom for instructional purposes.
- k. Assists students in mastering and caring for equipment and/or instructional materials as assigned by the teacher.

l. Assists with lunches, snacks, clean-up/wash-up and toilet routines.

m. Assist[s] in positioning and transporting of students requiring such assistance.

R Ex 1 at L IV. See W. Va. Code § 18A-4-8.

3. Prior to her employment with MCBE, Grievant was employed in a clerical capacity in the Mason County Clerk's Office from May 1961 to April 1976, and as a child care worker at Mount Vernon Day Care Center, operated by her mother, from 1976 to 1980. L II HT at 8-17; G Exs 1 & 2 at L II.

4. Grievant's duties in the Mason County Clerk's Office included typing, record keeping, collecting money, and operating and maintaining office equipment. G Ex 1 at L II; L II HT at 8-9.

5. Grievant's duties at the Mount Vernon Day Care Center included feeding, grooming, toileting, cleaning-up, and providing basic education such as teaching the alphabet and counting to pre-school children. G Ex 2 at L II, Deal testimony at L IV.

6. Prior to December 26, 1995, school service personnel in various classifications were awarded up to three years' increment credit for prior work experience, on a case-by-case determination that such experience was related to the employee's current job duties. 7. Personnel granted increment credit for prior work experience include: Glenva Hoover-Hughes, an Auditor; Phyllis Stevens, a Secretary III/Switchboard Operator -Receptionist; Anita Russell, a Secretary; Linda Henry, an Accountant; Permalee Layton, an Accountant; and Debbie Sayre, a Secretary. Miller testimony at L IV.

8. Beginning in December 1993, MCBE began to consider discontinuing the practice of granting experience credit as described in Findings of Fact Numbers 6 and 7, above. R Ex 1 at L II.

9. On December 26, 1995, MCBE awarded three years' experience credit to service employees Sayre and Layton as described in Finding of Fact Number 7, above. R Ex 4 at L II.

10. On December 26, 1995, after approving the experience credit described in Finding of Fact Number 9, above, MCBE adopted a policy which formally discontinued the Board's prior practice of granting increment credit to service personnel for prior work experience. However, employees who

had previously been awarded increment credit continued to receive pay including such increment. R Exs 4 & 6 at L II; Miller testimony at L IV.

11. Several years ago, MCBE granted two years' increment credit to mechanics with at least two years' prior experience at the time they were hired, as an incentive to obtain qualified applicants for hard-to-fill positions. Miller testimony at L IV. 12. Increment credit results in employees being advanced on the pay scale established by W. Va. Code §§ 18A-4-8 and 18A-4-8a, so that they are compensated as if they have been employed by the board for a greater length of time than their actual period of employment.

13. In each case where experience credit was granted, such decision was duly noted in the public minutes of that particular MCBE meeting. Miller testimony at L IV; G Ex 4 at L II.

14. Prior to December 26, 1995, MCBE had not reduced the policy under which employees were granted experience credit to writing, nor had MCBE notified its current employees of the availability of such credit.

15. Prior to Grievant's application, no MCBE service employee in the aide classification had applied for or received increment credit for prior work experience.

16. On January 9, 1996, Grievant submitted a request for experience credit based upon her prior work experience with the County Clerk's Office and the Mount Vernon Day Care Center. G Ex 3 at L II.

17. Grievant's request for experience credit was treated as untimely and was not considered on its merits by MCBE.

### **DISCUSSION**

Grievant alleges that, by failing to grant her experience credit for her employment at a day care center and the County Clerk's office, MCBE is violating W. Va. Code § 18A-4-5b (1993). That statute provides in pertinent part:

The county board of education may establish salary schedules which shall be in excess of the state minimum fixed by this article.

These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like duties and assignments within the county .... (Emphasis added).

W. Va. Code § 18A-4-5b is directed toward employees who perform comparable work but receive dissimilar pay. Fowler v. Mason County Bd. of Educ., Docket No. 94-26-037 (Oct. 6, 1994). See Harper v. Pendleton County Bd. of Educ., Docket No. 89-36-708 (Aug. 21, 1990). A grievant seeking to establish a violation of W. Va. Code § 18A-4-5b must establish each essential element of her claim by a preponderance of the evidence. Fowler, supra; Collins v. Wayne County Bd. of Educ., Docket No. 50-86-368-1 (Aug. 20, 1987). This grievance presents the question of whether the "uniformity" provision in W. Va. Code § 18A-4-5b restricts MCBE from continuing to maintain a salary differential which lingers despite rescission of a prior policy. This Grievance Board has previously determined that § 18A-4-5b prohibits such a practice.

In Swisher v. Preston County Board of Education, Docket No. 39-87-266-2 (Apr. 29, 1988), a similar situation was addressed wherein the school board was in the process of "discontinuing" supplemental pay to bus operators who drove mid-day runs. The grievants in that matter had been hired to drive mid-day runs that were posted subsequent to the decision to phase out the supplemental pay. Drivers who had previously received the supplemental pay continued to receive it, while the grievants did not. The administrative law judge in Swisher declared:

While there are no statutory requirements that mid-day runs be awarded extra compensation, once it is awarded, [W. Va. Code §] 18A-4-5b requires that it be paid uniformly. Phasing out supplemental pay would result in some individuals receiving additional pay for the same work which is done by other individuals who receive no additional pay. Although this situation would exist for only a limited period of time until the paid employees are eliminated through attrition, the lack of uniformity is prohibited for any period of time. Elimination of supplemental pay for mid-day runs will have to be achieved in a manner which will treat all affected employees in a uniform manner.

Swisher, supra, at 4-5.

Further, in Miller v. Boone County Board of Education, Docket No. 93-03-110 (June 11, 1993), this Grievance Board concluded that a lack of uniformity between employees hired when one pay scale was in effect, and employees hired after a new pay plan had been adopted, abrogated W. Va. Code § 18A-4-5b. Similarly, in Weimer- Godwin v. Board of Education, 179 W. Va. 423, 369 S.E.2d 726 (1988), the West Virginia Supreme Court of Appeals, interpreting a parallel uniformity provision in W. Va. Code § 18A-4-5a governing teachers' pay, declared that once a county board pays additional compensation to certain teachers, it must pay the same amount of additional compensation

to other teachers "performing like assignments and duties." [\(See footnote 1\)](#) There was evidence that MCBE granted up to two years' experience credit to mechanics with at least that amount of prior experience in private industry in an effort to attract qualified candidates to such positions. There was no evidence that similar experience credit has been extended at the time of hiring to any other category or classification of service employees. Thus, Grievant, a special education aide, does not perform "like assignments and duties" to these mechanics within the meaning of W. Va. Code § 18A-4-5b. See Clark v. Kanawha County Bd. of Educ., Docket No. 95-20-559 (Apr. 15, 1996); Wilkinson v. Lincoln County Bd. of Educ., Docket No. 95-22-248 (Sept. 7, 1995); Hissom v. Hancock County Bd. of Educ., Docket No. 94-15-568 (Jan. 31, 1995); Dillon v. Cabell County Bd. of Educ., Docket No. 93-06-438 (Aug. 9, 1994).

With regard to other service personnel who were awarded experience credit subsequent to their initial employment, based upon work experience obtained prior to their employment by MCBE, Grievant's situation is indistinguishable from these other employees. [\(See footnote 2\)](#) See Wilkinson, supra; Meadows v. Jefferson County Bd. of Educ., Docket No. 19-88-192 (Dec. 29, 1988). See generally Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). Therecord before the undersigned indicates that MCBE granted increment credit to every service employee in good standing who requested such credit and satisfied the Superintendent that his or her prior experience was related to the duties of their present position.

Although W. Va. Code § 18A-4-5b requires MCBE to treat Grievant in the same manner as other service personnel who were retroactively awarded increment credit, the inquiry does not end here. MCBE, apparently anticipating such an outcome, further argued that Grievant's prior work experience is not sufficiently related to the duties of her current position to support award of the experience credit requested. Because MCBE decided these questions on a case-by-case basis without any clearly articulated criteria for awarding credit, and Grievant's request was not addressed on its merits by MCBE, there is a very limited record available to decide this issue. At this point, applying a "discrimination" analysis under W. Va. Code § 18-29-2(m) facilitates adjudication of this question.

At Level IV, Grievant amended her grievance to allege that MCBE's actions in regard to denying her experience credit constituted "discrimination" under W. Va. Code § 18-29-2(m). MCBE consented to this amendment. [\(See footnote 3\)](#) "Discrimination" is defined by § 18-29-2(m) 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." This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), must demonstrate the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

E.g., Kirchner v. W. Va. Dept. of Educ., Docket No. 94-DOE-569 (Sept. 26, 1995); Webb v. Kanawha County Bd. of Educ., Docket No. 94-20-210 (Nov. 22, 1994); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Applying this prima facie analysis to the facts presented here, Grievant has demonstrated that she is similarly situated to one or more other service personnel employed by MCBE as service personnel, and she has been treated differently, to her detriment, because she has been denied increment credit towards her pay for prior experience in a related position. Thus, Grievant established a prima facie case of discrimination under W. Va. Code § 18-29- 2(m). See, e.g., Kirchner, supra; Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Once a grievant establishes a prima facie case of discrimination under § 18-29-2(m), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Steele, supra. MCBE has explained that, even if service employees in Grievant's classification must be treated the same as other service employees receiving increment credit to comply with W. Va. Code § 18A-4-5b, Grievant's prior experience is not sufficiently job-related to warrant award of such credit. Grievant is employed by MCBE as a special

education aide. Comparing her job description with the duties she performed at the Mason County Clerk's Office, according to the documentation and testimony in the record, it does not appear that this prior work experience was related to special education. Moreover, such work experience is significantly different from working in a school environment where the primary emphasis is upon learning. Accordingly, the undersigned administrative law judge finds that MCBE has identified a job-related, non-pretextual reason for treating Grievant differently by not awarding her experience credit for the time she worked in the Mason County Clerk's Office. See Tex. Dept. of Community Affairs, supra; Frank's Shoe Store v. W. Va. HumanRights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

With regard to Grievant's work experience in a day care center, the record before the undersigned is less than crystal clear. Certainly, there are some similarities between Grievant's duties in a day care center and some of her duties as an aide. However, inasmuch as Grievant is presently working in special education at the high school level, and MCBE has not previously granted experience credit to any other aides, MCBE has established a legitimate, job-related basis for denying experience credit to Grievant, and Grievant has not shown that such reasons are merely a pretext. Accordingly, although MCBE should have considered Grievant's request for experience credit on its merits, in order to comply with the "uniformity" provision in W. Va. Code § 18A-4-5b, Grievant has not demonstrated that she was harmed by such refusal in that MCBE had legitimate reasons for concluding that her prior work experience was insufficiently job-related to warrant granting this discretionary benefit. See Tex. Dept. of Community Affairs, supra; Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

### **CONCLUSIONS OF LAW**

1. W. Va. Code § 18A-4-5b requires uniformity of compensation for all persons performing like assignments and duties. Mersing v. Preston County Bd. of Educ., Docket No. 89-39-513 (July 12, 1991); Hardbarger v. Ritchie County Bd. of Educ., Docket No. 89-43-74 (Aug. 31, 1989). See



Weimer-Godwin v. Bd. of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988).

2. A grievant seeking to establish a violation of W. Va. Code § 18A-4-5b must establish each essential element of her claim by a preponderance of the evidence. Fowler v. Mason County Bd. of Educ., Docket No. 94-26-037 (Oct. 6, 1994); Collins v. Wayne County Bd. of Educ., Docket No. 50-86-368-1 (Aug. 20, 1987).

3. Where a county board of education attempts to "phase out" a policy or practice granting supplemental pay by rescinding the policy prospectively without eliminating the additional compensation granted to other similarly situated service personnel, there is a lack of pay uniformity, prohibited by W. Va. Code § 18A-4-5b. See Miller v. Boone County Bd. of Educ., Docket No. 93-03-110 (June 11, 1993); Swisher v. Preston County Bd. of Educ., Docket No. 39-87-266-2 (Apr. 29, 1988).

4. Grievant, a special education aide, does not perform "like assignments and duties" to service personnel employed by MCBE and classified as mechanics who received up to two years' increment credit for prior work experience at the time they were hired. See Weimer-Godwin, *supra*; Dillon v. Cabell County Bd. of Educ., Docket No. 93-06-438 (Aug. 9, 1994); Wetherholt v. Cabell County Bd. of Educ., Docket No. 93-06-017 (June 30, 1993); Robb v. Hancock County Bd. of Educ., Docket No. 91-15-356 (Mar. 31, 1992); Skaggs v. Cabell County Bd. of Educ., Docket No. 90-06-054 (Mar. 27, 1990).

5. Grievant performs "like assignments and duties" to a number of service personnel employed by MCBE who were awarded increment credit for prior work experience related to the duties of their current position between the time they were hired and December 26, 1995. See Weimer-Godwin, *supra*; Casto v. Kanawha County Bd. of Educ., Docket No. 95-20-567 (May 30, 1996); Wilkinson v. Lincoln County Bd. of Educ., Docket No. 95-22-248 (Sept. 7, 1995).

6. "Discrimination" is defined by W. Va. Code § 18-29-2(m) 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." This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), must demonstrate the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

E.g., *Kirchner v. W. Va. Dept. of Educ.*, Docket No. 94-DOE-569 (Sept. 26, 1995); *Webb v. Kanawha County Bd. of Educ.*, Docket No. 94-20-210 (Nov. 22, 1994); *Steele v. Wayne County Bd. of Educ.*, Docket No. 89-50-260 (Oct. 19, 1989).

7. Although Grievant established a prima facie case of discrimination in regard to MCBE's failure or refusal to award her increment credit for prior work experience as was awarded to other service personnel, MCBE established legitimate, non-discriminatory reasons for denying her increment credit based upon a determination that her prior work experience was not sufficiently related to the duties of her current position, and Grievant failed to demonstrate that such explanation was merely pretextual. See *Tex. Dept. of Community Affairs, supra*; *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 365 S.E.2d 251 (W. Va. 1986); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Accordingly, this Grievance is **DENIED**.

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

- **LEWIS G. BREWER**  
**ADMINISTRATIVE LAW JUDGE**

**Dated: August 30, 1996**

---

[Footnote: 1](#)

*It is apparent that the "uniformity" provisions contained in W. Va. Code §§ 18A-4-5a and 18A-4-5b are more restrictive than the more general provision in W. Va. Code § 29-6-10 defining the concept of "equal pay" for state employees. Cf. Largent v. W. Va. Div. of Health, 192 W. Va. 239, 432 S.E.2d 42 (1994); AFSCME v. CSC, 174 W. Va. 221, 324 S.E.2d 363 (1984).*

---

[Footnote: 2](#)

*Grievant is comparing herself with all service employees who have been granted increment credit as a class.*

---

[Footnote: 3](#)

*W. Va. Code § 18-29-3(j) limits a grievant from altering a grievance at hearing to such an extent that it results in a different grievance being heard by the grievance evaluator. See Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (Apr. 13, 1995); Anderson v. Wyoming County Bd. of Educ., Docket No. 93-55-183 (Sept. 30, 1993). See also W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993). The statute permits the parties to consent to such a change, as was done here.*