

**JUDY BALL,**

**Grievant,**

**v.**

**Docket No. 96-26-135**

**MASON COUNTY BOARD OF EDUCATION,**

**Respondent.**

### **DECISION**

This is a grievance by Judy Ball (Grievant), employed by Respondent Mason County Board of Education (MCBE) as a Secretary III. Grievant complains that she is not being compensated in accordance with W. Va. Code § 18A-4-5b because she has not been awarded experience credit for work experience with a prior employer, as has been done for other MCBE employees. This grievance was initiated at Level I on February 14, 1996. Her grievance was waived to Level II where a hearing was conducted on March 15, 1996. Following denial at Level II in a decision issued by the Superintendent's designee, Kenneth Evans, on March 21, 1996, Grievant by-passed Level III as authorized by W. Va. Code § 18-29-4(c), and appealed to Level IV on March 29, 1996. A Level IV evidentiary hearing was held in this Board's office in Charleston, West Virginia, on June 4, 1996. [\(See footnote 1\)](#) 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 not in dispute, and the following findings of fact have been developed from the record established at Levels II and IV.

### **FINDINGS OF FACT**

1. Grievant has been employed by the Mason County Board of Education (MCBE) as a Secretary for eighteen years. L II HT at 5-6. She is currently classified as a Secretary III and assigned to the

Transportation Department.

2. Grievant's statutory duties as a secretary include "performing general clerical tasks, transcribing from notes or stenotype or mechanical equipment or a sound- producing machine, preparing reports, receiving callers and referring them to proper persons, operating office machines, keeping records and handling routine correspon dence." W. Va. Code § 18A-4-8 ¶ 83 (1995). See also R Ex 1 at L IV.

3. Prior to her employment with MCBE, Grievant was employed as a full-time receptionist with Holzer Clinic in Gallipolis, Ohio. L II HT at 6, 17; G Ex 1 at L II.

4. Grievant's duties at Holzer Clinic included "answering the phone, taking messages, filing, making appointments, receiving the public and typing." G Ex 1 at L II. 5. Grievant was employed at Holzer Clinic from February 1970 to July 1972 and again from May 1975 to June 1976, a total of 43 months. G Ex 1 at L II; Ball Testimony at L IV.

6. Prior to December 26, 1995, MCBE awarded school service personnel in various classifications up to three years' increment credit for prior work experience related to their current duties. Included in this class of employees were Phyllis Stevens and Anita Russell, who are respectively classified as a Secretary/Receptionist and Secretary. L II HT at 11; G Ex 1 at L IV.

7. On December 26, 1995, MCBE awarded three years' experience credit to Debbie Sayre and Permalee Layton, school service personnel classified as a Secretary and an Accountant, respectively. L II HT at 39-40; R Ex 8 at L II.

8. 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.

9. In each case where experience credit was granted, such decision was duly noted in the public minutes of that particular MCBE meeting.

10. 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. 11. 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.

12. Beginning in December 1993, MCBE began to consider discontinuing the practice of granting experience credit as described in Findings of Fact Numbers 6-7, above.

13. On December 26, 1995, after approving the experience credit described in Finding of Fact Number 7, 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 3 & 8 at L II.

14. Prior to December 26, 1995, one mechanic who applied for experience credit received one year's credit less than he requested, but no other service personnel were denied experience credit by MCBE. Miller testimony at Level IV.

15. On January 23, 1996, Grievant submitted a request for experience credit to MCBE's Superintendent based upon her prior employment at Holzer Clinic. G Ex 1 at L II.

16. Because the practice of granting experience credit had been formally discontinued by MCBE on December 26, 1995, MCBE Assistant Superintendent George Miller took no action on Grievant's application described in Finding of Fact Number 15.

### **DISCUSSION**

Grievant alleges that, by failing to grant her experience credit for her prior employment as a receptionist at Holzer Clinic, 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 prevents MCBE from continuing to maintain a salary differential, despite rescission of a prior policy. This Grievance Board has previously determined that such disparity is specifically prohibited by § 18A-4-5b.

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 was adopted, violated W. Va. Code § 18A-4-5b. Likewise, 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 2](#)) 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. The evidence indicates that MCBE has limited this benefit to a single service personnel classification, mechanic. Grievant, a secretary, is clearly not

performing "assignments and duties" like those of the 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); 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); Wilkinson v. Lincoln County Bd. of Educ., Docket No. 95-22-248 (Sept. 7, 1995).

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. [\(See footnote 3\)](#) 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). Not only is Grievant a secretary, the same classification in which other MCBE employees have received experience credit, the record before the undersigned indicates that MCBE granted increment credit to every service employee ingood standing who requested such credit and satisfied the Superintendent that their prior experience was related to the duties of their present position.

Accordingly, W. Va. Code § 18A-4-5b requires that MCBE treat Grievant in the same manner as other service personnel who were retroactively awarded increment credit. MCBE, anticipating such an outcome, further contends that Grievant's prior work experience is not sufficiently related to the duties of her current position to support award of such experience credit. Because MCBE decided these questions on a case-by-case basis without any clearly articulated criteria for awarding credit, and Assistant Superintendent Miller rejected Grievant's request as being untimely, there are few objective facts to support MCBE's position. At this point, it is useful to analyze this aspect of this grievance from the perspective of a claim of "discrimination" under W. Va. Code § 18-29- 2(m).

Grievant amended her grievance at Level IV 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. [\(See footnote 4\)](#) "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 employees who are employed by MCBE in the secretary classification, and that she has been treated differently to her detriment, in that she has been denied increment credit towards her pay for prior experience in a related position. Further, Grievant has demonstrated that there is no significant difference in the actual job responsibilities of the other secretaries receiving such increment credit that would warrant such disparate treatment. 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). The undersigned further finds that Grievant's duties at Holzer Clinic and her current duties in the Transportation Department are sufficiently "like" duties so as to warrant award of increment credit, so long as credit is extended to other similarly situated service personnel. See *Weimer-Godwin v. Bd. of Educ.*, 179 W. Va. 423, 369 S.E.2d 726 (1988). Grievant's clerical duties while employed at Holzer Clinic are generically similar to her duties as a secretary in the MCBE Transportation Department, and any differences are more in degree than in kind. Id. Moreover, because MCBE awarded experience credit to another service employee, Phyllis Stevens, classified as a Secretary/Receptionist, without explaining any meaningful distinction between her situation and Grievant's, the undersigned finds that MCBE's after-the-fact justification for denying experience credit to Grievant is merely pretextual.

[\(See footnote 5\)](#) 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, supra; Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Granting increment credit to Grievant on the same terms as her peers merely represents treating all employees in a uniform manner as required by W. Va. Code § 18A- 4-5b. See Swisher, supra; Sims v. Preston County Bd. of Educ., Docket No. 39-86-082(Dec. 1, 1986), rev'd Civil Action No. 87-Misc.-7 (Kanawha County Cir. Ct. Nov. 19, 1987). Because this supplemental pay is not mandated by any statute and was extended at the school board's discretion, MCBE is not obligated to continue extending this benefit in perpetuity. [\(See footnote 6\)](#) See Bane v. Bd. of Educ., 178 W. Va. 749, 364 S.E.2d 540 (1987). Accordingly, so long as other similarly situated service personnel continue to receive increment credit which advances their standing on the pay scale, Grievant must be extended the same benefit in accordance with W. Va. Code § 18A-4-5b. See Swisher, supra; Miller, supra; Sims, supra.

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, and not 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 secretary, does not perform "like assignments and duties" as 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" as a number of service personnel, including at least two other secretaries, who are employed by MCBE, and 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. 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's attempt to establish 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, was not supported by a preponderance of the evidence. Instead, Grievant demonstrated by a preponderance of the evidence 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 **GRANTED**. The Respondent is hereby **ORDERED** to grant three years' experience credit to Grievant and to pay her in accordance with such enhanced increment credit, commencing 15 days prior to February 14, 1996, the date this grievance was filed.

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**

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[Footnote: 1](#)

*During that hearing, the parties agreed to incorporate the testimony taken at Level IV in a related case, Doris Deal v. Mason County Board of Education, Docket No. 96-26- 106, into the Level IV record in this matter.*

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[Footnote: 2](#)

*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).*

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[Footnote: 3](#)

*Grievant is not just comparing herself to another secretary, but with all service employees who have been granted increment credit as a class.*

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[Footnote: 4](#)

*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.

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[Footnote: 5](#)

*The West Virginia Supreme Court of Appeals has noted that a grieving employee may prevail under W. Va. Code § 18-29-2(m) by establishing that the challenged adverse employment decision was not job related or agreed to in writing by the employee. It is not necessary to prove that the discrimination was caused by an illicit motive or was the result of a discriminatory policy having a disparate impact on a protected category of individuals. Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).*

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[Footnote: 6](#)

*This comment should not be interpreted to suggest that the school board can discontinue such a practice without complying with W. Va. Code §§ 18A-4-8 and 18A-2-6, as applicable. *See* Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487 (1994).*