LARRY HOLLOWAY,

Grievant,

v. **DOCKET NO. 97-35-291**

OHIO COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Larry Holloway, employed by the Ohio County Board of Education ("OCBOE") as a Custodian III, alleges that he has not been compensated for prior related experience, which experience credit has been granted to other employees. Grievant contends that OCBOE has violated W. Va. Code §§ 18A-4-5b and 18-29-2(m). He seeks a salary increment retroactive to February 1989, with interest.

Grievant initiated this proceeding at level one on May 5, 1997, where his immediate supervisor was without authority to provide relief. A level two hearing was conducted on June 5, 1997, followed by a decision denying the grievance dated June 10, 1997. Consideration at level three was waived, and Grievant appealed to level four on June 19, 1997. A hearing was conducted in the Grievance Board's office in Wheeling, West Virginia, on November 4, 1997, followed by written submissions filed by December 15, 1997, at which time this matter became mature for decision.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by OCBOE since February 13, 1989, as aCustodian III.

2. Grievant's duties as a Custodian III include mopping floors, cleaning bathrooms, washing chalkboards, emptying garbage, changing light bulbs, cleaning carpets, cleaning the cafeteria after lunch each day, and performing minor "handyman" work.

3. Prior to his employment by OCBOE, Grievant was employed in the following positions:

Wheeling Machine Products_millwright and machine operator

Anchor Hocking Company_relief press operator

North American Coal Company_belt worker and inspector

U. S. Stamping_shipping clerk and machine operator

Marx Toy Company_press and relief operator

4. For the first 18 months he was employed by Wheeling Machine Products, Grievant was a "floor boy," and his duties included cleaning up debris and oil from around the machines.

5. While employed at Anchor Hocking Company, if Grievant was not functioning as a relief operator, he swept up glass and other debris from around the machines and emptied trash.

6. As a belt worker at North American Coal Company, Grievant shoveled coal and coal dust from around the belts of the machines to keep them running smoothly.

7. When Grievant was initially hired by OCBOE in 1989, he asked the personnel director, Patricia Solomon, if any credit was given for prior related work experience. Ms. Solomon led Grievant to believe that such a salary increment did not exist.

8. Ms. Solomon did not specifically remember discussing the salary increment for prior work experience with Grievant. 9. On November 22, 1977, OCBOE adopted a policy whereby service personnel could be granted credit for related work experience obtained outside the school system. That policy was rescinded in 1994.

10. Other service personnel, including several custodians, were given a salary increment for prior related work experience while the policy was in place. All of these custodians, except one, received credit for prior positions in which they held the job title of "custodian."

11. Grievant discovered that the work experience credit was given to another custodian in May of 1997, at which time he initiated this grievance.

Discussion

As this is not a disciplinary matter, grievant bears the burden of proving his allegations by a preponderance of the evidence. See W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997). Grievant contends that OCBOE's actions violated both the uniformity provisions of W. Va. Code § 18A-4-5b and the prohibitions against discrimination contained in W. Va. Code § 18-29-2(m). However, Respondent has initially

raised the issue of timeliness, arguing that, because Grievant delayed so long in filing his grievance, this matter should not be considered on the merits. W. Va. Code § 18-29-4(a)(1) addresses when a grievance must be filed, providing as follows:

> **Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.**

Grievant contends that this case falls within the "discovery rule" exception to the fifteen-day filing limit, because he did not know that other employees were actually receiving the work experience credit, or that it even existed, until 1997. In Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990), the West Virginia Supreme Court of Appeals held that, until an employee knows of the relevant facts giving rise to his grievance, the time limitations contained in W. Va. Code § 18-29-4(a)(1) are tolled. Grievant testified, both at levels two and four, that he inquired of Ms. Solomon, Personnel Director, whether credit was given for prior work experience. Although he could not remember her exact word-for-word response, she indicated to him in some manner that it did not exist. When called to testify at level four, Ms. Solomon could not specifically remember her conversation with Grievant. However, she stated that she did not believe she would have told him the salary increment did not exist, because that would not be true. Her only explanation for Grievant's testimony was that she may not have asked him about prior related experience, because his application did not reflect custodial positions.

Because Ms. Solomon cannot specifically recall her conversation with Grievant, his version of the events must be accepted as true. Whatever she may have said to him at that time he was hired, even if he misunderstood, Grievant believed she indicated the credit did not exist. Therefore, he did not file a grievance at that time, which is reasonable. One cannot be expected to grieve misapplication of a policy which he believes does not exist. Therefore, this grievance was filed within fifteen days of the date Grievant "discovered" the credit existed in Ohio County schools, and is, therefore, timely.

Next, it must be determined whether Grievant was entitled to the prior work experience credit. OCBOE's policy stated as follows:

> **It shall be the policy of the Ohio County Board of Education to grant credit to Service and/or Auxiliary Personnel for related work experience obtained outside the Ohio County Schools. Said experience shall be evaluated by the Superintendent of Schools, and upon the Superintendent's recommendation, credit may be allowed for each appropriate step on the salary schedule.**
>
> **Up to four (4) years of related work experience may be granted to Service and/or Auxiliary personnel and in bona fide circumstances the Superintendent may grant additional experience for related work experience to Service and/or Auxiliary Personnel employed in jobs that require technical expertise. All related work experience must be verified by the Service and/or Auxiliary Employees (sic) past employer.**

As explained by Ms. Solomon, after an employee was hired, she reviewed his or her resume and application to determine whether or not the employee had prior related work experience. She then sent a verification form to any such past employer. However, the form did not ask for any description of the employee's duties at the previous job. It merely requested the company name, years when the employee worked there, his or her position, and number of full years worked. Level four, Gr. Ex 1 and Resp. Ex. 2 There is no information on Grievant's application for employment with OCBOE or his resume which indicates, describes, or otherwise states that he worked as a custodian in any of his past jobs. In fact, these documents contain descriptions of his work such as "welding," work operating various machines, "heavy maintenance," "worked on coal conveyor system," and "kept records, cut sheet metal for size, drove high lift, and loaded railroad cars." There is no information on Grievant's application documents which would have prompted Ms. Solomon to verify related work experience.

Grievant contends that Respondent's failure to grant him the experience credit violates the uniformity and discrimination statutes. W. Va. Code § 18A-4-5b requires uniformity of salary, increments and compensation for regular employees "performing likeduties and assignments." It has previously been held by this Grievance Board that this section does require that all similarly classified employees be granted such credit, once such a policy is in place. See Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996); Ball v. Mason County Bd. of Educ., Docket No. 96-26-135 (Aug. 30, 1996). However, the employee must prove that the duties of the prior position were sufficiently related to entitle him/her to

the experience credit. OCBOE does not dispute that other service personnel, including custodians, received the experience credit.

In Deal, supra, and Ball, supra, the grievants' entitlement to the experience credit was examined under a discrimination analysis, as has been asserted in the instant case. "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 this statute must demonstrate the following:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employees:**
>
> **(b) that he has, to his detriment, been treated by his employer in a manner that the other employees have not, in a significant particular;**

and

> **(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employees 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 the above standard to the instant case, Grievant has demonstrated that he is similarly situated to other service personnel, particularly custodians, and that he has been treated differently, to his detriment, by having been denied a salary increment for prior related work experience. Therefore, Grievant has 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 W. Va. Code § 18-29-2(m), the employer is provided an opportunity to articulate legitimate, non- discriminatory

reasons for its actions. Conner, supra. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Steele, supra. In the instant case, OCBOE does not contest that the work experience credit has been given to other custodians and various service personnel, but argues that Grievant's prior work simply is not sufficiently related to custodial work to qualify. Grievant testified regarding the duties he believed were "custodial" at his previous jobs. A close analysis of these duties indicates that Grievant was working in industrial settings, and that the work he has described as "custodial" consisted of sweeping up metal and glass scraps and shoveling coal and coal dust, all of which were necessary to make sure that the industrial environment was safe and machines could be run smoothly and properly. This is quite different from Grievant's present duties of mopping floors, shampooing carpets, washing chalkboards, and cleaning up after lunch. The purpose of Grievant's present duties is to tend to everyday tidying and cleanliness of common areas used by staff and students, rather than the "cleanup" which is necessary to keep industrial facilities safe while heavy machinery is being operated. Also, many employees are called upon to empty the garbage on occasion, hardly qualifying one as a"custodian." Therefore, the undersigned finds that OCBOE has provided a legitimate, job- related reason for not granting Grievant the experience credit for his prior industrial work. 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); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Moreover, a review of the documents introduced both by Grievant and Respondent regarding other employees who have received the experience credit reveals that the policy has been applied in a consistent fashion. Except for one custodian who was previously employed as a carpet installer, all of the custodians who received increment credit worked in positions where "custodian" was part of their job title or description. A county board of education must abide by the regulations it promulgates. Powell v. Brown, 238 S.E.2d 220 (W. Va. 1977); Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996); Wright v. McDowell County Bd. of Educ., Docket No. 93-33-115 (Nov. 30, 1993). In addition, Respondent's interpretation of the provisions of its own internal plicy is entitled to some deference by this Grievance Board, unless it is contrary to the plain meaning of the language utilized or is inherently unreasonable. See Watts v. W. Va. Dept. of Health & Human

Resources, 465 S.E.2d 887 (W. Va. 1995); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996). OCBOE has explained, through Ms. Solomon, its method for ascertaining whether prior work was related, based upon the information contained in an employee's application. The other employees who received the credit clearly provided information indicating their work was custodial, and Grievant did not, so Respondent wasnot prompted to seek further information. (See footnote 1) **However, in this particular case, utilizing the form that OCBOE has promulgated for verification from prior employers, it is unlikely that such information from Grievant's past jobs would have led OCBOE to believe he had custodian experience, due to the various job titles he has held. OCBOE has reasonably and consistently applied its policy.**

Consistent with the foregoing findings and discussion, the following conclusions of law are appropriate in this matter. (See footnote 2)

Conclusions of Law

1. In non-disciplinary matters, grievant bears the burden of proving his allegations by a preponderance of the evidence. See W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997).

2. A grievance must be filed within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant. W. Va. Code § 18-29-4(a)(1); See Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990).

3. Grievant did not know that OCBOE granted experience credit for prior work experience until 1997, and he filed his claim within fifteen days of that discovery.

4. W. Va. Code § 18A-4-5b requires uniformity of compensation for all persons performing like assignments and duties and is applicable to work experience salaryincrements. See Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996); Ball v. Mason County Bd. of Educ., Docket No. 96-26-135 (Aug. 30, 1996).

5. Grievant performs “like assignments and duties” to other custodians and service personnel who were awarded a salary increment for prior related work experience.

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 this statute must demonstrate the following:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employees:**
>
> **(b) that he has, to his detriment, been treated by his employer in a manner that the other employees have not, in a significant particular;**

and

> **(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employees 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, OCBOE has provided legitimate, job-related reasons for not granting Grievant work experience credit, because his prior positions were not custodial positions, and the work he performed was not sufficiently related to the duties of his current position to entitle him to the credit. See Tex. Dept. of Community Affairs, supra; Frank's Shoe Store v. W. Va. Human RightsComm'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).

8. A county board of education must abide by the regulations it promulgates. Powell v. Brown, 238 S.E.2d 220 (W. Va. 1977); Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996); Wright v. McDowell County Bd. of Educ., Docket No. 93- 33-115 (Nov. 30, 1993).

9. Grievant did not prove by a preponderance of the evidence that OCBOE has improperly or inconsistently applied its policy regarding prior related work experience credit.

Accordingly, this grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Ohiol 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.

DATE: March 20, 1998 _____ V. DENISE MANNING

Administrative Law Judge

Footnote: 1

As to the one custodian who received credit for prior work as a carpet installer, there is insufficient information regarding that employee to determine how his situation may have differed from Grievant's.

Footnote: 2

Respondent raised arguments based upon laches, but, due to the outcome of this Decision, those issues need not be addressed.