SHIRLEY CROCK,

Grievant,

v. **Docket No. 98-17-290**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Shirley Crock, employed by the Harrison County Board of Education (HCBE) as an Aide II, filed a level one grievance in March 1998, in which she stated:

I worked for 10½ years as a Certified Nursing Assistant at Heartland Nursing Home. During that time I served a wide variety of patients who were handicapped. One of the patients I spent a great deal of time with suffered from Cerebral Palsy. My assignment with the Harrison County Board of Education is to serve a student who suffers from the same problem. My experience has allowed me to do a much better job of serving his needs.

I wish to have 10½ years of credit for my prior work experience as per WV. Code §18A-4-5b.

The grievance was denied at levels one and two, and Grievant elected to by-pass consideration at level three as is permitted by W. Va. Code §18-29-4(c). Appeal was made to level four on August 6, 1998, at which time the parties, represented by WVEA Consultant William C. White, and Basil R. Legg, Jr., Esq, respectively, agreed to submit the matter for decision based upon the lower-level record. The matter became mature with the filing of proposed findings of fact and conclusions of law by both parties on September 18, 1998.

The record in this matter is limited and the parties do not disagree on any pertinent facts. Therefore, the following formal findings of fact are derived from the record, including the level two transcript.

Findings of Fact

1. Grievant was first employed by HCBE in February 1998, as a regular, full- time Aide II, assigned to work with a student who suffers from cerebral palsy.

2. Prior to her employment with HCBE Grievant worked at Heartland Nursing Home, a privately owned facility, for ten and one-half years. At Heartland, Grievant received training in methods and procedures, including seizure disorders, range of motion, and restraints, which has enhanced her ability to work with her current charge. Grievant is also a Certified Nursing Assistant.

3. In September 1979, HCBE hired Grace Washington as an Aide. Mrs. Washington was previously employed by the Central district Mental Health Center, a public, governmental agency, as a Behavioral Modification Technician. HCBE granted Mrs. Washington five years experience credit for salary purposes based upon this previous employment.

4. Mrs. Washington is the only Aide employed by HCBE to ever receive experience credit for previous, outside employment.

5. HCBE does not have a policy addressing whether service personnel are entitled to experience credit for outside employment.

Discussion

Grievant argues that to deny her the experience credit granted to Mrs. Washington results in discrimination. Grievant also asserts that she is entitled to the experience credit based upon the provisions of W. Va. Code §18A-4-5b, which permits county boards of education to establish salary schedules in excess of the state minimum salaries so long as they are uniform for all persons performing like duties and assignments. In support ofher claim Grievant cites the Grievance Board decision in the matter of Ball v. Mason County Bd. of Educ., Docket No. 96-26-135 (Aug. 30, 1996) in which it was held that to deny Ms. Ball experience credit for work with another employer, as had been granted to other employees, resulted in discrimination, even though MCBE had discontinued the credit for new employees.

HCBE denies that it has engaged in discrimination because it has provided a legitimate, job related reason for not granting Grievant experience credit, i.e., her work experience was with older adults and not directly related to her ability to provide services to students, and it was earned in the private sector. HCBE also asserts that Mrs. Washington had been granted prior experience credit prior to the passage of W. Va. Code §18A-4-5b, and that the statute does not require the reduction of salaries of employees previously awarded experience credit in order to meet the uniformity requirements.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each

element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

"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." An employee seeking to establish discrimination under W. Va. Code §18-29-2(m) must first make out a prima facie case by demonstrating 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.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

In the present matter, Grievant has established that she has been, to her detriment, treated differently than similarly-situated employees, that the differences are unrelated to their actual job responsibilities, and were not agreed to in writing. HCBE attempts to show a legitimate, non-discriminatory reason for its decision, but fails. Because HCBE does not have a policy addressing this matter, it cannot deny Grievant's request for experience credit based upon the age of the individuals she worked with, or the fact that her work was in the private rather than the public sector. Although it is correct that Code §18A-4-5b does not require the reduction of an employee's salary to maintain uniformity, HCBE is clearly treating two similarly-situated employees very differently. Grievant's prior experience isdirectly related to her ability to provide services as an aide to a student with cerebral

palsy, just as Mrs. Washington's prior experience was transferrable to her school assignment, Therefore, HCBE's failure to grant Grievant the credit for salary purposes constitutes discrimination.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

2. "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."

3. An employee seeking to establish discrimination under W. Va. Code §18-29- 2(m) must first make out a prima facie case by demonstrating 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.

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4. Grievant has proven by a preponderance of the evidence that HCBE has engaged in

discrimination by compensating a similarly situated employee based upon prior work experience, while denying Grievant credit for her prior work experience.

Accordingly, the grievance is **GRANTED**, and HCBE Ordered to grant Grievant prior work experience credit for salary purposes.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Harrison 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: September 30, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE