

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**Joseph Miker,
Grievant below, Petitioner,**

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v.

CASE NO.: 22-ICA-311

**Monongalia County Board of Education,
Respondent below, Respondent.**

PETITIONERS' BRIEF

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PETITIONER JOSEPH MIKER'S BRIEF

I. ASSIGNMENTS OF ERROR

1. The ALJ erred in finding that Mr. Miker's years of experience pay was awarded in error, and he is not entitled to the same as it was an error regarding his education, not his experience, for which the years of experience pay were taken.

2. The ALJ erred when it incorrectly determined that Mr. Miker's private sector experience did not meet the statutory definition of experience to provide him the years of experience pay.

II. STATEMENT OF THE CASE

A. Factual Background

Petitioner Joseph Miker, (hereinafter referred to as "Mr. Miker"), is currently employed by the Monongalia County Board of Education ("MCBE") as a heating, ventilation, and air conditioning ("HVAC") Career and Technical Education ("CTE") teacher at Monongalia Technical Education Center ("MTEC"). D.R.0033. Mr. Miker began his employment at MTEC just prior to the 2012 - 2013 school year. D.R.0034.

Prior to his employment at MTEC, Mr. Miker worked at Darvzer Inc. and at Sid Harvey Inc. for a total of Twenty-Eight (28) years. D.R.0081. Mr. Miker held various positions within both companies, but ultimately found himself in a management, sales, and technical advisor position. D.R.0081. Mr. Miker's duties, included, but were not limited to, management of the store, personnel, and day-to-day operations, and advise consumers and/or installers of the equipment and products, including installation, repair, and other mechanical and technical issues with the equipment and products.

D.R.0081. In or around 2012 when Mr. Miker was hired by MTEC, he applied for 28 years' experience pay for his roles and positions he held prior to gaining employment at MTEC. D.R.0035.

Initially, that request was granted by MCBE. D.R.0038. However, it was later discovered that Mr. Miker did not hold a bachelor's degree, a requirement of MCBE to grant years of experience pay to its technical teachers. D.R.0038. Mr. Miker had, at that time, received roughly Ten Thousand Dollars (\$10,000.00) attributable to his years of experience pay. D.R.0038 Mr. Miker was given Three (3) options: (1) pay back the money in one lump sum payment; (2) pay back the money in installments that were to be garnished from his paychecks; or (3) resign his employment from MTEC. D.R.0038 Mr. Miker chose option (2), and the pre-mature funds were paid back to MCBE.

D.R.0038

Mr. Miker was informed that if he wished to receive his years of experience pay, he would need to earn a bachelor's degree and submit that request for approval.

In December 2021, Mr. Miker did earn a Regent's Bachelor's degree from West Virginia University. D.R.0039, D.R.0084. Mr. Miker then re-applied for his years of experience pay, which was denied.

B. Procedural History

On or about January 24, 2022, Mr. Miker filed a Level One grievance with the Public Employees Grievance Board ("PEGB"), alleging discrimination, favoritism, and a grievance under W.Va. Code § 6C-2-2 and alleged that there was not uniformity of pay and responsibilities for like assignments under W.Va. Code §§ 18A-2-2, 18A-4-1, and

18A-4-2. Specifically, Mr. Miker stated he was requesting experience pay, and that request was denied. At that time, Petitioner requested a Level One Conference. The Level One Conference was held on March 7, 2022, wherein Mr. Miker was granted Ten (10) years' experience following a discussion and offer by Respondent.

On or about March 28, 2022, Petitioner filed a Level Two grievance with the PEGB with the same allegations. At that time, Mr. Miker requested a Level Two Mediation by an Administrative Law Judge ("ALJ"). The mediation was conducted on or about May 9, 2022.

After an unsuccessful mediation, Mr. Miker filed a Level Three grievance with the PEGB on or about May 16, 2022. At that time, Petitioner requested a hearing before an ALJ. A hearing before ALJ Ronald L. Reece was held on or about August 18, 2022. In the Decision from which this appeal is taken, dated November 1, 2022, Petitioner's relief was denied.

III. STANDARD OF REVIEW

The standard of review in this case is both deferential and *de novo*. "Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are

reviewed de novo.” Syl. pt. 1, *Calhull v. Mercer Cnty. Bd. Of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000).

IV. REQUEST FOR ORAL ARGUMENT

Petitioner hereby requests that he be permitted to present Oral Argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure as this case involves both issues of law and issues of fact.

V. SUMMARY OF THE ARGUMENT

The ALJ held that Mr. Miker was not entitled to years of experience pay that was initially granted to him based on a mistake. However, the cases cited by the ALJ are distinguishable from the case at bar because in the cases cited by the ALJ, the mistake violated a policy previously set and in place at the time the mistake was made. In this case, no policy existed at the time Mr. Miker was granted the years of experience pay in 2012 regarding the experience’s match with the statutory definition of experience. The only policy was one that required MTEC CTE instructors to first have a bachelor’s degree prior to receiving credit for their years of experience in the private sector. The mistake that was made eliminated Mr. Miker’s entitlement to credit for his private sector years of experience at that time, but it was not a mistake that eliminated Mr. Miker’s eligibility for years of experience completely.

Furthermore, it cannot be argued that Mr. Miker’s experience in the private sector did not qualify as experience within the statutory definition. Mr. Miker, while employed in the private sector, was tasked with having a full and complete knowledge of the equipment and products his employer manufactured and sold. While in his role

as a technical advisor, Mr. Miker actually taught and advised consumers, contractors, and distributors that used, installed, maintained, repaired, and/or sold the equipment and products manufactured and sold by Mr. Miker's employer how to properly use, install, maintain, and repair the equipment and products. Certainly, Mr. Miker's experience and knowledge in actually teaching and advising these other individuals qualifies as experience under the statutory definition.

Even still, Mr. Miker's duties and responsibilities as an HVAC instructor at MTEC require him to teach his students about all aspects of the HVAC industry, including the business side of running an HVAC company. It cannot be argued that Mr. Miker's experience in a managerial role in the private sector does not qualify as experience under the statutory definition.

VI. ARGUMENT

- A. The ALJ erred in finding that Mr. Miker's years of experience pay was awarded in error, and he is not entitled to the same as it was an error regarding his education, not his experience, for which the years of experience pay were taken.**

In denying Mr. Miker's grievance, the ALJ found that Mr. Miker was granted the years of experience pay in 2012 when initially hired based on a mistake made by the administration at that time. While that fact may be partially true, the mistake must be scrutinized to determine which mistake was made in granting Mr. Miker the years of experience pay initially.

In holding that Mr. Miker was not entitled to the years of experience pay, the ALJ held that past mistakes do not entitle greivants to future pay. The ALJ relied on *Pugh v.*

Hancock County Bd. Of Educ., Docket No. 95-15-128 (June 5, 1995) and *Stover v. Div. of Corr.*, Docket No. 04-CORR-259 (Sept. 24, 2004) in order to come to this conclusion. However, the cases cited by the ALJ are distinguishable from this case.

In *Pugh*, the grievant alleged that she was entitled to an hourly pay of Twenty Dollars and 49/100 (\$20.49) for her role as a Saturday School chaperone. *Pugh v. Hancock County Bd. Of Educ.*, Docket No. 95-15-128 (June 5, 1995). During the hearing before the ALJ, the Respondent introduced evidence, that upon the Hancock County Board of Education's approval, Weir High School created the Saturday School program as an alternative to out-of-school suspensions for students. *Id.* Upon receiving approval and the creation of the program, a formal job listing was posted seeking Saturday School teachers. *Id.* The job listing, as posted, noted a salary of Twelve Dollars (\$12.00) per hour. *Id.*

Later, administration at Oak Glen High School, the place of employment for the grievant, expressed interest in creating the same or similar program as the Saturday School program at Weir High School. *Id.* Oak Glen High School then received the approval from the Hancock County Board of Education. *Id.* No formal job posting was listed for Saturday School chaperones at Oak Glen High School. *Id.*

After her first assignment of Saturday School chaperoning, the grievant received her paycheck providing for the higher rate of Twenty Dollars and 49/100 (\$20.49) per hour rather than the Twelve Dollars (\$12.00) per hour rate. *Id.* Upon notification from the business office, the superintendent of the school system discovered that some Saturday School chaperones were receiving a high pay rate than the Twelve Dollars

(\$12.00) per hour due to a clerical error in the executing and issuing of paychecks. *Id.*

The superintendent notified those affected by the clerical error and informed them that the pay rate was to be, and would continue to be, Twelve Dollars (\$12.00) per hour. *Id.*

The ALJ in *Pugh* concluded that the grievant was not entitled to the increased rate. *Id.* The increased rate only came about due to a clerical error. *Id.* Furthermore, there was a policy in place that Saturday School chaperones were to be paid at a rate of Twelve Dollars (\$12.00) per hour. *Id.* The clerical error did not entitle the grievant to a continuation of the increased rate. *Id.*

In *Stover*, the grievant requested reimbursement for travel expenses that she incurred as a result of being called into work on a scheduled day off. *Stover v. Div. of Corr.*, Docket No. 04-CORR-259 (Sept. 24, 2004). The grievant claimed that she had been compensated for such travel on days off in the past, proving that a policy existed that allowed the reimbursement of travel expenses on scheduled days off when the employee was called to work. *Id.* However, the respondent in that case, Mount Olive Correctional Center, argued that the grievant was not entitled to continued reimbursement that was based on a mistake. *Id.* Mount Olive Correctional Center argued that the basis of determining whether an employee is entitled to reimbursement for travel expenses was the State Auditor's rule that compensable mileage must meet the federal Internal Revenue Service's rules. *Id.* Mount Olive Correctional Center further provided evidence that Section 4.2.6.1 of the State Travel Rules provided that reimbursement for travel expenses was not to include reimbursement for "normal daily commuting mileage." *Id.*

Ultimately, the ALJ in *Stover* found that the grievant's "shifting schedule" and "overtime work" were both normal for her job, and ultimately, her travel to her place of employment on scheduled days off was "normal daily commuting mileage." *Id.* The ALJ held that the grievant was not entitled to reimbursement for travel expenses as there was a policy against providing such reimbursement for normal daily commuting mileage and the grievant was mistakenly provided reimbursement in the past, in violation of said policy. *Id.*

In this case, Mr. Miker was granted years of experience pay in 2012 upon his hiring into his position with MTEC and MCBE. At the time of Mr. Miker's hiring and currently, as testified to by Robert DeSantis ("Mr. DeSantis") the associate superintendent for MCBE, MCBE does not, and did not, have any policy regarding the criteria for the experience in granting or denial of years of experience credit to CTE teachers. D.R.0047. The grant or denial of years of experience credit is determined on a case-by-case basis. D.R.0047. The only policy that MCBE has in regards to granting or denying years of experience credit is that the applicant must first have obtained a bachelor's degree.

Having not yet earned a bachelor's degree in 2012, Mr. Miker was erroneously granted his years of experience pay. No mistake was made as to whether or not his experience fit the criteria for years of experience pay. No testimony or evidence was proffered that Mr. Miker was erroneously given the years of experience pay for failing to match the criteria for experience. Neither at the time of Mr. Miker's initial application for the years of experience pay in 2012 nor at the time of his subsequent application for

years of experience pay which led to this appeal has there been a policy regarding the criteria for granting or denying years of experience pay to CTE teachers. Finally, it was not due to any clerical, typographical, or other common error that Mr. Miker was granted the years of experience based on his experience's fitness into the statutory definition of "experience."

In discussing some of the other instances when MCBE did not grant years of experience pay to other applications by CTE instructors, Mr. DeSantis did not provide any insight into the policies or criteria for determining whether a person should be granted years of experience pay.

Mr. DeSantis testified regarding a CTE instructor that works with nursing students. D.R.0065. Mr. DeSantis explained that this CTE instructor requested years of experience credit for time she spent working in a doctor's office and aiding the doctor, which was verified by the doctor. D.R.0066. However, this CTE instructor was not employed in the nursing field prior to her employment at MTEC or MCBE. This instructor was a receptionist. D.R.0066. Additional information is not provided by Mr. DeSantis throughout his testimony regarding this instructor's denial, but it cannot be said that while this instructor was a receptionist that she was experienced in the field of nursing.

Mr. DeSantis further testified regarding a TISK instructor that applied for years of experience credit and was denied. D.R.0066. Mr. DeSantis explained that this TISK instructor had experience in computer programming prior to her employment with MTEC and MCBE. D.R.0066. Mr. DeSantis did not further expound on what this

person's role and duties were at MTEC, nor did he expound upon her role and duties at her previous employment. However, Mr. DeSantis conceded that this individual's previous employment did not relate to her new role as a TISK instructor at MTEC.

D.R.0066 – 67.

As will be discussed more fully within Section IV.B. of this brief, Mr. Miker's role and duties in his previous employment are directly related to his role and duties as an HVAC instructor at MTEC.

The mistake that was made by MCBE in 2012 granting Mr. Miker years of experience pay at that time was a mistake that eliminated Mr. Miker's entitlement to years of experience pay at that time, but it was not a mistake that eliminated Mr. Miker's entitlement to years of experience pay completely.

As a result, it cannot be said that Mr. Miker's grant of years of experience pay in 2012 was a mistake for failing to meet the criteria and/or against any policy regarding criteria, other than the policy that Mr. Miker did not yet meet the prerequisite of obtaining a bachelor's degree prior to receiving the years of experience pay. Once Mr. Miker had fulfilled the prerequisite for receiving the years of experience pay, MCBE should have granted his application for years of experience credit. In holding that Mr. Miker was not entitled to the years of experience pay based on mistake, the ALJ erred.

B. The ALJ erred when it incorrectly determined that Mr. Miker's private sector experience did not meet the statutory definition of experience to provide him the years of experience pay.

"County boards of education are required to provide uniform benefits and compensation only to similarly situated employees, meaning those who have 'like

classifications, ranks, assignments, duties and actual working days.” *Paul Smith, et al., v. Randolph County Bd. Of Educ.*, Docket No. 2014-0385-CONS, (Jan. 14, 2015) (quoting *Bd. of Educ. v. Airhart*, 212 W.Va. 175, 569 S.E.2d 422 (2002); *Covert v. Putnam County Bd. of Educ.*, Docket No. 99-40-463 (Feb 29, 2000); and *Stanley v. Hancock County Bd. of Educ.*, Docket No. 95-15-217 (Sept. 29, 1995)). Grievants seeking to enforce the uniformity provisions must establish that their duties and assignments are like those of the employees whom they are attempting to compare themselves. *Paul Smith, et al., v. Randolph County Bd. of Educ.*, Docket No. 2014-0385-CONS (Jan. 14, 2015) (citing *Adkins v. Lincoln County Bd. of Educ.*, Docket No. 97-22-105 (Sept. 24, 1997)).

West Virginia Code § 18A-4-1(1) states, in pertinent part, “‘Years of experience’ means the number of years the teacher has been employed in the teaching profession, including active work in educational positions other than the public schools. . .”

The ALJ by way of its Decision dated November 1, 2022 determined that Mr. Miker did not meet the criteria for receiving years of experience credit. The ALJ effectively determined that Mr. Miker’s position in a management, sales, and technical advisor role did not relate to his duties as an HVAC instructor at MTEC.

In his testimony, Mr. DeSantis conceded that the reason for Mr. Miker’s denial of the years of experience credit is his determination of the difference between knowledge and experience, D.R.0065. However, Mr. DeSantis completely ignores the cause of the knowledge gained by Mr. Miker: experience.

Throughout his private sector employment, Mr. Miker had duties that did not include solely management and sales responsibilities, but also responsibilities in

service, instruction, installation, design, and application of HVAC systems, parts, and supplies. D.R.0112. Mr. Miker, as a salesman and in his management and technical advisor role, was required to have an in-depth knowledge and understanding of the particular products, equipment, and mechanics of the products and equipment in order to effectively sell and aid in the installation and maintenance of the HVAC systems he sold. In the words of Mr. Miker: "you don't go to a contractor and start running your jaws if you don't know what you're talking about because they shoot you down just as fast as you can imagine." D.R.0053.

Furthermore, Mr. DeSantis, the ALJ, and MCBE ignore the certifications presented by Mr. Miker that show his knowledge and understanding of the HVAC trade. See D.R.0098 – D.R.0109. Again, while Mr. DeSantis states that there is a difference between knowledge and experience, Mr. DeSantis, and thereby the ALJ, ignore the cause of Mr. Miker's knowledge: a long and studious Twenty-Eight (28) year career within the private sector of the HVAC trade.

Mr. Miker testified that, in his positions in the private sector, he was responsible for the technical assistance of contractors and/or other persons involved in the installation and maintenance of the HVAC systems sold by him or his employer. How can it be that Mr. Miker is the point of reference to aid other individuals in the installation and maintenance of HVAC systems due to his experience with the equipment and products, yet Mr. Miker does not have the experience to warrant his receiving credit for the years of experience in the HVAC trade?

Finally, Mr. Miker testified that he installed HVAC systems for a time while working with contractors. While the work with contractors was not documented, nor did it appear on Mr. Miker's application for hire to MCBE, there is no evidence to the contrary that Mr. Miker did not in fact perform work and/or services for contractors

As to his duties and responsibilities as an HVAC instructor at MTEC, Mr. Miker stated in his testimony that he is required to describe, detail, and, of course, teach about different products, systems, and equipment that are used within the HVAC trade. His students have various assignments relating to HVAC systems. The students are expected to learn about not only the mechanics of the HVAC systems, but the causes and resolution of maintenance issues, the installation of the systems, and how to keep up in the industry as the products, equipment, and other aspects of the HVAC change constantly.

Mr. Miker's duties and responsibilities while employed in the private sector were the same. Mr. Miker, in selling and providing technical assistance regarding the HVAC equipment and products his company manufactured and sold, was required to have an in depth understanding of all aspects of the HVAC equipment and products. Mr. Miker could not have effectively remained in his position for nearly Thirty (30) years in the private sector without such a vast understanding of the equipment and products.

Furthermore, any contractor, distributor, or consumer working to install, maintain, or repair HVAC equipment or products from Mr. Miker's company that required assistance in such installation, maintenance, or repair would have had the opportunity to call the company and request such assistance. As a technical advisor for

the company, Mr. Miker could not have remained in that position and effectively provided assistance to consumers, contractors, or distributors without knowledge and experience in the HVAC field and knowledge and experience in dealing with such equipment and products.

In his role as a technical advisor in the private sector, Mr. Miker was engaged in the practice of actually teaching other individuals, whether contractors, distributors, or consumers about the mechanics, installation, maintenance, and repair issues of the HVAC equipment and products. To suggest that his teaching and assistance of technical issues is not related to his duties and responsibilities as an HVAC instructor at MTEC is ludicrous.

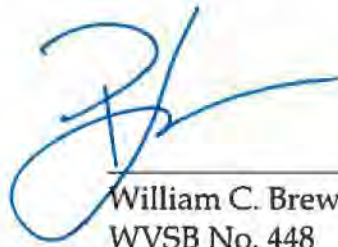
Even still, Mr. Miker's instruction is not simply limited to HVAC systems themselves, but Mr. Miker's instruction relates to all aspects of the HVAC industry. Mr. Miker duties and responsibilities in his role as an HVAC instructor at MTEC includes teaching his students about the business side of HVAC as well. It certainly cannot be argued that Mr. Miker's duties and responsibilities to teach his students regarding business aspects of the HVAC industry are not related to his managerial and/or sales position while employed in the private sector.

In finding that Mr. Miker was not entitled to years of experience credit, the ALJ erred.

VII. CONCLUSION

The ALJ erred when it found that Mr. Miker was granted the years of experience credit in 2012 based on a mistake that did not entitle him to future years of experience

credit as the mistake was not one that eliminated his ability to receive the credit, but it merely eliminated Mr. Miker's ability to receive the credit at that time. The ALJ erred when it found that Mr. Miker did not meet the criteria to receive years of experience credit as the ALJ ignored the reason for Mr. Miker's knowledge in the industry was experience, and Mr. Miker's employment experience in the private sector is directly related to his duties and responsibilities as an HVAC instructor at MTEC. Mr. Miker prays this Court reverse the Decision of the ALJ dated November 1, 2022, and remands this matter back to the ALJ for entry of a Decision granting Mr. Miker the years of experience credit he is due.

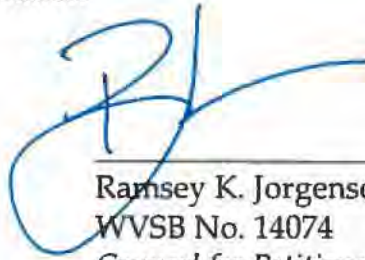


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CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served a true and accurate copy of the within *Petitioner Joseph Miker's Brief* on this 15th day of March, 2023, via United States Mail, postage pre-paid, upon the following:

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