

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' REPLY BRIEF

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PETITIONER JOSEPH MIKER'S REPLY 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. 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, *Calhill v. Mercer Cnty. Bd. Of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000).

III. REQUEST FOR ORAL ARGUMENT

Petitioner hereby renews his request 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.

IV. 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.**

Respondent, in its Response Brief, argues that awarding Mr. Miker experience credit based on his experience "as a manager or a salesperson or the like" is in violation of W.Va. Code § 18A-4-1(1). See Resp. Brief at pg. 7. It further argues that the initial award to Mr. Miker was in error, and that error was corrected. *Id.* As a result of that error, Mr. Miker is not entitled to now receive his experience credit. *Id.*

Respondent relies on *Ragione v. Preston County Bd. Of Educ.*, PEGB Docket No. 2014-1327-PreED (Feb. 12, 2016) to support its assertion that Mr. Miker is not able to now receive his experience credit previously given to him. Respondent goes on to state that the Grievance Board "has previously held that nearly the same exact decision does not warrant requiring that experience credit be awarded to the employee." Resp. Brief at pg. 7.

However, *Ragione* makes no reference to why the grievant in that case was stripped of his experience credit. *Ragione* makes no reference to the experience that the grievant had in the private sector prior to gaining employment with the Preston County Board of Education. The only information that can be deciphered from *Ragione* is that the superintendent of Preston County awarded the grievant experience credit, upon review by the Office of Education Performance Audits, a mistake was discovered, and the grievant was stripped of his experience credit.

Furthermore, *Ragione* is distinguishable from this case, much like those of *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 all three cases cited by Respondent and the ALJ in its Decision, the error that permitted the grievant some pay that was not warranted violated a policy that was in place at the time the error was made. In this case, there is no policy to determine experience credit for CTE teachers, nor is there any evidence that there ever was a policy to determine experience credit for CTE teachers.

The only evidence of any mistake in awarding Mr. Miker experience credit is the testimony of Mr. DeSantis that he would not now choose to award experience credit for the private sector experience Mr. Miker had prior to his employment with MTEC. However, Mr. DeSantis was not then the decision maker when Mr. Miker gained employment at MTEC, nor can he speak to the policy, procedure, method, or process MTEC and/or MCBE used at that time to award Mr. Miker experience credit.

The only evidence or testimony relating to a mistake is the evidence and testimony of Mr. Miker. As Mr. Miker clearly explained during the Level 3 hearing, he was informed that there was a mistake in awarding the experience credit at that time, and he needed to first obtain a bachelor's degree to be eligible for that credit. Mr. Miker fulfilled his obligation, and he is now eligible to receive that experience credit.

In deciding that Mr. Miker was not eligible to receive the experience credit after fulfilling his obligations to be eligible for that experience credit, 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.

The Respondent, in its Response Brief, argues that the ALJ did not err in determining Mr. Miker's experience in the private sector did not fit within the statutory definition of "years of experience." See Resp. Brief at pgs. 6 - 7. However, both the ALJ and MCBE incorrectly apply the language of W.Va. Code § 18A-4-1(1).

MCBE, as testified to by Mr. DeSantis, determines whether or not a potential MTEC or CTE teacher is eligible for experience credit based on whether they actually performed work in the subject area in which they will teach. "At the moment, what we've done, we've always looked at past practice and how they directly relate to what they were doing. Meaning, if I am teaching welding, I had to be a welder." D.R.0071.

This is an incorrect application of W.Va. Code § 18A-4-1(1). To determine whether a person is eligible for experience credit, the test is not whether that person performed services of that type in the private sector, the test is whether they have experience teaching those types of services.

Respondent points out that Mr. Miker was not actually an HVAC technician that serviced or installed HVAC equipment. First and foremost, that assertion is patently false. Mr. Miker explicitly testified that he did have such prior experience installing HVAC systems, although that experience was undocumented. No evidence to the contrary was introduced.

Secondly, as stated above, that is not the correct test to determine whether or not Mr. Miker is eligible for experience credit. Even if it were the correct test, without any

evidence to the contrary that Mr. Miker did in fact perform installations of HVAC equipment for contractors, MCBE ignored its own "past practice" of granting experience credit to those that performed those services. Furthermore, while Respondent argues that Mr. Miker's role "as a manager or a salesperson or the like" is not actually performing the services that Mr. Miker was charged with instructing his students on, Respondent's own website and description of the class taught by Mr. Miker lists employment opportunities that can be obtained after taking the course, which includes "HVAC Technician, Plumber, Electrician, Counter Sales Representative." MCBE and MTEC advertise that taking Mr. Miker's class will prepare you for the specific role that he kept while in the private sector while claiming that Mr. Miker's duties and responsibilities as a CTE instructor are not sufficiently related to that specific role. How can it be both a course that will prepare you for that role, but not be sufficiently related to that role to warrant experience credit?

Furthermore, it bears noting that Mr. Miker was also involved in a management position in the private sector. On the same web page advertising Mr. Miker's course, it lists "Employment Opportunities with Further Training." The only employment opportunity listed is "Management potential in HVAC, Plumbing, Electrician, Sales." Of course, this implies that because Mr. Miker was in a management position in the private sector, Mr. Miker underwent additional training. Training that is not required to be able to teach others HVAC.

But even still, it makes no matter whether Mr. Miker actually performed those services. Under the statutory definition of "years of experience," the test to be applied

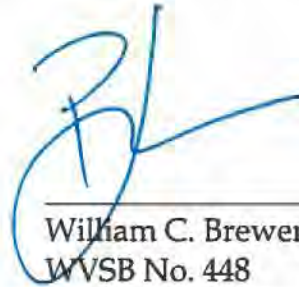
to determine eligibility is whether Mr. Miker was involved in a teaching role while in the private sector. Mr. Miker was a technical advisor to distributors, contractors, and other persons that used the equipment sold by Mr. Miker's private sector employer. In his role as a technical advisor, Mr. Miker provided instructions and information to distributors, contractors, and other persons using that equipment on (1) how it operated; (2) how to install the equipment; (3) troubleshooting issues; and (4) resolution of those issues. In plain terms, Mr. Miker taught distributors, contractors, and other persons using the equipment all aspects of the HVAC equipment.

In determining that Mr. Miker was not eligible for his experience credit, the ALJ erred.

V. 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, Mr. Miker's employment experience in the private sector is directly related to his duties and responsibilities as an HVAC instructor at MTEC, and Mr. Miker held a teaching position within the private sector as a technical advisor to distributors, contractors, and other persons using the HVAC equipment sold by his employer. 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 Reply Brief* on this 17th day of May, 2023, via the West Virginia Intermediate Court of Appeals e-filing system, upon the following:

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