

IN THE

**Intermediate Court of Appeals of West Virginia**

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**DOCKET NO. 22-ICA-311**

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JOSEPH MIKER,

**Grievant Below, Petitioner,**

v.

MONONGALIA COUNTY BOARD OF EDUCATION,

**Respondent Below, Respondent.**

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On Appeal From  
The Public Employees Grievance Board

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**RESPONDENT'S BRIEF**

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COUNSEL FOR RESPONDENT:

DINSMORE & SHOHL LLP  
Of Counsel

Jason S. Long  
(W. Va. Bar No. 9080)  
Mary Catherine Tuckwiller  
(W. Va. Bar No. 11670)  
P.O. Box 1850  
Lewisburg, West Virginia 24901  
(304) 645-5360  
(304) 645-5375 (facsimile)  
[jason.long@dinsmore.com](mailto:jason.long@dinsmore.com)  
[mc.tuckwiller@dinsmore.com](mailto:mc.tuckwiller@dinsmore.com)

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## STATEMENT OF THE CASE

Respondent, in large part, agrees with the Petitioner's Statement of the Case. It states below, only a few discrete facts to supplement Petitioner's Statement of the Case.

### A. Factual Background

The Grievant below, Joseph Miker, is employed by the Monongalia County Board of Education ("Board") as a heating, ventilation, and air conditioning Career and Technical Education ("CTE") teacher at Monongalia Technical Education Center ("MTEC"). *Miker v. Monongalia County Bd. of Educ.*, PEGB Docket No. 2022-0581-MonED at 2 (Nov. 1, 2022). Prior to his employment with Respondent, Miker worked in the private sector for an HVAC wholesale company. *Id.* Miker indicated that he started in 1984 at the warehouse, then moved to counter, then to assistant manager, and manager. *Id.* Miker served in a management capacity since 1986, managing a store front, conducting product ordering, and distribution. *Id.* He did not conduct servicing and installation of HVAC equipment.

When he started employment with the Board, Miker was initially awarded twenty-eight years of experience. *Id.* at 3. "[Y]ears of experience" is defined by the Code as "the number of years the teacher has been employed in the teaching profession, including active work in educational positions other than the public schools." W. Va. Code § 18A-4-1(1) (2022). Since Miker had not worked in the teaching profession or in educational positions prior to his employment with the Board, Miker's years of experience were in error, and the experience pay was revoked from his salary in 2013. *Miker* at 3. Miker obtained a Board of Regents Bachelor of Arts degree in 2021, and requested the twenty-eight years of experience credit. *Id.* The Board denied his request, though, because of his degree, his salary was increased significantly. *Id.*

## **B. Procedural History**

In 2022, Miker grieved the denial of his twenty-eight years of experience. *Id.* At Level I, the Level I evaluator awarded Miker ten years of experience, due to the ten years that he had been employed with the Board. *Id.* A Level 2 mediation was held on May 9, 2022, but was unsuccessful. *Id.* at 1. The Grievance Board held a Level 3 hearing on August 18, 2022. *Id.*

The decision from the Level 3 hearing notes that “it was somewhat difficult to understand Grievant’s basis for his claim” but noted that the “Statement of Grievance alleges discrimination and favoritism in seeking an award of twenty-eight years of work experience.” *Id.* at 5. Thus, the Level 3 decision analyzes Miker’s claims that the twenty-eight years of experience were not awarded to him on the basis of discrimination and favoritism.

The Grievance Board found that Miker had not submitted any evidence to support his claims of discrimination and favoritism. *Id.* at 6. The Grievance Board noted that the Board had demonstrated that no CTE teachers who are similarly-situated with Miker are paid based on years of experience. *Id.* It also noted that while there is no written policy governing the award of years of experience, the fact that the Board had previously made a mistake and awarded Miker his years of experience did not justify an award going forward. *Id.* As such, the Grievance Board denied the grievance. *Id.* at 8. This appeal followed.

### **SUMMARY OF ARGUMENT**

This Court should affirm the decision of the Grievance Board. First, Miker has not submitted any evidence from which this Court could determine that the decision not to award him years of experience was the result of discrimination or favoritism. Although not the Board’s legal burden, it was only the Board that submitted any evidence on this point, and the only evidence submitted demonstrated that no other similarly-situated CTE teacher is paid for years of

experience for service in the private sector. Indeed, doing so would violate the express statutory language governing years of experience for pay purposes.

Second, Miker's argument on appeal that the Board (or even the Grievance Board) misapplied the statute is plainly wrong. The statute makes clear that years of experience are only awarded for those years during which the teacher was employed in a "teaching profession" or in "educational positions." Miker's employment in the private sector quite simply does not qualify him to receive years of experience for pay purposes. While that experience did provide him with knowledge of the substantive area that he teaches, it clearly does not qualify him to receive credit for those years of employment under the appropriate statutory language.

Finally, the fact that the Board made a mistake in awarding him experience credit when he was initially employed cannot be used to justify the award of experience credit now. The Board's decision to award credit was mistaken, and as it was a misinterpretation of the statute, it was *ultra vires*. Such a decision cannot be used to justify a future award of years of experience.

For those reasons, this Court should affirm the decision of the Grievance Board, denying his grievance.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Respondent does not believe that oral argument is necessary in this case, as the facts and legal arguments are adequately presented by the briefs and the record.

#### **ARGUMENT**

This Court should affirm the decision of the Grievance Board for three reasons. First, Miker has failed to present any evidence from which the Court could determine that the decision not to award years of experience was the result of discrimination or favoritism. Second, Miker's argument on appeal that the statutory language concerning the application of years of experience

was misapplied is wrong. Finally, the fact that the Board made a mistake in awarding the years of experience at one point does not justify awarding those years of experience going forward.

**A. The Grievance Board Correctly Determined That Miker Failed To Support His Allegations Of Discrimination Or Favoritism.**

This court should affirm the decision of the Grievance Board. The Grievance Board's Decision denying Miker's grievance is "permitted to stand unless it was clearly wrong." *Martin v. Barbour Cnty. Bd. of Educ.*, Syl. Pt. 3, 228 W. Va. 238, 719 S.E.2d 406 (2011) (quoting *Randolph Cnty. Bd. of Educ. v. Scalia*, Syl. Pt. 1, 182 W. Va. 289, 387 S.E.2d 524 (1989)). The Supreme Court of Appeals has stated the following with respect to the standard of 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.

*Cahill v. Mercer Cnty. Bd. of Educ.*, Syl. Pt. 1, 208 W. Va. 177, 539 S.E.2d 437 (2000).

As the Grievance Board noted, discrimination and favoritism are defined for purposes of the grievance process. Discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. Va. Code § 6C-2-2(d) (2022). Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional, or advantageous treatment of a similarly situated employee unless agreed to in writing or related to actual job responsibilities." W. Va. Code § 6C-2-2(h) (2022). To demonstrate discrimination or favoritism, "an employee must show that he or she has been treated differently from other employees and that the different treatment is not related to the

actual job responsibilities of the employees and not agreed to in writing by the employee.” *Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 248, 605 S.E.2d 814, 820 (2004).<sup>1</sup>

As the Grievance Board found, “Grievant provided no evidence to support his allegation of discrimination and favoritism.” *Miker v. Monongalia County Bd. of Educ.*, PEGB Docket No. 2022-0581-MonED at 6 (Nov. 1, 2022). The only evidence introduced on the issue of whether there are similarly-situated employees who received experience credit in circumstances similar to Miker’s was introduced by the Board. (D.R. 65-67). The Board’s representative testified that there are no other instructors at MTEC who are receiving experience credit for having held high level positions in the field in which they are teaching. (D.R. 68-69).

Further, the Board’s representative distinguished between the knowledge required to teach the subject matter and experience teaching the subject matter. (D.R. 65-67). Experience credit is received for years of teaching experience, but not for years spent in a position gaining knowledge in the subject matter. Indeed, “years of experience” is defined as “the number of years the teacher has been employed in the teaching profession, including active work in educational positions other than the public schools.” W. Va. Code § 18A-4-1(1) (2022).

Again, the Board’s representative testified that no other similarly-situated employee was receiving experience credit while Miker’s had been denied. And Miker introduced no evidence of any such similarly-situated employee at all. Even if Miker argues that the Board should have granted experience credit for the type of position he held prior to his employment with the Board, he introduced no evidence of any individual who was granted experience credit in those

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<sup>1</sup> Though the *White* decision was primarily focused on discrimination, the Court later confirmed that its holding in *White* applied to questions of favoritism as well. *Frymier v. Higher Educ. Policy Comm’n*, 221 W. Va. 306, 313, 655 S.E.2d 52, 59 (2007).



circumstances. Thus, the evidence before the Grievance Board quite clearly failed to establish the prima facie case of discrimination or favoritism.

For those reasons, the Grievance Board correctly determined that Miker had failed to support his allegations of discrimination and favoritism, and its decision should be affirmed.

**B. The Board Correctly Denied Miker Experience Credit.**

Miker argues in this appeal that the Board improperly interpreted the statute to deny him experience credit; his argument is incorrect. As explained above, “years of experience” is defined in Code as “the number of years the teacher has been employed **in the teaching profession**, including active work **in educational positions** other than the public schools.” W. Va. Code § 18A-4-1(1) (2022) (emphasis added). That is, by statute, experience credit is awarded only for time spent in the teaching profession or in educational positions.

Miker argues on appeal that the Grievance Board’s decision “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.” (Pet. Br. at 11). He goes on to argue that his experience in the private sector qualified him for his role with the Board and justified the experience credit.<sup>2</sup>

First, though, that is not quite what the Grievance Board decided. The Grievance Board did discuss Miker’s work in the private sector, but it did so in the context of discussing whether he held the knowledge that might be required of a CTE teacher at MTEC. *Miker* at 6. But it quite clearly also discussed that experience credit required a showing that his employment was in teaching. *Id.* at 5. Similarly, the Board has never argued that Miker did not hold the requisite knowledge to be a CTE teacher, at all – just that he did not hold the teaching experience necessary to warrant application of the statutory experience credit.

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<sup>2</sup> The Grievance Board did not interpret Miker as making this argument at that level, and thus, it is not addressed in the Grievance Board’s decision.

But further, Miker’s argument is directed at the language of the statute, which the Board cannot change. The Board, as is required by the statute, awards experience credit when the employee has experience “in the teaching profession” or in “educational positions.” Miker might have a compelling argument that the Legislature should review whether experience in the private sector in the field taught should justify experience credit, but that is quite clearly not what the statute currently provides. The Board appropriately applied the statute when it removed his experience credit, and that decision should not be reversed.

For those reasons, the Grievance Board’s decision should be affirmed.

**C. The Grievance Board Correctly Determined That A Prior Mistake Did Not Warrant Granting Miker The Requested Experience Credit.**

Finally, Miker’s argument on appeal appears to be that a prior mistake by the Board in granting experience credit to Miker somehow warrants awarding that credit now; the argument fails. First, it is accurate, as Miker argues, that the Board did not have a written policy addressing the criteria to determine when experience credit is awarded to CTE teachers. (D.R. 47). Thus, the grant or denial of experience credit is determined on a case-by-case basis. (*Id.*). As explained above, awarding Miker experience credit based on experience as a manager or a salesperson or the like would clearly be in violation of the statute, and a mistake – a mistake that the Board corrected in 2013. (D.R. 38).

However, experience credit cannot be awarded based on the Board’s prior mistake. The Grievance Board has previously held that nearly the same exact decision does not warrant requiring that experience credit be awarded to the employee. *Ragione v. Preston County Bd. of Educ.*, PEGB Docket No. 2014-1327-PreED (Feb. 12, 2016). In that case, the grievant had previously been awarded twenty-eight years of experience credit by a prior superintendent, and a state audit revealed that the credit should not have been awarded, and as a result, it was removed.

*Id.* at 3. The grievant argued, among other things, that the Board was equitably estopped from arguing that it was mistaken when it awarded the credit, but the Grievance Board denied the grievance. *Id.* Of note, the Grievance Board noted that the prior superintendent – by awarding experience credit in violation of the Code section – had engaged in an *ultra vires* act, which was non-binding and could not be used to force the Board to repeat the violation. *Id.* at 5 (citing *Parker v. Summers Cnty. Bd. of Educ.*, 185 W. Va. 313, 317, 406 S.E.2d 744, 748 (1991) (“unlawful or ultra vires promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity”)). Thus, the prior superintendent’s award of experience credit was not a justification to award experience credit now.

For the same reason, the prior mistake to award Miker experience credit does not justify awarding it now. The awarding of experience credit to him in 2012 was clearly a mistake, and there has been no evidence introduced at all to suggest it was anything other than a mistake. But that mistake – since it awarded him experience credit in violation of the applicable Code section – was an *ultra vires* act, and it cannot be used to justify awarding him experience credit now.

For those reasons, the Grievance Board correctly determined that Miker was not entitled to receive experience credit, and its decision should be affirmed.

#### CONCLUSION

For the foregoing reasons, the Grievance Board correctly denied Miker’s grievance. This Court should affirm its decision.

**MONONGALIA COUNTY BOARD OF  
EDUCATION,  
By Counsel,**

/s/ Jason S. Long \_\_\_\_\_

Jason S. Long

(W. Va. Bar No. 9080)

Mary Catherine Tuckwiller

(W. Va. Bar No. 11670)

P.O. Box 1850

Lewisburg, West Virginia 24901

(304) 645-5360

(304) 645-5375 (facsimile)

[jason.long@dinsmore.com](mailto:jason.long@dinsmore.com)

[mc.tuckwiller@dinsmore.com](mailto:mc.tuckwiller@dinsmore.com)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was filed this 1<sup>st</sup> day of May, 2023, using the Court's electronic filing system, and will be served on counsel through that system.

/s/ Mary Catherine Tuckwiller  
Mary Catherine Tuckwiller