**KAREN BROWNING, et al.,**

**Grievants,**

**v.**

**DOCKET NO. 97-29-297**

**MINGO COUNTY BOARD OF EDUCATION,**

**Respondent,**

**and**

**DEBBIE ADAMS, et al.,**

**Intervenors.**

**D E C I S I O N**

The Grievants and Intervenors in this matter include both professional and service personnel who filed the following grievance against their employer, the Mingo County Board of Education ("Board"):

> Grievants describe the grievable event as follows: By recommendation of the Superintendent, the Mingo County Board of Education Members reduced continuing contracts of each grievant. The grievants contend the action taken was in violation of 18-29-2 letter M, representative of discrimination and O, representative of favoritism.
>
> As relief, Grievants seek: Return of continuing contract to the status of the 1996-97 school term restoring, days lost due to superintendent's recommendation and approval of the board.

A level two hearing was conducted on June 11, 1997, and the grievance was denied by decision of Grievance Evaluator Everett Conn on June 18, 1997. Grievants appealed to level four on June 27, 1997, and following several continuances for good cause, a levelfour hearing was held at the Mingo County Board of Education office in Williamson, West Virginia, on February 24, 1998. (See footnote 1)

This grievance became mature for decision on March 31, 1998, the deadline for the parties'

submission of proposed findings of fact and conclusions of law.

Grievants Karen Browning, Janice Miller, Sue Fullen, Nell Hatfield, and Pam Varney were represented by West Virginia Education Association representative, Kathleen Smith. Grievant William Kirk was represented by American Federation of Teachers representative, Steve Angel. Intervenors Debbie Adams, Barbara Webb and Nolice Hensley were represented by American Federation of Teachers representative, Sidney Fragale. Intervenors Earl Spence, Drema Dempsey, Christine Whitt, and Debbie Moore were represented by West Virginia School Service Personnel Association counsel, John E. Roush, Esq. The Mingo County Board of Education ("Board") was represented by William C. Totten.

## SUMMARY OF EVIDENCE

### Level II Grievant's Exhibits

Ex. 1 -

West Virginia Board of Education Directives to the Mingo County Board of Education for Resolving the Deficit.

Ex. 2 -

Letters from Superintendent Everett Conn to Grievants notifying them of their contract reduction in the Spring of 1997.

### Level II Board Exhibits

Ex. 1 -

February 26, 1997 letter from Carolyn Arrington to Superintendent Everett Conn, Jr.

### LIV Grievant's Exhibits

Ex. 1 -

Transcript of March 25, 1997 Board Hearing of Karen Browning, Janice Miller, Sue Fullen and Nell Hatfield.

Ex. 2 -

List of Summer projects of Janice Miller.

Ex. 3 -

List of Summer projects of Karen Browning.

Ex. 4 -

September 3, 1997 letter from Barbara Jones, Ph.D. to Superintendent Everett Conn.

Ex. 5 -

September 29, 1997 letter from Karen Browning to Superintendent Everett Conn.

Ex. 6 -

May 27, 1997 letter from Henry Marockie to Everett Conn.

Ex. 7 -

Transcript of March 25, 1997 Board Hearing of Pamela Varney.

Ex. 8 -

Personnel to be approved July 3, 1995 Board Meeting.

Ex. 9 -

Extended Day Personnel 1996-97 vs. 1997-98.

Ex. 10 -

Service Personnel Employment List, Mingo County, 1996-97.

Ex. 11 -

Professional Personnel Employment List, Mingo County, 1997-98.

Ex. 12 -

Mingo County Board of Education Vacation Policy for Service/Professional 261 Day Employees.

Ex. 13 -

Continuing Contract of Employment for Service Personnel for Earl Spence, dated September 1, 1994.

Ex. 14 -

Continuing Contract of Employment for Service Personnel for Earl Spence, dated August 19, 1997.

Ex. 15 -

March 18, 1997 letter from Bill Kirk to Everett Conn.

Ex. 16 -

Continuing Contract of Employment for Service Personnel for William M. Kirk, dated August 19, 1997.

Ex. 17 -

March 13, 1997 and April 4, 1997, letters to Debra Adams, Nolice Hensley, Barbara Webb, and Connie Chambers from Everett Conn.

Ex. 18 -

Transcript of March 25, 1997 Board Hearing of Connie Chambers.

Ex. 19 -

Personnel to be approved March 31, 1997 Board Meeting.

Testimony

All Grievants testified in their own behalf, and presented the testimony of Judy McCoy. All Intervenors, except Barbara Webb, testified in their own behalf. The Board presented the testimony of Everett Conn.

## FINDINGS OF FACT

The material facts in this grievance are not in dispute, and are set forth in the following findings.

1. Grievants and Intervenors are professional and service employees of the Board. 2. The Board was and is experiencing a significant fiscal deficit, and during the 1996-97 school year, requested a technical assistance team from the West Virginia Department of Education to make recommendations regarding the necessary further reduction of personnel.

3. By letter dated February 26, 1997, the team recommended a number of measures,

including:

> With the exception of the Superintendent, Treasurer, and the two Assistant Superintendents with a two-year contract, over a span of two years reduce the employment of all personnel presently on an extended employment term to 200 days and stagger work schedules of those persons to provide appropriate coverage.

The recommendations were addressed to then-Superintendent Everett Conn, with a copy to members of the Board and to members of the West Virginia State Board of Education. LII Board Ex. 1.

4. The West Virginia State Board of Education subsequently issued a number of directives to the Board, including:

> Review the extended employment contracts for all professional and service personnel employed in excess of 200 days and reduce the number of days employed of all personnel, with the exception of the superintendent and treasurer, <u>to the minimum number required to accomplish the duties assigned.</u> Work schedules of service personnel could be staggered during the summer months to provide coverage.

LII G. Ex. 1 (emphasis added).

5. Subsequent to receiving the directive from the State Board of Education, the Board notified Grievants and Intervenors of proposed contract reductions. Grievants and Intervenors were afforded the opportunity to be heard before the Board, and some of them availed themselves of that opportunity. The Board voted to approve the proposed contractreductions before April1, 1997, and Grievants and Intervenors were subsequently notified. LII, G. Ex. 2; LIV G. Ex. 17.

6. The process of reducing Grievants' and Intervenors' extended employment terms was in accordance with all statutory requirements.

7. Grievant Karen Browning is the Director of Special Education. Her contract was reduced from 261 days to 240 days.

8. Grievant Janice Miller is the Assistant Director of Special Education. Her contract was reduced from 240 days to 220 days.

9. Grievant Sue Fullen is the Dean of Exceptional Students. Her contract was reduced from 210 days to 200 days.

10. Grievant Nell Hatfield is a Certification/Media Specialist. Her contract was reduced from 261

days to 240 days.

11. Grievant Pam Varney is a Clerk/Receptionist. Her contract was reduced from 261 days to 240 days.

12. Grievant William Kirk is the Director of Transportation. His contract was reduced from 261 days to 200 days. He was asked by Superintendent Conn at his hearing before the Board if he would agree to assume the duties of Director of Maintenance, as well, and his contract was extended to 240 days.

13. Intervenor Debbie Adams is an Executive Secretary in the Central Office. Her contract was reduced from 261 days to 240 days.

14. Intervenor Barbara Webb is an Executive Secretary/Secretary III in the Central Office. Her contract was reduced from 261 days to 240 days. 15. Intervenor Nolice Hensley is an Executive Secretary/Secretary II in the Central Office. Her contract was reduced from 261 days to 240 days.

16. Intervenor Connie Chambers is an Executive Secretary for the Transportation Department. Her contract was reduced from 210 days to 200 days.

17. Intervenor Earl Spence is a Transportation Supervisor. His contract was reduced from 261 days to 230 days.

18. Intervenor Drema Dempsey is an Executive Secretary/Secretary III in the Central Office. Her contract was reduced from 261 days to 240 days.

19. Intervenor Debbie Moore is an Accountant III/Office Manager. Her contract was reduced from 261 days to 240 days.

20. Intervenor Christine Whitt is the Director of Food Services. Her contract was reduced from 261 days to 240 days.

21. All maintenance employees of the Board retained their 261-day contracts.

22. Transportation Supervisor Alex Hunt retained his 261-day contract.

23. Judy McCoy, Curriculum Specialist, retained her 230-day contract.

24. Paul Hall, who is listed on the Board's certification list as a Director, but is not a Director of any department, retained his 261-day contract. Mr. Hall is an Electrician within the Maintenance Department.

25. Five other Deans of Students retained their 210 day contracts.

26. Former Superintendent Conn is now the Director of Maintenance. His contract term is 240

days.

## DISCUSSION

Grievants and Intervenors allege the Board's actions were arbitrary and capricious because it did not review the duties and responsibilities with each employee prior to reduction in contracts.

County boards of education have substantial discretion in matters relating to the hiring and assignment of school personnel. The exercise of that discretion must be in the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W. Va. 1991). The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the decision-maker. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). Generally, an action by a board of education is considered arbitrary and capricious if the decision-maker did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-255 (Mar. 19, 1998).

“When board of education seeks to reduce employment costs, board may decide that schools' best interests require either elimination of some service personnel jobs or retention of all service personnel jobs but with reduced employment terms.” Syl. Pt. 3, Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487 (1994). Determinations of the number of school service personnel and length of their employmentterms are primarily management decisions, and, without a clear statutory requirement to the contrary, such determinations should remain with board of education. Syl. Pt. 4, Lucion, supra.

Lucion, supra, establishes that a county board of education may reduce the contract terms of its employees, as long as it follows the proper statutory procedure. There is no dispute that the Board adhered to all proper statutory procedures in reducing Grievants' and Intervenors' contracts. With regard to whether that action was arbitrary and capricious, there is nothing in the State Board

directive that mandated the Board sit down with each employee and review his or her duties and responsibilities prior to making contract reductions. The State Board directive merely states that the Board should "[r]eview the extended employment contracts of all professional and service personnel employed in excess of 200 days and reduce the number of days employed of all personnel, with the exception of the superintendent and treasurer, to the minimum number required to accomplish the duties assigned." There is no evidence to show that the Board did not review the extended employment contracts of all employees before making the reductions. Grievants and Intervenors offered lengthy explanations and descriptions of their various job functions, and while this decision in no way intends to demean or belittle the jobs these individuals perform, they did not succeed in demonstrating that the Board acted in an arbitrary or capricious manner when it reduced their contracts. Indeed, a review of the recommendations of the State Department's team of advisors indicates that a good many of the Grievants' and Intervenors' positions were recommended for elimination entirely, especially those in the Special Education Department. Former Superintendent Conn testified that he did not want to eliminate any personnel. He explained that the difference between a 261 day and a 240 day contract equals 1/3 of a position for the purposes of the state aid formula. Thus, if he cut three 261- day contracts to 240-days, he would effectively eliminate one position. By cutting the Grievants' and Intervenors' 261-day contracts, he effectively eliminated a total of 3 positions, only counting those whose contracts were cut from 261 to 240 or 230 days, without having to eliminate any employees. Adding in other employees whose contracts were cut from 240 to 220, or 210 to 200, it adds up to the equivalent of at least one more position eliminated, again, without having to eliminate any employees.

Grievants and Intervenors insist on chastising former-Superintendent Conn for cutting their contracts, and for not adhering strictly to the recommendations of the State Department of Education team of advisors. But it is clear, had he given more credence to the team's recommendations, some of those employees would no longer have jobs.

Grievants and Intervenors also allege that, with respect to their contract reductions in comparison to all other Board employees, and in comparison to some specific individuals, as well, the Board is guilty of discrimination and favoritism. The Board denies it discriminated against, or showed favoritism to, any of its employees in attempting to comply with the State Board of Education directives.

W. Va. Code § 18-29-2(m) defines “discrimination” 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.” W. Va. Code § 18-29-2(o) defines “favoritism” as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” Inorder to establish a claim of discrimination, an employee must establish a prima facie case by a preponderance of the evidence. In order to meet this burden, the employee must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his 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.

Once the employee establishes a prima facie case of discrimination or favoritism, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. However, the employee may still prevail if he can demonstrate the reason given by the employer was mere pretext. Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievants and Intervenors allege they are similarly situated to all employees of the Board with respect to their contract reductions. They point to the language of the State Board's directive, stated in Finding of Fact No. 4, and restated below:

> Review the extended employment contracts for all professional and service personnel employed in excess of 200 days and reduce the number of days employed of all personnel, with the exception of the superintendent and treasurer, to the minimum number required to accomplish the duties assigned. Work schedules of service personnel could be staggered during the summer months to provide coverage.

LII G. Ex. 1 (emphasis added).

Grievants and Intervenors claim this directive demanded that the contracts of all personnel be

reduced. Since some personnel, specifically, the maintenance department employees, were not cut, and Grievants and Intervenors are similarly situated, in that they are also employees of the Board, they allege this constitutes discrimination.

Grievants and Intervenors ignore the entire language of the State Board's directive, specifically, that contracts are to be reduced "to the minimum number required to accomplish the duties assigned". Even if I accepted Grievants' and Intervenors' arguments that they are similarly situated to all employees of the Board, which I do not, their argument of discrimination and favoritism with regard to all other employees would fail.

Grievants and Intervenors compare themselves to the maintenance employees who retained their 261-day contracts. The Board explained that it simply was not feasible to cut the contracts of maintenance employees because the need for all types of maintenance, such as plumbing, electrical, carpentry, and air conditioning and heating, did not simply stop on the day school let out for the summer. In fact, a large number of these tasks are undertaken to a greater degree during the summer, when school is not in session, to avoid interruption of instructional activities. In addition, the Board was under a federal mandate to bring all of its buildings and facilities into compliance with federal disabilities laws by July 1, 1997, or all federal funds to the State of West Virginia would be stopped. To the extent the State Board ordered the Board to reduce contracts to the minimum number of days required to accomplish the duties assigned, the Board has offered a legitimate, non-discriminatory reason why it did not cut the maintenance employees' 261 day contracts.

Several Grievants and Intervenors compare themselves with some specific individuals whose contracts were not cut, and these employees will be addressed individually.

William Kirk, Director of Transportation

Mr. Kirk's contract was first cut from 261 days to 200 days. Then, during his hearing before the Board, he agreed to assume the duties of the Director of Maintenance, as well as his Transportation duties, and his contract was extended to 240 days.

Mr. Kirk alleges he is similarly situated to Paul Hall, who is listed on the Board's certified list of personnel as a Director or Coordinator. Mr. Hall retains a 261-day contract. The evidence during the level four hearing established conclusively that Mr. Hall is not the Director or Coordinator of anything under the definitions contained in W. Va. Code § 18A- 4-8a. Mr. Hall is an Electrician within the Maintenance Department, and retained his 261- day contract along with all other maintenance

employees.

With respect to other Directors, however, Mr. Kirk is the only Director who had his contract cut initially to 200 days. Even the Transportation Supervisors who are subordinate to Mr. Kirk, have longer contracts. Only upon agreeing to assume the duties of Director of Maintenance did Mr. Kirk get his contract increased to 240 days. Cutting Mr. Kirk's contract to 200 days when no other Director's was cut that far was discriminatory on the part of the Board.

However, the evidence has established that, while Mr. Kirk's contract was extended to 240 days upon assumption of Director of Maintenance duties, those duties were subsequently transferred to Mr. Conn, and Mr. Kirk retained the 240 day contract. Other Directors' contracts were cut to 240 days, including Karen Browning's, Christine Whitt's,and Mr. Conn's. Thus, while it was initially a discriminatory act to cut Mr. Kirk's contract to 200 days, he now holds the same 240-day contract that other Directors hold. As his contract was extended at the Board hearing, Mr. Kirk never suffered any economic effects of the initial cut to 200 days, and thus, is not entitled to any relief for that action.

Sue Fullen

Ms. Fullen is the Dean of Exceptional Students for Mingo County. Her contract was cut from 210 to 200 days. Her job was recommended for elimination by the State Department team of advisors. Ms. Fullen is similarly situated to other Deans in the County, and former Superintendent Conn testified that hers was the only contract to be cut to 200 days. Thus, Ms. Fullen has shown that the act of cutting her contract to 200 days was discriminatory, and the Board has offered no legitimate, non-discriminatory reason for its action vis-a-vis other Deans. Ms. Fullen's contract should be restored to 210 days and she should be compensated for the difference in salary and benefits she would have received had she been operating under a 210 day contract.

Janice Miller

Ms. Miller is the Assistant Director of Special Education. Her contract was reduced from 240 days to 220 days. Her position was recommended for elimination by the State Department team of advisors. Ms. Miller contends she is really a Curriculum Specialist, and thus, misclassified, and compares herself to other Curriculum Specialists, Judy McCoy and John Maynard, who have 230-day contracts. The testimony presented by Ms. Miller and Ms. McCoy illustrated that, while Ms. Miller is responsible for the special education curriculum, she is also responsible for many other duties, and she does not perform all of the duties that Ms. McCoy performs as Curriculum Specialist for the entire

county. Whilemany of the duties of the two positions may overlap, that alone does not make Ms. Miller a Curriculum Specialist. See Hamilton v. Mingo County Bd. of Educ., Docket No. 91-29- 077 (Apr. 15, 1991). More importantly, if Ms. Miller believes she is misclassified, she should bring that issue to the Board in a separate grievance, as that claim was not part of her grievance here. I do not find the evidence presented sufficient to prove that Ms. Miller should be considered similarly situated to a Curriculum Specialist, thus warranting a 230- day contract, as opposed to her present 200-day contract.

Earl Spence

Mr. Spence alleges he is one of two Transportation Supervisors with the Board. His contract was reduced from 261 days to 230 days. His position was recommended for elimination by the team of advisors from the State Department of Education. The other Transportation Supervisor, Alex Hunt, retains a 261-day contract.

The Board explained that Mr. Hunt performs mechanic duties and it is necessary that he be available year-round to maintain the school buses and other equipment. Mr. Spence does not perform these types of duties. In fact, this Grievance Board has recently held in a very similar grievance that Mr. Spence is not a Transportation Supervisor, but is an Assistant Director of Transportation. See Spence v. Mingo County Bd. of Educ., Docket No. 97-29-244 (Apr. 6, 1998). Thus, Mr. Spence and Mr. Hunt do not perform like assignments and duties, and do not hold the same classification, and the Board has established a legitimate, non-discriminatory reason why it reduced Mr. Spence's contract term and not Mr. Hunt's.

With respect to the other Grievants and Intervenors, they have not shown they were treated differently than any other employees within their classifications. The secretarieswere all cut from 261 days to 240 days. The Directors were all cut from 261 days to 240 days. The various other Grievants and Intervenors pointed to no other similarly-situated employees and did not show their contract reductions were otherwise arbitrary and capricious.

## CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievants and Intervenors have the burden of proving each element of their 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. County boards of education have substantial discretion in matters relating to the hiring and assignment of school personnel. The exercise of that discretion must be in the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W. Va. 1991).

3. "When board of education seeks to reduce employment costs, board may decide that schools' best interests require either elimination of some service personnel jobs or retention of all service personnel jobs but with reduced employment terms." Syl. Pt. 3, Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487 (1994).

4. "Determinations of number of school service personnel and length of their employment terms are primarily management decisions, and, without clear statutory requirement, such determinations should remain with board of education." Syl. Pt. 4, Lucion, supra. 5. W. Va. Code § 18-29-2(m) defines "discrimination" 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."

6. W. Va. Code § 18-29-2(o) defines "favoritism" as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

7. In order to establish a claim of discrimination or favoritism, an employee must establish a prima facie case by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his 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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination or favoritism, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Accordingly, this grievance is **GRANTED IN PART and DENIED IN PART.** The Board is hereby **ORDERED** to compensate Sue Fullen for the difference in salary and benefits she would have received had she retained a 210 day contract for the 1997-98 school year, and to extend her contract term in the future to be the same as the other Deans in the county.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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.

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**MARY JO SWARTZ**

**Administrative Law Judge**

**Dated: May 28, 1998**

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*Footnote: 1*

*This matter was reassigned to the undersigned Administrative Law Judge for administrative reasons in August 1997.*