**DONNA O. MILLS,**

**Grievant,**

**v.** **DOCKET NO. 02-54-254**

**WOOD COUNTY BOARD**

**OF EDUCATION,**

**Respondent.**

## DECISION

In a grievance filed May 20, 2002, Donna O. Mills stated: "In the case of Wood County v. William Airhart et al. employees were granted back pay to April, 2002 when their contracts were changed from 240 days to 261 days. Grievant requests back pay to April 2002 as she is similarly situated to other employees granted back pay in the above named case." The grievance was amended without objection at Level II in terms of the relief sought. Grievant now requests back pay to April, 2000 (See footnote 1) . This grievance was denied at Levels I and II, and Level III was waived.

A Level IV hearing to supplement the lower-level record was convened on October 28, 2002, at the Grievance Board's Charleston office, with Grievant represented by WVEA UniServ Consultant Bruce W. Boston, and Respondent represented by its attorney, Dean Furner, Esq. of Spilman, Thomas & Battle. The parties agreed to submit their proposedfindings of fact and conclusions of law by November 18, 2002, whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

### FINDINGS OF FACT

1. Grievant has been employed as a secretary at VanDevender Junior High School for about four years.

2. Until April 5, 2002, Grievant worked under a 240-day contract.

3. On July 22, 1999, William Airhart and a group of other Wood County service personnel, not including Grievant, filed a grievance alleging their 240-day contracts should be 261-day contracts.

Those grievants prevailed at Level IV, lost on appeal to the Circuit Court of Wood County and substantially prevailed again on appeal to the West Virginia Supreme Court of Appeals (See footnote 2) .

4. Although the Airhart grievants were granted 261-day contracts and back pay at Level IV, the W. Va. Supreme Court of Appeals found the back pay award to be inappropriate despite "the usual practice in cases of continuing discrimination . . . to permit recovery of back pay for up to one year prior to the filing of the grievance." Airhart, *supra* at 429. Instead, the court only granted back pay from the date the grievants' contracts should have converted to 261-day contracts, the date of the Level IV decision. No money was awarded for the period of time prior to the Level IV decision.

5. Grievant's 240-day contract was converted to a 261-day contract as of April 5, 2002, the date of the Supreme Court decision. She was not granted any back pay.

## DISCUSSION

Despite the fact that Grievant did not join the Airhart grievance, she essentially seeks to ride on the coattails of that grievance. She advanced the argument that, since Respondent converted the contracts of the Airhart grievants from 240 days to 261 days, and made the same change to Grievant's contract, it must consider Grievant to be similarly situated to the Airhart grievants. She argues that granting back pay to the Airhart grievants and not to her violates the uniformity of pay provisions of W. Va. Code § 18A-4-5b and falls within the definitions of discrimination and favoritism contained in W. Va. Code §§ 18-29- 2(m) and (o).

Respondent contends Grievant is not similarly situated to those employees who were awarded back pay because she was not a party to the Airhart grievance, and that the award of back pay granted by the Grievance Board and West Virginia Supreme Court of Appeals does not violate the uniformity of pay provisions.

Grievant's argument is based on a mistake of fact: the Airhart grievants were not awarded back pay for any time prior to the Level IV decision in their grievance. Instead, they were only awarded back pay from the date their 240-day contracts were effectively switched to 261-day contracts. Grievant seeks to use this decision to gain back pay for herself for the time before her contract was converted to 261 days, despite the express statement by the Supreme Court that back pay was inappropriate and that "only prospective application of [its] decision is warranted." Airhart, *supra* at

430.

West Virginia 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.” Hogsett v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001). “Favoritism” is defined by W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated bypreferential, exceptional or advantageous treatment of another or other employees." Rice v. Putnam County Bd. of Educ., Docket No. 00-40-011 (May 4, 2000).

In order to establish a *prima facie* case of favoritism under W. Va. Code §§ 18-29- 2(o), a grievant must demonstrate by a preponderance of the evidence:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her; and,
>
> (c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

*See* Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991).

Grievant failed to establish her *prima facie* case for two reasons: she is not similarly situated to the Airhart grievants in a pertinent way, and even if she were, she received no difference in treatment.

Normally in uniformity of pay disputes such as this, to establish she is “similarly situated” requires the complaining employee to compare herself to those who have "like classifications, ranks, assignments, duties and actual working days." *See* Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995); Durig v. Wetzel County Bd. of Educ., Docket No. 00-52-127 (June 28, 2000). While Grievant did show her classification and duties closely matched one of the Airhart grievants, this aspect of their similarity is not pertinent to the dispute over whether she should benefit from the back pay award granted to participants in a different grievance. Instead, Grievant must prove the impossible, that she was one of the Airhart grievants in order to establish that she is similarly situated to them. Grievant also failed to show she was treated differently that the

Airhart grievants. They were given 261-day contract benefits from the effective date of the conversion of their contracts from 240 days to 261 days. Grievant was also given 261-day contract benefits from the date of the conversion of her 240-day contract to a 261-day contract.

Further, Grievant failed to show she would have been owed any back pay. For the Airhart grievants and for Grievant, there was no salary difference upon which to base a back pay award. Instead, the pay was compensation for non-contract days taken during the disputed period which, under a 261-day contract, would have been paid vacation days. Since there was no delay between the effective date of her contract conversion and the date she began receiving 261-day benefits, unlike in the case of the Airhart grievants, Grievant did not take any unpaid non-contract days after her contract was changed.

The following conclusions of law support this discussion:

## CONCLUSIONS OF LAW

1. "Discrimination" is "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(m); Hogsett v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001).

2. "Favoritism" is "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 18-29-2(o); Rice v. Putnam County Bd. of Educ., Docket No. 00-40-011 (May 4, 2000).

2. In order to establish a *prima facie* case of favoritism under W. Va. Code §§ 18-29-2(o), a grievant must demonstrate by a preponderance of the evidence:

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

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her; and,

(c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); Board v. Div. of Rehabilitation Services, Docket No. 00-RS-216 (Sept. 22, 2000). *See* Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989); Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991).

4. In uniformity of pay disputes a grievant must establish she is “similarly situated” to other employees who have "like classifications, ranks, assignments, duties and actual working days." *See* Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995); Durig v. Wetzel County Bd. of Educ., Docket No. 00-52-127 (June 28, 2000).

5. Grievant failed to establish she was similarly situated to the Airhart grievants in a pertinent way.

6. Grievant failed to establish she was treated differently than the Airhart grievants.

7. Grievant did not present a *prima facie* claim of discrimination nor of favoritism.

8. Grievant did not otherwise establish she was entitled to back pay for the period from April, 2000 to April 5, 2002.

For the foregoing reasons, this grievance is hereby **DENIED**. Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

**Date: November 25, 2002** _____

**M. Paul Marteney**

**Administrative Law Judge**

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*Footnote: 1*

*Grievant's amendment did not specify a specific day in April, 2000, but incorrectly stated that the grievants in Airhart*

*infra, were granted back pay to April 2000.*

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*Footnote: 2*

*See Airhart v. Wood County Board of Educ., Grievance Bd. Docket No. 99-54-419 (May 19, 2000) and Board of Education of the County of Wood v. Airhart, ___ W. Va. ___; 569 S.E.2d 422 (2002).*