DEBORAH GRUBB and

SHARON BELL,

Grievants,

v. **Docket Nos. 02-54-278/279**

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Deborah Grubb and Sharon Bell, each filed a grievance against her employer, the Wood County Board of Education ("WBOE"), in June of 2002. Grievant Grubb's statement of grievance reads:

> In the case of Wood Co. v. William Airhart et al. employees were granted back pay to April 2000 when their contracts were changed from 240 days to 261 days. Grievant requests back pay to this same time April 2000 and in addition requests retroactive pay to original date of 240 contract 8/97.

Grievant Bell's statement of grievance is nearly identical, except that she requested back pay to her "original hiring date of 8/12/96." The grievances were consolidated at Level IV.

The following Findings of Fact are made based upon the evidence presented at Levels II and IV. (See footnote 1)

FINDINGS OF FACT

1. Grievant Bell was hired by WBOE as a regular employee under a 240-day contract on August 12, 1996. She was hired into a secretary position at Edison Junior High School. The position had previously been a 261-day position, but was posted as a 240-day position.

2. At the time Grievant Bell accepted the 240-day contract, all other junior high secretaries in Wood County were employed under 261-day contracts. Grievant Bell became aware of this fact shortly after she was hired.

3. Grievant Grubb was hired by WBOE as a regular employee under a 240-day contract in August 1997. She was hired into a secretary position at Jackson Junior High School. The position had previously been a 261-day position, but was posted as a 240-day position.

4. Grievant Grubb was aware at the time she accepted the 240-day contract that other secretaries employed by WBOE had 261-day contracts.

5. Grievants worked under 240-day contracts until April 5, 2002, when WBOE awarded them 261-day contracts as a result of a decision of the Supreme Court of Appeals of West Virginia. Grievants were notified of this change in the terms of their contracts on May 10, 2002.

DISCUSSION

Grievants bear the burden of proving each element of their grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). Grievants contended they should have been employed under 261- day contracts from the time they were first employed as regular employees by WBOE. Respondent did not and cannot dispute that Grievants should have held 261-day contracts, just as other service personnel employed by WBOE held, as that issue has been decided by the Supreme Court of Appeals of West Virginia, and Grievants received 261-daycontracts as a result of that decision. The Court found that "[w]here county board of education employees perform substantially similar work under 261-day and 240-day contracts, and vacation days provided to 261-day employees reduce their annual number of work days to [a] level at or near the 240-day employees, principles of uniformity demand that the similarly situated employees receive similar benefits." Board of Educ. of the County of Wood v. Airhart, _ W. Va. _, 569 S.E.2d 422 (2002). Ms. Bell and Ms. Grubb did not participate as grievants in Airhart. They filed this grievance more than a month after they were notified that they had been awarded 261-day contracts. The only issue here then is whether Grievants are entitled to back pay for the period of time they held 240- day contracts.

The grievance which led to Grievants receiving 261-day contracts was filed by school service personnel employed by WBOE under 240-day contracts. Those employees challenged their contract term as discriminatory and in violation of the uniformity provisions of W. Va. Code § 18A-4-5b, pointing, as Grievants do here, to the fact that other school service personnel performing substantially similar duties, had the benefits of 261-day contracts. The grievants prevailed on their

argument, and were awarded 261-day contracts. At Level IV of the grievance procedure, the grievants were awarded back pay for a period of one year before the filing of the grievance. However, the Supreme Court of Appeals determined that back pay was not appropriate, stating:

> With regard to the issue of backpay, we do not reinstate the administrative law judge's finding that backpay is appropriate. While the Appellants' initial acceptance of the 240-day contract did not preclude them from later filing a grievance based upon the absence of uniformity, we find that their acceptance of the 240-day contract and performance of duties thereunder renders backpay inappropriate. We appreciate that the ordinary and usual practice in cases of continuing discrimination is to permit recovery of back pay for up to one year prior to the filing of the grievance. Yet, we find some merit in the Board's argument regarding the Appellants' acceptance of the 240-day contract, insofar as such acceptance indicates a general satisfaction with the offered terms of employment. We are not persuaded that in all these circumstances this discrimination represented an intentional effort by the Board to deprive these employees of appropriate compensation and benefits. The multiple employment periods, ranging from 200 to 261-day employees, common in school service personnel employment, can easily be seen as providing the Boards of Education a free hand in setting the number of days of employment contracts. The discrepancies in the 240 and 261-day contract benefits, existent in Wood County and perhaps other counties, suggests this absence of uniformity was more accidental than intentional. This Court endeavors to correct the uniformity error, with the recognition that the 240 and 261-day contracts are substantially similar but not identical. Based upon the unique circumstances of this case, we decline to grant back pay, except from the date of the initial favorable decision by the administrative law judge at Level IV on May 19, 2000. Otherwise, only prospective application of our decision is warranted.

Airhart, supra.

The undersigned is bound to follow the determination of the Supreme Court of Appeals of West Virginia in Airhart. "The Decision of the Court should ordinarily, be adhered to in other actions between the same or different parties growing out of the same cause of action, or a continuance thereof, and involving substantially the same set of facts considered in the decided case, especially where a different ruling would work great injustice to some of the litigants." Lyons v. Grassilli Chemical Co., 106 W. Va. 518, 146 S.E. 57 (1928). Further, "in a pending suit or action, a decision of the appellate court on a question of law once made, becomes the law of the case in future proceedings in a trial court in the same case, or even in a subsequent suit or action on the same cause of action . . . . (citations omitted)." State ex. rel Adkins v. Sims, 130 W. Va. 645, 46 S.E.2d 81 (1947). In Armstrong v. Armstrong, 201 W. Va. 244, 496 S.E.2d 194, (Oct. 24, 1997), the West Virginia Supreme Court of Appeals discussed the Law of the Case doctrine and stated, "[t]he essence of this doctrine is that a court of general jurisdiction, not sitting as an appellate court, may not overrule the decision of another court of general jurisdiction. See Chesapeake & W.R. Co. v.

Washington C. & St. Louis R'y, 99 Va. 715, 40 S.E. 20, 21 (Va. 1901) ('The proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal, one not sitting in exercise of appellate power.')." Grievants argued they should receive back pay to the dates many years ago each accepted a 240-day contract, because they had no choice but to accept these contracts if they wanted to be employed, as WBOE was no longer offering 261-day contracts. This was no doubt true for the Airhart grievants also, and the Court did not find this to be persuasive. Grievants were fully aware either at the time they accepted their employment or shortly thereafter that other secretaries had 261-day contracts, but they chose to continue to work under 240-day contracts for many years, waiting until after other employees pursued the issue and prevailed, and waiting over a month after they were notified they had been awarded 261-day contracts, to pursue the issue. Grievants are not entitled to any back pay. Airhart, supra.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. Grievants bear the burden of proving each element of their grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996).

2. "The Decision of the Court should ordinarily, be adhered to in other actions between the same or different parties growing out of the same cause of action, or a continuance thereof, and involving substantially the same set of facts considered in the decided case, especially where a different ruling would work great injustice to some of the litigants." Lyons v. Grassilli Chemical Co., 106 W. Va. 518, 146 S.E. 57 (1928). Further, "in a pending suit or action, a decision of the appellate court on a question of law once made, becomes the law of the case in future proceedings in a trial court in the same case, or even in a subsequent suit or action on the same cause of action . . . . (citations omitted)." State ex. rel Adkins v. Sims, 130 W. Va. 645, 46 S.E.2d 81 (1947).

3. The issues presented in this grievance have already been ruled upon by the Supreme Court of Appeals of West Virginia. The Court specifically determined that backpay was not appropriate. Board of Educ. of the County of Wood v. Airhart, _ W. Va. _, 569 S.E.2d 422 (2002).

Accordingly, this grievance is **DENIED**.

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

BRENDA L. GOULD

Administrative Law Judge

Dated: November 27, 2002

Footnote: 1

The grievances were denied at Level I. Grievants appealed to Level II, where separate hearings were held on July 23, 2002. Level II decisions denying the grievances were issued on August 29, 2002. Grievants bypassed Level III, appealing to Level IV on September 6, 2002. A Level IV hearing was held on October 25, 2002. Grievants represented themselves and Respondent was represented by Dean Furner, Esquire. This grievance became mature for decision on November 15, 2002, upon receipt of the last of the parties' written arguments.