EZRA CUTRIGHT,

Grievant,

v. **Docket No. 05-21-335**

LEWIS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Ezra Cutright ("Grievant") initiated this proceeding on May 9, 2005, alleging entitlement to the same employment term and benefits as other employees whom he claims are similarly situated. After denials at the lower levels, Grievant appealed to level four on September 15, 2005. A hearing was conducted in Elkins, West Virginia, on November 9, 2005. Grievant was represented by counsel, John E. Roush, of the School Service Personnel Association, and Respondent was represented by counsel, Jason S. Long. This matter became mature for consideration upon receipt of the parties' fact/law proposals on December 8, 2005.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent for approximately 10 years as a regular custodian, with a 200-day contract term. For the past several years, he has been assigned to Robert Bland Middle School, and his classification is Custodian III. 2. Since approximately 2000, Grievant has bid upon and received a contract as a "summer maintenance" employee each summer. These contracts have varied, but the usual employment term is approximately 40 days during the summer.

3. As a 200-day employee, Grievant receives no paid vacation days.

4. Five other service employees employed by Respondent have a 250-day contract, stating that they are multiclassified as custodian/general maintenance. These employees receive a paid

vacation of from five to fifteen days, depending on their years of employment. Their contracts also state that they perform only custodial duties for the 200-day school term and work as “itinerant” maintenance employees during the summer months.

5. Gary Riddle is also employed at Robert Bland Middle School, and he holds a 250-day contract as a Custodian III/General Maintenance. Mr. Riddle receives a paid vacation.

6. Grievant and Mr. Riddle perform almost identical duties at Robert Bland Middle School, both during the school year and during the summer. As custodians, they perform the usual cleaning duties, including floors, bathrooms and classrooms, along with changing light bulbs and doing minor repairs, such as broken toilets or window blinds. During the summer, they perform more intensive cleaning, such as stripping and waxing the floors, painting and mowing grass. Grievant and Mr. Riddle even work together on occasion. Both have been called upon occasionally in the summer to assist with more “heavy duty” maintenance work at other locations, such as roofing, construction, and welding. However, the majority of their duties, specifically during the past two years, have been located at Robert Bland. 7. Because Mr. Riddle receives several paid vacation days, Grievant actually works more days each year than Mr. Riddle.

8. The level one decision issued by Grievant's immediate supervisor, Grace Talhammer, was dated May 13, 2005. However, Ms. Talhammer had no recollection or documentation of what day she actually gave the decision to Grievant. Grievant believed he received it on a Friday in late May of 2005, possibly the 27th. He filed his level two appeal five working days later, on June 3, 2005.

Discussion

As a preliminary issue, Respondent contends that this grievance is untimely, both as to the initial filing at level one, and also upon appeal to level two. “Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed.” Heckler v. Randolph County Bd. of Educ., Docket No. 97- 42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997). The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the most recent occurrence of a continuing practice. W. Va. Code § 18-29-4(a)(1); Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002).

Based upon its previous ruling in Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995), the Supreme Court of Appeals held, in a similar case involving lack of uniformity in contract terms, that this type of allegation constitutes a continuing practice. In Flint v. Bd. of Educ., 207 W. Va. 251, 531 S.E.2d 76 (1999) (overruled in part on other grounds, Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d814 (2004)), the Court found that the grievance was timely, because the board's failure to provide uniform contracts to similarly situated employees, although a practice that had begun some years before, constituted a continuing practice that was still occurring at the time the grievance was filed. Accordingly, pursuant to this holding, the instant grievance is timely.

As to Grievant's appeal to level two, it has been held by this Grievance Board that a grievant's failure to file an appeal within the mandated time period does not constitute substantial compliance with the statute and can result in dismissal of the grievance. Lambert/White v. Div. of Envtl. Protection, Docket No. 97-DEP-275 (Aug. 20, 1997);Eva Short, et al., v. Dept. of Health and Human Resources, Docket No. 97-HHR-270 (July 29, 1997); Gaskins v. W. Va. Dept. of Health and Human Serv., Docket No. 90-H-032 (Apr. 12, 1990). However, W. Va. Code § 18-29-4(b) states that a grievant must appeal to level two "[w]ithin five days of *receiving* the [level one] decision." (Emphasis added.) In the instant case, Respondent has provided no definitive evidence as to when Grievant actually received the level one decision. In fact, Grievant's supervisor testified that she had no specific recollection of when she actually gave it to him and admitted that it could have been a different day from the date reflected on the document. Moreover, Grievant testified that he actually received the decision on a Friday at the end of May, most likely May 27, and filed his level two appeal five working days later on June 3, 2005. Accordingly, the evidence does not establish that the instant claim should be barred due to any failure to file a timely level two appeal.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va.Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); 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.

West Virginia Code § 18A-4-5b provides that "uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county[.]" The West Virginia Supreme Court has determined that

boards of education are required only to provide uniform benefits and compensation to similarly situated employees, meaning those who have “like classifications, ranks, assignments, duties and actual working days.” Bd. of Educ. v. Airhart, 212 W. Va. 175, 569 S.E.2d 422 (2002); Covert v. Putnam County Bd. of Educ., Docket No. 99-40-463 (Feb. 29, 2000); Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995). Grievants seeking to enforce the uniformity provisions must establish that their duties and assignments are like those of the employees to whom they are attempting to compare themselves. Lockett v. Fayette County Bd. of Educ., Docket No. 01-10-477 (Dec. 28, 2001); Adkins v. Lincoln County Bd. of Educ., Docket No. 97-22-165 (Sept. 24, 1997).

In the instant case, Respondent contends that Grievant and Mr. Riddle have different classifications, due to the fact that Mr. Riddle is multi-classified. Therefore, pursuant to the holding in Flint, supra, that “employees who do not have the same classifications are not performing 'like assignments and duties,'” there is no uniformity violation here. Unfortunately, Respondent's claim amounts to a “distinction without a difference,” so to speak. Although, technically, Mr. Riddle *is* multi-classified, his contract clearly states that he is *only* a maintenance employee during the summer, and he is acustodian throughout the school year. Despite his alleged multi-classified title, it is obvious that, just like Grievant, Mr. Riddle works as a custodian throughout the school year, along with performing additional maintenance duties during the summer, just like Grievant. As noted by the Supreme Court in Airhart, supra (citing Justice McGraw's dissent in Flint), school boards should not be allowed to evade uniformity requirements by “expanding the number of employees subject to multiclassification.” Flint, supra, 207 W. Va. at 258, 531 S.E.2d at 83. Accordingly, the Court held that the grievants in Airhart had demonstrated that they were performing “substantially similar work” to employees holding longer contract terms, entitling them to similar benefits. The conclusion that the same situation exists in the instant case is inescapable.

While Respondent argues that Grievant's and Mr. Riddle's duties differ substantially, the testimony of both gentlemen belies this fallacy. Even Mr. Riddle stated that his and Grievant's duties throughout the year are the same, and they even work side-by-side on occasion. The only differences, according to Mr. Riddle, are the shifts that they work. Even in the summer, both men testified to performing almost identical work, such as cleaning and stripping floors, painting, and mowing grass. The only minor differences that have occurred were a few years ago, when Mr. Riddle

did some construction work, and Grievant did welding on bleachers. Nevertheless, either type of work falls within usual duties of general maintenance workers (the title both gentlemen carry each summer), which type of work is going to vary from year-to-year under any circumstances, due to the various projects which arise as time goes on.

It is undisputed that both men are classified as Custodian III during the school year, and as "maintenance" during the summer. Notably, there is no definition contained in W.Va. Code § 18A-4-8 for "summer maintenance," and "general maintenance" is defined as "personnel employed as helpers to skilled maintenance employees and to perform minor repairs." The evidence clearly demonstrates that both Grievant and Mr. Riddle enjoy the same classification titles at the same times of the school year, performing similar duties. Accordingly, the undersigned finds that Grievant is performing "substantially similar" duties to Mr. Riddle, a 250-day employee with paid vacation, entitling Grievant to the same benefits.

As relief in this grievance, Grievant has graciously agreed to accept either a 250-day employment term with vacation benefits, or in the alternative, to have similarly situated 250-day employees reduced to 200-day contracts. However, pursuant to the provisions of W. Va. Code § 18-29-3(v), Grievant is entitled to back pay and benefits for a period of one year prior to the filing of his grievance, in a case involving a continuing practice. See Flint, supra. (See footnote 1) Accordingly, Respondent must provide Grievant with back pay for any vacation benefits he should have received as a 250-day employee, beginning May 9, 2004, and a 250-day contract for the current 2005-2006 school year. As to future years and contract terms, Respondent is directed to provide Grievant and all similarly situated employees performing substantially similar work with the same contract terms. See White, supra.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. "Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed." Heckler v. Randolph County Bd. of Educ., Docket No. 97- 42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997).

2. The grievance process must be started within 15 days following the occurrence of the event

upon which the grievance is based, or within 15 days of the most recent occurrence of a continuing practice. W. Va. Code § 18-29-4(a)(1); Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002).

3. Allegations of lack of uniformity in contract terms constitutes a continuing practice, so this grievance was timely filed. See Flint v. Bd. of Educ., 207 W. Va. 251, 531 S.E.2d 76 (1999) (overruled in part on other grounds, Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004)).

4. Grievant filed his level two appeal within five working days of receipt of the level one decision, so he has complied with grievance procedure timelines. See W. Va. Code § 18-29-4(b); See also Lambert/White v. Div. of Envtl. Protection, Docket No. 97- DEP-275 (Aug. 20, 1997).

5. Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); 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. 6. Boards of education are required only to provide uniform benefits and compensation to similarly situated employees, meaning those who have “like classifications, ranks, assignments, duties and actual working days.” Bd. of Educ. v. Airhart, 212 W. Va. 175, 569 S.E.2d 422 (2002); Covert v. Putnam County Bd. of Educ., Docket No. 99-40-463 (Feb. 29, 2000); Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995).

7. "Where 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 level at or near the 240-day employees, principles of uniformity demand that the similarly situated employees receive similar benefits." Syllabus Point 5, Airhart, supra.

8 Grievant has proven by a preponderance of the evidence that his duties are substantially similar to those of another employee who has a longer contract term with paid vacation days. Therefore, Grievant is entitled to similar benefits.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to give Grievant a 250-day contract term, effective May 9, 2004, and compensate him for any vacation days he should have received pursuant to such a contract.

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

of Lewis 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 tosuch 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: January 18, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Respondent has argued that pursuant to the Supreme Court's finding in Airhart, supra, that backpay was inappropriate, due to the grievants' acceptance of their contract terms for several years ongoing, the same logic should apply here. However, subsequent to that decision, in Board of Education v. White, 216 W.Va. 242, 605 S.E.2d 814 (2004), a back pay award was left undisturbed in a uniformity case, and the Court opined that such an award was consistent with Flint, supra, and the provisions of W. Va. Code § 18-29-3(v).