WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CURTIS GUNNOE, et al.,

Grievants,

v. **Docket No. 2008-0834-CONS**

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants, (See footnote 1) employed by the Raleigh County Board of Education as Custodian IIIs, initiated grievances in July of 2007 alleging entitlement to a 261-day contract term. The consolidated grievances were denied at level one on July 26, 2007, following a hearing conducted by Dr. Emily Meadows. A level two mediation session held on December 17, 2007, was unsuccessful. After appeal to level three, a hearing was held at the Grievance Board's hearing facilities in Beckley, West Virginia, on April 10, 2008. The parties submitted fact/law proposals on May 14, 2008. Grievants were represented by John E. Roush, Esquire, of the School Service Personnel Association, and Respondent was represented by Gregory W. Bailey, Esquire. For administrative reasons, this grievance was reassigned to the undersigned administrative law judge on November 3, 2008. (See footnote 2)

Synopsis

Grievants are employed as custodians at various facilities by Respondent. They allege that the

provision of a 261-day contract, including paid vacation days, to another employee in their classification, violates statutory uniformity requirements and constitutes discrimination.

Although Grievants did prove that they perform substantially similar duties to those of the 261-day custodian, it was found that neither back pay nor the prospective provision of 261-day contracts would be appropriate under the circumstances presented. As in the Supreme Court's decision in *Airhart, infra*, Grievants knew of the situation for many years and accepted their contracts without complaint; in addition, the evidence did not establish intentional discrimination on Respondent's part. As to Grievants' contention that they should receive 261-day contracts now and in the future, due to Respondent's violations of statute, this would be inappropriate, in that the 261-day employee has retired, and no current employees have such a contract. Therefore, the grievance is granted in part, but relief is denied.

After a review of the entire record, including the recording of the level three hearing, documentary exhibits, and transcript of lower level proceedings, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant Curtis Gunnoe has been employed by Respondent for 21 years and is currently classified as a Custodian III/Electrician II. He has been assigned to Woodrow Wilson High School (“WW”) since 1989 pursuant to a 210-day contract. Grievant Gunnoealso serves in a summer position at WW that is posted each year, which is a 30-day contract each summer.

2. Grievants Linda Crouch and Larry Patterson are also employed in the Custodian III classification, pursuant to 210-day contracts, and are assigned to WW. They also work in 30-day summer positions at WW. They have been employed by Respondent for 31 and 29 years, respectively.

3. Grievants Gunnoe, Crouch and Patterson worked additional days during the summer of 2007, for which they were compensated, due to HVAC work that was being done at WW at that time.

4. Grievant Ricky Dillard is employed as a Custodian III pursuant to a 230-day contract and is assigned to Beckley Elementary School. He has been employed by Respondent for 17 years.

5. Grievant Donald Cella is employed as a Custodian III pursuant to a 240-day contract and is assigned half-time to the Special Education Complex and half-time to WW. He holds two separate,

half-time positions and has been employed by Respondent since 2004.

6. Grievants Jimmy Cozart and Richard Rice are employed as Custodian IIIs pursuant to 240-day contracts and are assigned to the Central Office. They have been employed by Respondent for 15 and 12 years, respectively.

7. Grievant Steve Simmerman is employed as a Custodian III pursuant to a 230-day contract and is assigned to Beckley Stratton Middle School. He has 24 years of seniority. 8. Grievants Ricky Scarbro and Norman Pannell are employed as Custodian IIIs and are assigned to the Academy of Careers and Technology ("ACT"). Mr. Scarbro has a 210-day contract, but normally works an extra 20 days during the summer at ACT, although he does not have a contract for the work, and it is not posted. He has been employed by Respondent for 11 years. Mr. Pannell has a 240-day contract and 35 years of seniority.

9. Grievants Pannell and Patterson retired from their employment subsequent to the level three hearing, in the summer of 2008.

10. Harold French, who retired on June 30, 2008, was employed by Respondent as a Custodian III at the ACT. He began employment in 1969 and held a 261-day contract throughout his employment, which included an unspecified number of paid vacation days.

11. All grievants knew, from the beginning of their employment, that Mr. French held a 261-day contract with paid vacation.

12. Respondent employs most custodians under 210-day contracts, but provides longer terms for those assigned to buildings which are open during the summer months and for specific programs which provide extra funding for custodial services; it also provides optional, separate summer contracts for some. Summer work for custodians varies, depending on needs. However, all custodians perform similar duties at their assigned locations, which include normal cleaning during the school year, and more extensive work during unoccupied periods (such as summer) like stripping and waxing floors, mowing grass, and painting.

13. Many years ago, Respondent employed custodians under 261-day contracts with paid vacation days, but that practice was discontinued. Mr. French retained his 261-day contract until he retired, but it has not been explained in this grievance why his contract was never changed to reflect Respondent's current practice.

14. Grievants do not receive vacation days, and each of them takes unpaid days off throughout

the year, determined by arrangements made with their principals/supervisors according to the needs of their facility.

Discussion

Because this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

As in many past cases involving similar situations, Grievants contend that Respondent's employment of them under less than 261-day contracts, while Mr. French was so employed, violates the “uniformity” provision of West Virginia Code § 18A-4-5b, along with constituting unlawful discrimination as defined by the grievance statute. Pursuant to Code § 18A-4-5b, county salary schedules must be uniform regarding “classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment and other requirements.” Inaddition, the uniformity requirement applies “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 determination of what constitutes “like assignments and duties,” implicating a requirement of uniform compensation and benefits, is sometimes difficult, resulting in several opinions rendered by the West Virginia Supreme Court of Appeals. A seminal case within that line of decisions is *Board of Education v. Airhart*, 212 W. Va. 175; 569 S.E.2d 422 (2002), where the Court held at Syllabus Point 5:

> 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.

In *Airhart*, the Court concluded that the Grievance Board's finding that the Grievants' duties were either substantially similar or identical to those of 261-day employees was not clearly wrong. Although not specifically discussed in the original Grievance Board decision in *Airhart v. Wood County Board of Education*, Docket No. 99-54-419 (May 19, 2000), the Supreme Court noted that the grievants provided “extensive testimony” demonstrating their performance of the same duties as the other employees and cited specific examples of such testimony. 212 W. Va. 175 at 178.

The pay uniformity provision for service personnel employees in Code § 18A-4-5b is essentially the same as the pay uniformity clause governing professional employees contained in Code § 18A-4-5a. In *Weimer-Godwin v. Board of Education*, 179 W. Va. 423, 369 S.E.2d 726 (1988), the Supreme Court determined it was not necessary for employees to be performing identical duties in order to meet the “like assignments and duties”requirement for uniform pay under that statute. The Court found that when the assignments and duties are "substantially similar," the uniformity requirement applies. As discussed in *Durig v. Board of Education*, 215 W. Va. 244; 599 S.E.2d 667 (2004):

> The [*Weimer-Godwin*] Court specified that duties of the compared personnel do not have to be identical. "This is not the test." Id., 369 S.E.2d at 730. The Court found that substantial similarity was sufficient to invoke the statutory protections of uniformity. Id. at 428, 369 S.E.2d at 731. In his dissent to Flint, Justice McGraw accentuated the importance of adopting a "liberal measure of comparison to determine whether employees are similarly situated for purposes of § 18A-4-5b[.]" 207 W.Va. at 258, 531 S.E.2d at 83.

215 W. Va. at 248.

In the instant case, Grievants testified to their custodial duties, which, despite the facility to which they are assigned, consist of normal cleaning duties, along with additional and more extensive cleaning during the summer months, most specifically stripping and re-waxing floors. The two grievants who worked at the ACT with Mr. French testified that their duties were identical to his, but each was assigned to different shifts and worked more or less days, depending on his contractual arrangement. Similar testimony was given by most Grievants regarding their duties, which only vary when special projects or circumstances occur, which has happened at various locations at different times. However, despite which building to which they are assigned, all Custodian IIIs employed by Respondent perform very similar duties, sufficient to meet the “substantial similarity” test discussed by the Supreme Court in *Weimer-Godwin, supra*. (See footnote 3) In the cases in which it has found a uniformity clause violation occurred as a result of varying contract terms for employees

performing similar duties, the Supreme Court has also found that unlawful discrimination occurred. The Court's test for determining discrimination was refined most recently in *Frymier v. Higher Education Policy Comm*., 221 W. Va. 306, 655 S.E.2d 52 (2007), wherein it reaffirmed the standard for determining discrimination and favoritism under grievance law which had been established in *Board of Education v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004). *White, supra*, was also a case involving uniformity and discrimination claims resulting from disparate contract terms given to school service personnel.

Discrimination is defined by the current grievance statute 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). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier, supra; (See footnote 4) *See White*, *supra*; *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

As in the cases cited above, the 261-day contract term which included vacation days given to Mr. French resulted in discrimination to Grievants classified as Custodian III, performing substantially similar duties, and having shorter contract terms with no vacation days. Although the number of paid vacation days given to Mr. French is unknown, Grievants have provided sufficient evidence that, for employees working during the summer months, they likely worked “at or near” the same number of days. *Airhart, supra*. Accordingly, all Grievants classified as Custodian III have established uniformity violations and discrimination.

Despite counsel's arguments to the contrary, the one grievant who does not have a viable uniformity or discrimination claim is Grievant Gunnoe, who is multi-classified as a Custodian III/Electrician II and, per his own testimony, is considered a maintenance, rather than a custodial,

employee. In *Airhart, supra*, the Court stated 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.” *See also 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). As held in *Flint v. Board of Education*, 207 W. Va. 251, 531 S.E.2d 76 (1999) (overruled in part on other grounds, *White, supra*), “employees who donot have the same classifications are not performing 'like assignments and duties.'” Even those employees who have some classifications in common with another service employee would not be performing 'like assignments and duties' because they have additional duties in relation to the other classifications they hold. 207 W. Va. at 257. In the instant case, Mr. Gunnoe did not discuss his specific job duties, merely stating that he divides his time between his two classifications, making no allegation that he performed the same duties as Mr. French. Therefore, unlike the situation that gave rise to a successful grievance in *Cutright v. Lewis County Board of Education*, Docket No. 05-21-335 (Jan. 18, 2006), Grievant Gunnoe has not demonstrated, that despite any differences in classification titles, he is performing exactly the same duties as a 261-day employee.

As relief, Grievants seek to be given 261-day contracts, retroactive “to the extent permitted by law.” The grievance statute permits back pay for a period of up to one year prior to the filing of a grievance. W. Va. Code § 6C-2-3(c)(2). Based upon a similar provision in the previous version of the grievance statute, the Supreme Court in *Flint, supra*, granted the grievants “the difference in compensation between a 240-day contract and a 261-day contract for the one year prior to the filing of this grievance and for the years thereafter while this case was pending.” 207 W. Va. at 257.

However, in subsequent cases, the Court found that back pay was inappropriate. In *Airhart, supra*, discussion of the issue was as follows:

> [W]e find that [the grievants'] 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, insofaras 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 discrepancies in the 240 and 261-day contract benefits, existent in Wood County and perhaps other counties, suggests that this absence of uniformity was more accidental than intentional**.

212 W. Va. at 182 (Emphasis added). Accordingly, the Court awarded relief, requiring uniform contracts, only from the date of the initial Grievance Board decision. Similar relief was granted in *Durig, supra*.

All Grievants who testified in this matter stated unequivocally that they knew of Mr. French's contractual terms from the outset of their employment, but did not file a grievance until learning of similar claims asserted in another county. While this does not limit their right to file a grievance, pursuant to the Court's reasoning in *Flint, supra*, that uniformity violations constitute a continuing practice, it does, however, warrant consideration of the concept voiced by the Court in *Airhart*, *supra*, that Grievants' acceptance of their contracts year after year (more than 20 or 30 years, in some cases) indicates a general satisfaction with the terms of those contracts. Moreover, the Court's discussion of “unintentional discrimination,” nullifying any obligation of back pay, would also seem applicable to the instant case.

Further complicating the fashioning of appropriate relief is Mr. French's retirement, effective June 30, 2008, while this grievance was still pending. It is undisputed that he was the only Custodian III with a 261-day contract, so his retirement has effectively ended the discrimination and uniformity violations. Therefore, as in *White, supra*, Grievants here are not entitled to 261-day contracts after June 30, 2008, when no further contracts of that typeexisted in Raleigh County. (See footnote 5) It would simply be illogical for Grievants to be given 261-day contracts for the current school year, because Mr. French's retirement has extinguished their entitlement to them.

As stated in *Airhart, supra*, boards of education are not completely prohibited from hiring employees for specific periods of employment. The Court clarified that their findings of statutory violations were limited to the situation in which “the differences in term of employment are essentially extinguished by the provision of paid vacation days to the 261- day employees, thus reducing if not completely eliminating any difference in actual number of days worked between the 240-day and 261-day positions.” 212 W. Va. at 183. Although Grievants have not expressed any complaint about the obvious discrepancies in contract terms among themselves, Respondent should be cautioned that, for employees performing like assignments and duties, it is obligated to provide uniform contract terms. For employees assigned to the same building, performing similar duties, and working almost the same number of days, a board of education is not permitted to utilize varying contract terms for

such similarly-situated employees. Similarly, it is somewhat troubling to the undersigned, though not raised as a problematic issue by Grievants, that many of them perform extra work during the summer which is outside of the terms of their contracts. Pursuant to West Virginia Code § 18A-2-5, all service employees are required to sign a written contract which specifically discusses their employment term, exact number of days worked, and salary. In conclusion, the undersigned finds that, although most Grievants have established that Respondent's provision of a 261-day contract to Mr. French violated the uniformity and discrimination statutes, they are not entitled to back pay under the circumstances of this case. Grievants knew of Mr. French's arrangement for many years, yet accepted their own contracts without complaint. Nevertheless, Grievants have proven that many Custodian IIIs in Raleigh County perform duties similar to the other employees assigned to their facilities, throughout the school year and summer, entitling them to uniform contract terms. (See footnote 6)

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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).

2. Pursuant to the provisions of West Virginia Code § 18A-4-5b, boards of education are required 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). 3. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 221 W. Va. 306, 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004).

4. Grievants, except for Mr. Gunnoe, have established by a preponderance of the evidence that they performed like assignments and duties as compared to Harold French, but were given shorter contract terms with no vacation, resulting in violations of West Virginia Code §§ 18A-4-5b and 6C-2-2(d).

5. Because they accepted their contracts for numerous years, back pay is not appropriate in this case. *See Airhart, supra*; *Durig v. Board of Education*, 215 W. Va. 244; 599 S.E.2d 667 (2004).

6. Grievants are not currently entitled to 261-day contracts, because the discrimination and uniformity violations ceased with Mr. French's retirement on June 30, 2008.

Accordingly, this grievance is **GRANTED IN PART**, in that Grievants have established entitlement to uniform contract terms with a 261-day employee, but both back pay and prospective 261-day contracts, as requested, are **DENIED**, as explained in this Decision. Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: December 31, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants include Mr. Gunnoe, Ricky Dillard, Linda Crouch, Larry Patterson, Donald Cella, Norman Pannell, Richard Rice, Ricky Scarbro, Steve Simmerman and Jimmy Cozart.

Footnote: 2

The administrative law judge who conducted the level three hearing, Thomas Gillooly, is no longer employed by the Grievance Board.

Footnote: 3

Of course, the conclusions in this Decision should not be construed to limit the authority of a board of education to not employ custodians during the summer in a building which is simply not open during the summer months and such services are not needed. However, it appears in this case that most custodians are expected to work during the summer, whether pursuant to their regular contract or a summer contract, but performing the same duties, resulting in violations of the uniformity and discrimination statutes due tothe differences in contract terms and benefits for employees providing the same services.

Footnote: 4

Although these cases addressed discrimination and favoritism as defined by the previous incarnations of the grievance statute, the prior definitions were virtually identical to those contained in the current statute.

Footnote: 5

The board of education in White, supra, had reduced all 261-day contracts to 256 days while the grievance was pending, leading the Court to conclude that the grievants were not entitled to the benefit of a 261-day contract once no other employees held such contracts.

Footnote: 6

Again, this is not to say that a board of education is completely prohibited from adjusting contract terms to the needs of the employer, but employees working side-by-side in the same building and performing the same duties must be provided with uniformity.