THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BRENDA TONEY,
Grievant,

v. **Docket No. 07-41-365R1**

RALEIGH COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION ON REMAND

This matter comes before the undersigned Administrative Law Judge upon remand from the Circuit Court of Raleigh County, by Order entered April 16, 2010, which orders that, "the decision of December 10, 2009, of the Administrative Law Judge should be and it is hereby reversed, and the matter remanded for further proceedings in accordance with the court's memorandum ruling." A hearing was held on the remanded issues before Administrative Law Judge M. Paul Marteney on March 7, 2011, in Beckley, West Virginia. Grievant appeared in person and by her attorney, Darl W. Poling, Esq. Respondent appeared by its attorney Gregory W. Bailey, Esq. The case was reassigned on August 15, 2011, due to administrative reasons. The parties have submitted their additional proposed findings of fact and conclusions of law and the matter is mature for consideration.

The issues upon remand were framed by the court in the following terms:

> The ALJ's ruling found that the comparison between the job duties of Toney and Freeman supported Toney's grievance, but the ruling declined to grant relief because of the unsupportable conclusions based on the retirement of Freeman and the conclusion of mootness. On remand, the ALJ may not revisit the conclusion that the comparison of duties of Toney and Freeman was apt. It is necessary, however, to determine whether the comparison employee, Freeman, was employed at the same time the appellant was so employed and whether Freeman was employed at a time prior to the enactment of the applicable statute. If so, the ALJ should then determine whether relief is warranted and, if it is, then fashion the appropriate remedy.

> The ALJ may consider the award of back pay in accordance with this ruling and the authorities cited herein. The ALJ may address these issues on the current record if it is possible to do so or, if it is deemed necessary to the consideration of the remanded issues, the ALJ may receive additional evidence.

Synopsis

Grievant, a 240-day employee, argues that she is similarly situated to an employee working under a 261-day contract. The main issue on remand is whether the comparison employee, Gloria Freeman, was employed at the same time Grievant was employed. The parties agree that Ms. Freeman was employed under a 261-day contract for the same position and at the same time Grievant was employed. The record established that Grievant was performing like assignments and duties to Ms. Freeman at that time. Grievant has meet her burden that she was subjected to discrimination. The remaining directive of the remand order is a determination of whether relief is warranted, and, if so, what is the appropriate remedy. Grievant is entitled to a 261-day contract, with back pay and benefits for a period of one year prior to the filing of the grievance.

The following findings of fact are based upon the stipulations of the parties and the record developed at the level three hearing conducted on the remand issues.

Findings of Fact

1. Grievant has been employed by Respondent since January 1996, and is currently certified as a Computer Operator/Secretary III/Accountant III/Accounts Payable Supervisor and was so certified at the time of the grievance.

2. Grievant was employed by Respondent under a 240-day contract.

3. Gloria Freeman, the comparison employee, was initially hired by Respondent

beginning with the 1966-1967 school year, and has held a 261-day contract with Respondent since that time.

4. Grievant has been in the position responsible for the payment of Accounts Payable since September 1998, which was prior to the creation of the Accounts Payable Supervisor classification.

5. The West Virginia Legislature created the classification of Accounts Payable Supervisor in April 2001. Grievant has held that position with Respondent since its creation and Grievant held the position of Accounts Payable Supervisor at the time of the filing of this grievance.

6. Gloria Freeman became an Accounts Payable Supervisor with Respondent on July 1, 2004.

7. Grievant has held the position of Accounts Payable Supervisor with Respondent for thirty-nine months longer than Gloria Freeman.

8. Respondent developed a policy and practice of allowing employees raising uniformity-based grievances to compare themselves to employees hired before the applicable uniformity statue.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is

evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Based upon the stipulated facts and the evidence presented, it is clear that the comparison employee, Gloria Freeman, was performing like assignments and duties at the same time the Grievant was employed. In fact, Judge Marteney made a finding that Grievant and Ms. Freeman "share the same duties although the accounts they work with are different. They use the same equipment, the same software and perform the same tasks." Nevertheless, Judge Marteney refused to consider Ms. Freeman a comparison employee since she retired three days after the grievance was filed. The record established that Ms. Freeman was employed at the same time Grievant was employed, and both performed like assignments and duties.[1] Therefore, Ms. Freeman should have been viewed as a valid comparison employee. In view of the stipulated facts, and the

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[1]W. VA. CODE § 18A-4-5b addresses the uniform treatment of county board of education service employees and states, in pertinent part:

> [C]ounty (salary) schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirement. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all regularly employed and performing like assignments and duties within the county . . ..

record of this case, Grievant has met her burden of proving that other similarly situated employees were favored over her by having a 261-day contract while the Grievant had only a 240-day contract. The failure to provide Grievant with a 261-day contract was discrimination and a violation of the uniformity statute.[2]

The next issue on remand is that of appropriate relief. Respondent argues that relief in the form of an award of a 261-day contract is foreclosed by decision rendered by the West Virginia Supreme Court of Appeals case styled *Dillard v. The Board of Education of the County of Raleigh*, No. 101221 (West Virginia Supreme Court of Appeals, February 11, 2011) (memorandum decision). Respondent characterizes this decision as saying that the departure of an employee who is the target of a comparison in establishing a uniformity claim extinguishes the availability of prospective relief. Respondent's reading of this memorandum decision is misplaced.

In *Dillard*, Grievant was employed by the respondent as a Custodian III with a 240-day contract and no paid vacation days. In July 2007, Grievant and other employees classified as Custodian III pursued a grievance asserting that respondent violated uniformity provisions and discriminated against them by employing a similarly situated Custodian III, Harold French, with a 261-day contract that included paid vacation days. This Administrative Law Judge concluded that Mr. Dillard, and certain other grievants proved that they performed substantially similar duties as Mr. French but were treated differently by virtue of their contracts in violation of the law. However, this Board denied

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[2]For purposes of the grievance procedure, discrimination is defined 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).

them any relief. The Administrative Law Judge found that the grievants were not entitled to instatement to a 261-day contract because Mr. French retired on June 30, 2008, and no other Custodian III held a 261-day contract, thus there was no longer any illegal discrimination or favoritism. The Administrative Law Judge denied back pay after finding that the evidence did not establish intentional discrimination by respondent, that the grievants knew of this situation for many years, and that the grievants had accepted their contracts without complaint. Grievant appealed, and the circuit court affirmed the Administrative Law Judge's decision.

Mr. Dillard explained to the Supreme Court of Appeals that five of his co-grievants also appealed but received different relief from other circuit judges. Although they did not receive any prospective relief, they received back pay for the one school year that the grievance was pending. Mr. Dillard raised a single assignment of error: that the lower tribunals erred by denying him back pay and benefits for the 2007-2008 school year equaling the difference between a 240-day contract and a 261-day contract.

The Administrative Law Judge relied upon *Board of Education of the County of Wood v. Airhart*, 212 W. Va. 175, 182-83, 569 S.E.2d 422, 429-430 (2002), and *Durig v. Board of Education of the County of Wetzel*, 215 W. Va. 244, 249, 599 S.E.2d 667, 672 (2004) (*per curiam*), in denying any back pay award. In those cases, the school boards violated the uniformity and discrimination statutes by giving some employees 240-day contracts while giving similarly situated employees 261-day contracts. However, the Supreme Court of Appeals found that back pay was inappropriate because the grievants had accepted their 240-day contracts and because the school boards' acts of giving 261-day contracts to other employees were incidental rather than intentional.

In an apparent distinction from *Airhart* and *Durig*, the Supreme Court of Appeals stated that in considering the Grievance Board's findings, but also applying the reasoning in *Airhart* and *Durig*, it concluded that the lower tribunals' decision to deny Mr. Dillard back pay for the 2007-2008 school year was arbitrary and capricious and was characterized by an abuse of discretion. Although Mr. Dilllard had accepted his contract in prior years, any indication of satisfaction with the offered terms was dispelled when he filed his grievance in July 2007. The Administrative Law Judge found that unlawful discrimination existed until the end of the 2007-2008 school year, when Mr. French retired. The Supreme Court of Appeals concluded that Mr. Dillard was entitled to the difference between his 240-day contract and a 261-day contract for the 2007-2008 school year.

The underlying facts in the instant case are virtually identical to those set forth in *Dillard*. Respondent had no viable justification for denying Grievant a 261-day contract, except for the Respondent's desire to eliminate 261-day contracts. Grievant was already in the position of Accounts Payable Supervisor prior to Ms. Freeman. Respondent's decision to place Ms. Freeman in the same position without increasing the Grievant's contract can only be viewed as a deliberate act by the Respondent with full knowledge of the uniformity requirements. Although Grievant accepted her contract in prior years, any indication of satisfaction with the offered terms was dispelled when she filed her grievance. Accordingly, Grievant is entitled to the difference between her 240-day contract and a 261-day contract for the period of one year prior to the filing of this grievance.

The following conclusions of law support this decision on remand.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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. In order to establish 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);
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> (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'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. County 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).

4. Grievants seeking to enforce the uniformity provisions must establish that their duties and assignments are like those of the employees whom they are attempting to compare themselves. *Locket 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).

5. Grievant has established her discrimination claim and a violation of the uniformity requirement found in W. VA. CODE § 18A-4-5b.

Accordingly, this grievance is **GRANTED** on remand.

Respondent is ordered to award back pay and benefits to the Grievant which she would have been entitled to had she been employed under a 261-day contract for a period of one year prior to the filing of the grievance. Grievant's request for attorney's fees is denied. It is well established that the Grievance does not have authority to award attorney fees.[3]

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

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[3]*Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); W. VA. CODE § 6C-2-6.

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: September 9, 2011

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Ronald L. Reece
Administrative Law Judge