WILLIAM AIRHART, et al.,

Grievants,

v. **Docket No. 99-54-419**

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On July 22, 1999, William Airhart and numerous other service personnel (See footnote 1) initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq.. The Statement of Grievance reads:

> Grievants, school service personnel employees with 240 day employment terms, contend that they are performing like assignments and duties as compared to other employees in their classifications who hold 261-day employment contracts. Grievants allege a violation of West Virginia Code §§ 18-29-2 & 18A-4-5b.
>
> Relief Sought: Grievant[s] request instatement to a 261-day employment term with all benefits retroactive to the full extent allowed by law and interest on all sums of money to which they are entitled.

As this grievance was filed with various supervisors, it was denied at Level I on a number of dates. Grievants appealed to Level II, and a consolidated hearing was conducted on August 26, 1999. A Level II decision denying the grievance was issued by theSuperintendent's designee, F. Gale Hammett, on September 21, 1999. Grievants appealed to Level III, and WCBOE waived consideration of the grievance on September 28, 1999, as permitted under W. Va. Code § 18-29-4(c). Grievants appealed to Level IV on October 6, 1999. (See footnote 2) On February 7, 2000, a Level IV hearing was conducted in the Grievance Board's office in Charleston, West Virginia. (See footnote 3) At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on March 21, 2000, following receipt of the parties' written post-hearing arguments.

Based upon a preponderance of the credible evidence contained in the record established at Levels II and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievants are employed by WCBOE in various school service personnel classifications and multi-classifications. 2. Approximately three years ago, WCBOE decided to post no more 261 day positions. If a 261 day position became vacant and needed to be filled, it was posted and filled as a 240 day or less position.

3. All Grievants are employed in 240 day positions. At the time of these postings, Grievants knew there were similarly classified employees with 261 day positions.

4. There are similarly classified service personnel employees in 261 day positions performing similar duties.

5. WCBOE's employees who hold 261 day employment contracts receive vacation days in accordance with a sliding scale which is based upon the number of years the employee has worked for WCBOE. Employees at the top of the scale receive 24 days of paid vacation annually. Because there have been no 261 day employees hired for three years, all 261 day employees receive at least 12 days of vacation. (See footnote 4)

6. WCBOE employees who hold 240 day employment contracts, including Grievants, must take 21 “non-calendar” days annually. Non-calendar days are days when an employee does not work and does not receive compensation. Employees in 240 day positions do not receive vacation. 240 day employees must request non-calendar days on the same form used by 261 day employees to request vacation. Resp. Ex. No. 2, at Level IV.

7. WCBOE's 261 day employees do not have non-calendar days. 261 day employees with sufficient seniority to receive 24 vacation days actually work 3 days lessper year than 240 day employees. 261 day employees may not be allowed to take vacation as requested, and they may not be allowed to take all their vacation within the current year. If this occurs, the vacation is added to their vacation time for the next year. 8. Respondent has been able to meet the needs of the Wood County School System with employees working fewer days. Occasionally, some Grievants are asked if they want to work overtime. There is no indication that WCBOE needs all Grievants to be employed more than the 240 days of their contract.

9. WCBOE's past practice is to stay within the state formula for service personnel, and it has directed its Superintendent to take whatever action is necessary to maintain this status quo. Since a 261 day employee is counted as greater than one full- time employee, the expectation is that the Superintendent will again be directed to take whatever action is necessary to maintain this formula.

10. Grievant Baker switched positions during this grievance from a Secretary III/Accountant III in the central office to a Secretary II in a junior high school. She was able to compare her duties to the other Secretaries III/Accountants III. Although she believed she now performs similar duties to other secretaries in various schools, she agreed the duties varied from school to school based on size and the other activities at the school. She also did not identify the classification of these other school secretaries. The majority of the school secretaries Grievant Baker identified as having 261 day contracts were in senior high schools, but not all 261 day Secretaries were in those positions. She alsotestified that the 261 day secretary at the elementary school probably had a 261 day contract because "it's an extra large school." (See footnote 5) Trans. at Level II at 96.

ISSUES AND ARGUMENTS

Grievants argue the issue in this grievance has been decided in the recent West Virginia Supreme Court of Appeals case, Flint v. Harrison County Board of Education, Docket No. 97-17-348 (Jan. 22, 1998); aff'd, in part; rev'd, in part, Harrison County Cir. Ct., Civil Action No. 95-C-485-1(Nov. 10, 1998), aff'd, in part; rev'd, in part, No. 25898 (Dec. 10, 1999). (See footnote 6) Grievants argue that Flint stands for the proposition that if employees are performing like or similar duties to, and are within the same classification as another employee who has a 261 day contract, it is discriminatory for their contract to be for the lesser term of 240 days. Grievants note that with the 261 day employees having vacation days, the number of days actually worked ends up being very similar between the two groups of employees, and in some cases the 240 day employee works more days than the 261 day employee.

Respondent avers the Flint decision should not control the outcome of this decision as the facts of the two cases are different, and the Flint decision was per curiam. Respondent also asserts that not all Grievants have demonstrated they worked the exactnumber of days as a 261 day employee. Respondent argues Grievants were aware of the contract term when they applied for and received their positions, and they knew at the time they received their positions that other employees with the

same classification had 261 day contracts. Respondent also argues the grievance is not timely filed, and the doctrine of laches should apply. Respondent also notes that requiring WCBOE to employ these Grievants for a longer term removes the discretion described in W. Va. Code § 18A-4-8. (See footnote 7) WCBOE notes it needs some employees for longer contract terms than others. WCBOE further maintains that if this grievance is granted, it would be necessary to RIF employees in order to stay within the state formula for service personnel.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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. Grievants allege WCBOE is violating W. Va. Code §18A-4-5b, which states "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." In addition, Grievants also charge they are the victims of discrimination and favoritism prohibited by W. Va. Code §§ 18-29-2(m) and (o). W. Va. Code § 18-29-2(m) defines "discrimination" to mean "any differences in the treatment of employees unless such differences are related to the actual job responsibili ties of the employees or agreed to in writing by the employees." Similarly, W. Va. Code § 18-29-2(o) defines "favoritism" to mean "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 18-29-2(m) and (o), a grievant must demonstrate the following:

(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.

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

Once a grievant establishes a prima facie case of discrimination under W. Va. Code § 18-29-2(m), or favoritism under W. Va. Code § 18-29-2(o), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the grievant may show the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. HumanRights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

The pay uniformity provision for service personnel employees in W. Va. Code § 18A-4-5b is essentially the same as the pay uniformity clause governing professional employees contained in W. Va. Code § 18A-4-5a. In Weimer-Godwin v. Board of Education, 179 W. Va. 423, 369 S.E.2d 726 (1988), the West Virginia Supreme Court of Appeals 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 in W. Va. Code § 18A-4-5a. The Court found that when the assignments and duties are "substantially similar," the uniformity requirement applies. Thus, in Weimer-Godwin, the county board of education was required to pay the same salary supplement to teachers who provided instruction in general and choral music as it was paying to teachers who provided instruction in band and string instruments.

In applying W. Va. Code § 18A-4-5b to service personnel, this Grievance Board has determined that grievants may not rely upon this uniformity provision to obtain the same benefits as employees who hold a different classification title. Flint, supra. See, e.g., Covert v. Putnam County Bd. of Educ., Docket No. 99-40-463 (Feb. 29, 2000); Allison v. Hancock County Bd. of Educ., Docket No. 97-15-454 (Mar. 31, 1998); Pate v. Summers County Bd. of Educ., Docket No. 97-45-188 (Feb. 5, 1998); Ricca v. Hancock County Bd. of Educ., Docket No. 95-15-101 (June 8, 1995); Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995). Here, Grievants hold the same classification ormulti-classification titles, as other WCBOE employees who hold 261 day employment contracts.

As contemplated by W. Va. Code § 18A-4-5b, Grievants are performing substantially similar or like assignments and duties to 261 day employees in exactly the same classifications. See Covert, supra; Flint, supra; Weimer-Godwin, supra; Allman v. Harrison County Bd. of Educ., Docket No. 89-17-215 (June 29, 1990), rev'd on other grounds, Civil Action No. 90-P-86-2 (Cir. Ct. of Harrison County Apr. 15, 1992). For purposes of establishing a prima facie case of discrimination under W. Va. Code § 18-29- 2(m), Grievants have demonstrated they are similarly situated to other WCBOE employees, and they are receiving disparate, less favorable, treatment because they have a shorter employment term, and no vacation benefits as do 261-day employees within their classifications. See Flint, supra.

WCBOE contends there are legitimate, job-related reasons for the differences in treatment between Grievants and other 261 day employees. WCBOE avers it does not need Grievants to work the extra time, and it is within its discretion to determine the needs of the school system. Further, WCBOE notes there is no need for Grievants' services for the additional days that a 261-day employee works. The undersigned finds the reasons given for treating Grievants disparately and in a non-uniform manner are pretextual. See Burdine, supra; W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994); Sheperdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). It is clear the major difference between the two sets of employees is whether they receive vacation time or not. The testimony of Grievants was undisputed that they perform the same or similar duties as those performed by 261 day employees. Although the undersigned Administrative Law Judge could see a clear difference when comparing 200 or 220 day employees, even within the same classification and with the same duties, here 240 day employees take 21 non-calendar days, non-vacation days during each school year. Currently, with WCBOE, because the more senior employees are the ones with the 261 day contracts, no 261 day employee receives less than 11 days of vacation. (See footnote 8) This is a difference of only 10 days. If the 261 day employee has 11 or more years of service with WCBOE, he receives 24 days of vacation; and the 261 day employees are working 3 days less than the 240 day employee.

Given this set of facts, and given the directions in Flint, supra, the undersigned Administrative Law Judge finds the current practice of giving 240 day contracts to similarly situated employees, with the same classifications as 261 day employees, and who are performing like assignments and duties, and work almost as many days, or at times more days, than 261 day employees, results in

discrimination. It would appear this practice allows WCBOE to work the 240 day employee the same or almost the same as a 261 day employee for a considerable savings of money, as the 240 day employee does not receive paid vacation. (See footnote 9) Respondent has asserted the grievances are untimely, and the doctrine of laches precludes Grievants from receiving back pay in this case, because of their delay in bringing their claims. Grievants knew of the differences in their contract terms dating back to when they were hired. Therefore, there is no question they could have filed their grievances earlier and did not. They provided no explanation for their delay.

The West Virginia Supreme Court of Appeals discussed the issues of timeliness and laches in Flint. This Grievance Board has noted that "[l]aches is a delay which operates prejudicially to another person's rights. A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of the expenditure of public funds. Failure to do so constitutes laches. Maynard v. Board of Education of Wayne County, 357 S.E.2d 246, 255 (W. Va. 1987)." COL No. 3, Buchanan v. Bd. of Directors/Concord College, Docket No. 94-BOD-078 (Nov. 30, 1994). Laches clearly applies to this case, because WCBOE would be prejudiced by having to pay years of back pay to Grievants. However, W. Va. Code §18-29-4(v), enacted in 1992, provides that "[t]he doctrine of laches shall not be applied to prevent a grievant or grievants from recovering back pay or other appropriate relief for a period of one year prior to the filing of a grievance based upon a continuing practice.

This question/issue was clearly addressed and answered by the West Virginia Supreme Court of Appeals in Flint, supra. The West Virginia Supreme Court of Appealsfound the Flint grievance was timely filed and held the failure to provide uniform vacation benefits was a continuing practice under the holding in Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.3d 399 (1995). (See footnote 10) The Flint court, after noting the Martin ruling, found that "in accordance with W. Va. Code § 18-29-3(v), . . . plaintiffs Anderson's and Flint's awards of back pay should be limited to the difference in compensation between a 240-day contract for the one year prior to the filing of this grievance and for the years thereafter while this case was pending." Since the action has been found to be a continuing practice, it is not untimely, and the same relief must be awarded here.

Accordingly, WCBOE must create the requisite uniformity in contract terms for Grievants for the one-year period prior to the filing of this grievance by compensating Grievants for the difference in pay between the 240 day contracts they held and 261 day contracts.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rulesof the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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.

2. "School personnel laws and regulations are to be construed strictly in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

3. The failure to provide uniform vacation benefits is a continuing practice. Flint v. Harrison County Board of Education, Docket No. 97-17-348 (Jan. 22, 1998); aff'd, in part; rev'd, in part, Harrison County Cir. Ct., Civil action No. 95-C-485-1(Nov. 10, 1998), aff'd, in part; rev'd, in part, No. 25898 (Dec. 10, 1999). See Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.3d 399 (1995); Allman v. Harrison County Bd. of Educ., Docket No. 89-17-215 (June 29, 1990), rev'd on other grounds, Civil Action No. 90-P-86-2 (Cir. Ct. of Harrison County Apr. 15, 1992).

4. W. Va. Code §18A-4-5b states 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."

5. Boards of education must provide uniform vacation benefits to similarly situated service employees, meaning those who have "like classifications, ranks, assignments, duties and actual working days." Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995). 6. Discrimination is defined in W. Va. Code § 18-29-2(m) 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."

7. Favoritism is defined in W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

8. In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 18-29-2(m) and (o), a grievant must demonstrate the following:

(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.

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

9. Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

10. Grievants have proven by a preponderance of the evidence that they are similarly situated to 261 day employees, as they perform like assignments and duties, have the same classifications, and work almost the same, or more, days. Thus, they are entitled to the same employment term as the 261 day employees.

11. Grievant have proven a violation of W. Va. Code § 18A-4-5(b), and demonstrated they have not been treated uniformly as other employees "performing like assignments and duties . . . ."

Accordingly, this grievance is **GRANTED**. However, this grievance is **GRANTED** for Grievant Baker only for the time she was classified as a Secretary III/Accountant III and not for the time after she switched to a Secretary II position. Respondent Wood County Board of Education is **ORDERED**

to instate Grievants to a 261 day employment contract, and to make Grievants whole; to include, but not limited to, paying back pay, with interest, for any "non-calendar" days they have taken during the pendency of this grievance and for one year prior to the filing of this grievance.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood County and 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Janis I. Reynolds

ADMINISTRATIVE LAW JUDGE

Dated: May 19, 2000

Footnote: 1

The named Grievants are Tom Tracewell, Jeff Tracewell, Kenneth Yonkins, Karen Powell, Pamela Wharton, Randy Thompson, Toney George, Steve Harper, Carolyn Raines, Sheila Belcher, Barbara Metz, James Perkins, and Beth Baker.

Although Barbara Metz filled out a grievance form she did not attend the Level II or Level IV hearings. Her duties are not discussed in Grievants' Level IV brief. At Level II, some of the other Grievants attempted to identify her duties, but there is no testimony from her on the record as to the duties she performs. Additionally, although she was listed on Mr. Roush's appeal to Level IV, she did not identify herself as a member of his association, and indicated on her grievance form that she would represent herself. Respondent moved to dismiss Ms. Metz from the grievance for failure to file at Level IV. Given this set of facts Grievant Metz is dismissed from this grievance.

Footnote: 2

Grievants were represented by counsel, John E. Roush, of the West Virginia School Service Personnel Association. Respondent was represented by counsel, Dean Furner of Spilman, Thomas, and Battle.

Footnote: 3

During the Level III hearing, Respondent also moved to dismiss Grievant Perkins and Grievant Baker stating they did

not appeal to Level IV. Although their names were not listed on the original form filed by Mr. Roush in October, he wrote this Grievance Board on January 3, 2000, indicating these two names had been inadvertently left off of the appeal to Level IV. Grievant Perkins and Grievant Baker did appear and testified at the Level II hearing. They were not represented by Mr. Roush at that time. They are discussed in his post-hearing submissions. Given this set of facts, Grievant Perkins and Grievant Baker are not dismissed from this grievance.

Footnote: 4

The amount of vacation time is calculated in the following manner: 1 year of service = 6 days annually; 2-5 years of service = 12 days annually; 6-10 years of service = 18 days annually; 11+ years of service = 24 days annually.

Footnote: 5

Grievant Baker also stated she "guessed" the secretary had been there when they still had 261 day contracts. Since Grievant was unclear on this information, it cannot be considered.

An employee who has served in a Secretary II for eight years is then promoted to a Secretary III. W. Va. Code § 18A-4-8

Footnote: 6

The West Virginia Supreme Court of Appeals basically affirmed the original order of the Grievance Board.

Footnote: 7

This Code Section allows a board of education to contract with "all or part" of its employees for a term of employment longer than 200 days.

Footnote: 8

Because the more senior employees have the 261 day contracts, many receive at least 18 days of vacation annually.

Footnote: 9

The facts in this case are distinguishable from this Grievance Board's decision in Halstead v. Boone County Board of Education, Docket No. 99-03-066 (Apr. 30, 1999),where Custodian positions were properly differentiated on the basis of the size of the building, the amount of surrounding grounds, and the number of days the building is open for school or community activities. It was clear in Halstead that a custodian at the grievant's school was needed only for the term of his contract.

Footnote: 10

"It has been held by this Grievance Board that the failure to provide uniform vacation benefits for similarly situated employees is a continuing practice." Flint, supra; Allman, supra.