

11-1531

BEFORE THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

LARRY PATTERSON,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE
COUNTY OF RALEIGH,

Respondent.

2011 OCT -5 PM 3:38
CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT
Civil Action No. 09-AA-23

FINAL OPINION AND ORDER
AFFIRMING, IN PART, AND REVERSING, IN PART, ADMINISTRATIVE ORDER

This is an appeal from a decision rendered by the West Virginia Public Employees Grievance Board that denied Petitioner's claim to be afforded a contract that included paid vacation days and to be awarded back pay based upon uniformity requirements.

Standard of Review

Syllabus point 1 of the case Cahill v. Mercer County Bd. of Educ., 208 W. Va. 177, 539 S.E.2d 437 (2000), provides:

Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. *Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo.* (Emphasis supplied).

The Grievance Board's decision in the present case turned upon an application of law. No material facts are in dispute. Therefore, the Court is required to review the decision *de novo*. For the reasons set forth below, the decision of the Grievance Board is **AFFIRMED** insofar as it denied the relief sought by Petitioner, *albeit* for differing reasons as outlined herein.

Findings and Conclusions

Petitioner conceded in his brief that the decision of the West Virginia Supreme Court in the companion case Dillard v. The Bd. of Educ. of The County of Raleigh (W.Va., 2011) precludes the consideration of any claim for prospective relief. Petitioner only seeks relief in the form of back pay for the 2007-2008 school year. Petitioner's Brief, at pages 7-9.

During all relevant times, Petitioner was a Custodian III employed under a 210-day contract. In establishing his uniformity claim, the Petitioner seeks to compare himself to Harold French. Mr. French was classified as a Custodian III and held a 261-day contract. Mr. French had a seniority date of January 20, 1969. Respondent's Exhibit 1, Level I transcript. Mr. French retired effective June 30, 2008. Level III, Respondent's Exhibit 1.

Mr. French is not subject to comparison under the uniformity requirements of West Virginia Code Section 18A-4-5b. The Supreme Court of Appeals of West Virginia has held that the compensation of an employee hired before the effective date of West Virginia Code Section 18A-4-5b need not be considered when applying uniformity requirements. See Crock v. Harrison County Board of Education, 211 W. Va. 40, 560 S.E.2d 515 (2002). There, the Court stated:

The intent of the Legislature to implement the uniformity provisions in a prospective fashion is clear. Accordingly, the uniformity provisions enacted in 1984, that apply to the paying of salary and benefits to personnel who are employed in similar positions with the county do not affect Mrs. Washington [hired prior to 1984].

The Court in Crock allowed the difference in salary and benefits arising from the application of the grandfather language of Code § 18A-4-5b to persist with respect to the affected employees and did not suggest that this circumstance would give rise to a discrimination, favoritism or uniformity claim. A difference in treatment for employees hired prior to the effective date of Code § 18A-4-5b provides no more basis for a favoritism/discrimination claim than the differences that arise in the salary and benefits of an employee with one year of experience as compared to an employee performing the same duties who has ten years of experience. In each case, the differences in salary and benefits arise from

the application of statutory provisions relating to compensation. It is within the province of the Legislature to prescribe the factors that may be applied in fixing the compensation of school employees. Such deference is evident in the Crock decision. While uniformity among all school service employees may be an appropriate objective, the Court was unwilling to ignore statutory language creating a distinction between employees hired before and after the effective date of Code § 18A-4-5b in prohibiting the Harrison County Board of Education from relying upon uniformity to trump the clear intent of the Legislature to limit the application of uniformity requirements to contracts entered post-1984. The assertions of the Petitioner do not establish a factual basis for discrimination, favoritism or uniformity claims.

The only circuit court decision that has squarely addressed this issue was recently rendered in an appeal of a Grievance Board decision, styled The Raleigh County Board of Education v. Patricia Tzystuck, Civil Action 09-AA-8 (February 11, 2010, Circuit Court of Raleigh County, West Virginia, Petition for Appeal refused by the West Virginia Supreme Court of Appeals by Order dated September 23, 2010). This court transferred the Tzystuck appeal to the Circuit Court of Raleigh County by Order entered on March 11, 2009 (Civil Action No. 09-AA-9). The Court's decision provided, in pertinent part:

The Court also concludes that the Administrative Law Judge erred as a matter of law in the application of the decision rendered by the West Virginia Supreme Court of Appeals in the case Crock v. Harrison County Board of Education. A careful reading of this decision reveals that the Court forewarned of a bar to uniformity claims by employees, hired subsequent to the enactment of West Virginia Code § 18A-4-5b, by making comparisons to employees hired in advance of the legislative creation of uniformity requirements. The Court, in Crock, permitted an employee hired subsequent to the enactment of West Virginia Code § 18A-4-5b to maintain a higher level of compensation only through the application of "law of the case" principals and not based upon a determination that school service employees hired after the enactment of West Virginia Code § 18A-4-5b were entitled to establish uniformity claims by comparing themselves to individuals hired before the enactment of the statute. The Court expressly held that Code § 18A-4-5b was intended to be applied prospectively. The Court stated:

The intent of the Legislature to implement the uniformity provisions in a prospective fashion is

clear. Accordingly, the uniformity provisions enacted in 1984, that apply to the paying of salary and benefits to personnel who are employed in similar positions within the county, do not affect Mrs. Washington [hired prior to 1984].

A retroactive application of the statute would have inflicted material consequences upon county boards of education in that they would have been afforded no notice or warning that decisions relating to compensation and benefits that occurred prior to the establishment of uniformity requirements would have been “locked in” and have the effect of dictating entitlements to future school service employee compensation and benefit levels. Typically, where the retroactive application of legislation would affect substantive matters, the Courts have required an express intention on the part of the Legislature to be evident. There is no such evidence.

Parenthetically, no Kanawha County Circuit Court decision had addressed the issue of whether an individual hired prior to 1984 may serve as a target for a uniformity claim. Because Mr. French was hired prior to 1984 and is the only individual with whom the Petitioner seeks comparison, the Tzystuck decision, if followed, would result in the denial of any back pay award. The decision of the Circuit Court of Raleigh County is persuasive and should be afforded deference.

The Court also concludes that an award of back pay based upon a uniformity claim does not arise from a comparison of an employee holding a 261-day contract with a 210-day contract. The West Virginia Supreme Court has never held that school service employees holding less than 240-day regular contracts are entitled, by virtue of uniformity requirements, to be granted 261-day contracts. It is only when the sole distinction between 240-day contract and 261-day contract employees involves paid vacation that the Court has afforded relief. See Flint et al. v. Bd. of Educ. of the County of Harrison, 207 W. Va. 251, 257, 531 S.E.2d 76, 82 (1999) (overruled in part on other grounds); Board of Education of County of Wood v. Airhart, 212 W. Va. 175, 569 S.E.2d 422 (2002); Durig v. Board of Education of the County of Wetzel, 215 W. Va. 244, 599 S.E.2d 667 (2004), all involved the resolution of a 240- versus 261-day contract. Syllabus point 5 of Airhart provides:

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.

The Petitioner's 210-day contract does not establish the profile required to establish a uniformity claim. Actual work for 210 days fails the "like assignments and duties" test when compared with a 261-day contract requiring (work for 240 days/vacation for 21 days). Code § 18A-5-5b requires uniformity between service employees who perform "like assignments and duties." Assignments that are unlike, by virtue of materially different amounts of work to be performed under the regular employment contracts (210 contract days compared with 240 contract days), are not subject to uniformity requirements.

Petitioner held summer employment. Summer employment is separate and distinct from regular employment and is governed by West Virginia Code § 18-5-39 that provides, in part:

(a) Inasmuch as the present county school facilities for the most part lie dormant and unused during the summer months, and inasmuch as there are many students who are in need of remedial instruction and others who desire accelerated instruction, it is the purpose of this section to provide for the establishment of a summer school program, *which is to be separate and apart from the full school term as established by each county.* (emphasis supplied).

There is no legal basis to combine the number of days with a school service employee's regular contract and the period of summer employment to achieve a comparison with another school service employee holding a regular contract term in excess of 200 days. The West Virginia Supreme Court has never held that summer employment may be piggy-backed with a regular employment term to establish uniformity claims. The summer employment of school service personnel is related to support for summer programs and are, therefore, different than regular employment. Moreover, the record contains no evidence showing that Petitioner's summer responsibilities could be compared to the duties and responsibilities associated with his regular employment.

ORDER

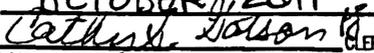
Upon a thorough examination of the record below, the Court finds that the decision of the Administrative Law Judge is not contrary to law in so far as it denied the relief sought by Petitioner.

Accordingly, the Court **ORDERS**:

The decision of the West Virginia Public Employees Grievance Board, dated March 10, 2010, is **AFFIRMED**. There being nothing further pending before this Court this matter shall be **DISMISSED** and **STRICKEN** from the docket of the Court. It is further **ORDERED** that the Clerk distribute certified copies of this Order to all *pro se* parties and counsel of record and the West Virginia Public Employees Grievance Board. This is a Final Order.

Enter this 5th day of Oct., 2011.


Honorable Paul Zakab, Jr.
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 5TH
DAY OF OCTOBER, 2011

CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA