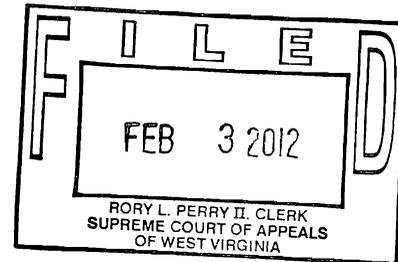


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

LARRY PATTERSON,
Petitioner,



v. Appeal No. 11-1531

**THE BOARD OF EDUCATION
OF THE COUNTY OF RALEIGH,
Respondent.**

**PETITION OF APPEAL TO THE WEST VIRGINIA SUPREME COURT
OF APPEALS FILED ON BEHALF OF PETITIONER LARRY PATTERSON**

John Everett Roush, Esq.
Legal Services
West Virginia School Service Personnel Association
1610 Washington Street East
Charleston, WV 25311
Telephone # 304-346-3544
State Bar ID # 3173

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ASSIGNMENT OF ERROR

- The circuit court erred in holding that Petitioner had not established a right to uniformity with Mr. French.
- The circuit court and the administrative law judge erred in denying Petitioner’s request for back pay and benefits for 2007-2008 school year equaling difference between a 240-day contract and a 261-day employment contract.

STATEMENT OF THE CASE

Petitioner and a group of like situated employees initiated a grievance at level I pursuant to West Virginia Code §6C-2-1, et seq., on or about July 2, 2007.¹ Dr. Emily Meadows, the designee of the chief administrator², conducted a hearing at level I on July 9, 2007. By decision received July 26, 2007, Dr. Meadows denied the grievance.

Petitioner and the other grievants appealed to level II on July 31, 2007. The mediation conference was unsuccessful and the grievance was appealed to level III.

Administrative Law Judge Thomas Gillooly, Esq., conducted an evidentiary hearing on April 10, 2008 to supplement the record created below. Eventually, the grievance was reassigned to Administrative Law Judge Denise Spatafore, Esq., who denied the grievance by decision issued December 31, 2008 and received January 5, 2009. Administrative Law Judge Denise Spatafore, Esq., held that Petitioner and all the other grievants except one had established their claim of nonuniformity and discrimination/favoritism and had proven entitlement to a 261-day contract. However, she denied Petitioner and the other grievants any retroactive relief including both back pay and benefits for the time period preceding the filing of the grievance and the time period after the filing of the grievance through issuance of the decision. Further, Ms. Spatafore also denied the Petitioner any prospective relief in the form of reinstatement into a 261-day contracts. Petitioner and the other grievants appealed the denial of retroactive and prospective relief to circuit court pursuant to West Virginia Code §6C-2-5 on or about February 4, 2009. For reasons unclear to the undersigned, the circuit clerk required the filing of individual petitions for each of the employees involved in the original grievance.³

¹ Supplementary pleadings were filed upon behalf of several of the employees on July 20, 2007 at the request of the staff of the WVPEGB.

² For a county board of education, the chief administrator is the county superintendent of schools.

³ The docket numbers for this group of cases are Civil Action No. 09-AA-19 through Civil Action No. 09-AA-27.

By order entered October 5, 2011, the circuit court affirmed the decision of the administrative law judge to deny back pay to Petitioner Larry Patterson. In addition, the circuit court reversed the finding of the administrative law judge that Petitioner had established discrimination and nonuniformity. Petitioner seeks judicial review of this order by this court.

Larry Patterson, Petitioner, is employed as a Custodian III by the Respondent. Petitioner held a 210-day employment terms regular contract of employment as a Custodian III and 30-day summer contract with the Respondent. The Board of Education of the County of Raleigh, Respondent, is a quasi-public corporation created by statute for the management and control of the public schools of Raleigh County.

Harold French was employed at the time this grievance arose by the Respondent as a Custodian III at the ACT facility. Mr. French held a 261-day employment term contract. The duties performed by Mr. French and Petitioner fall within the responsibilities of a Custodian III.

Respondent's policy grants paid vacation to 261-day employees. Therefore 261-day employees are not required to work 261 days during the school year in order to receive their full salary. These employees are eligible to take paid vacation days. As Petitioner did not hold a 261-day contract, he did not receive paid vacation. Instead of paid vacation, Petitioner took twenty-one non-calendar days each school year. On these days he would neither work nor be paid, though these days would be "normal" working days. By "normal", we mean a weekday (Monday through Friday), which does not coincide with a legal holiday. As a consequence of these factors, Petitioner and Mr. French worked roughly the same number of days per school year, but Mr. French received twenty-one days of additional salary per year.⁴ Both took off

⁴ Combining Petitioner's 210-day regular contract of employment with his 30-day summer contract of employment results in a total of 240 days per school year.

roughly the same number of normal working days during the year, but Petitioner did so without pay.

Petitioner and the other employees were alerted to the subject matter of the current litigation when they learned of a settlement of a grievance was filed by employees in other classifications. While the parties were awaiting a decision at level III, Mr. French retired at the end of the 2007-2008 school year, i.e. June 30, 2008.

SUMMARY OF ARGUMENT

First, Petitioner concedes that it may well be improper to remove a benefit from an employee whose employment commenced prior to the enactment of the uniformity provision, i.e., West Virginia Code §18A-4-5b. However, this should not relieve Respondent of the obligation to maintain uniformity between two similar situated employees, even if one was hired prior to the enactment of the uniformity provision.

Second, Petitioner contends that he is entitled to back pay for the 2007-2008 school year, which is the year after he initiated the current grievance and the last school year in which Mr. French was employed by Respondent with a 261-day contract. Petitioner contends that two factors which had led the court to deny such back pay in past cases, i.e. general satisfaction with the 240-day contract and the possibility that the nonuniformity was inadvertent, were not present in the current case. Further, Petitioner asserts that the grant of back pay for the 2007-2008 school year to Petitioner would be consistent with the outcomes in the cases of the other eight employees who joined the original grievance with Petitioner.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that the facts and legal arguments are adequately presented in the briefs and record on appeal and that the decisional process would not be significantly aided by oral argument. Consequently, pursuant to Rule 18(a)(4) of the Revised Rules of Appellate Procedure, Petitioner does not request scheduling of oral argument.

ARGUMENT

Prior to addressing the issue peculiar to this case, Petitioner will address two general issues common to all administrative appeals from the West Virginia Public Employees Grievance Board. The first of these issues is the standard of review that this court must apply to this case. The second is the statutory construction to be applied to school personnel laws.

STANDARD OF REVIEW

This appeal is controlled by West Virginia Code §6C-2-5. The language of this provision is virtually identical to the language formally found in West Virginia Code §18-29-7, which related to appeals to circuit court of grievance board decision by administrative law judges under the previous statutory grievance procedure. As a consequence of this affinity, case law interpreting West Virginia Code §18-29-7 is applicable to West Virginia Code §6C-2-5.

In construing West Virginia Code §18-29-7 the West Virginia Supreme Court of Appeals has held that the standard of review is two fold. First, judicial review of a decision on factual issues is similar to the standard of review under the Administrative Procedure Act (West Virginia Code § 29A-5-4), in that both require that evidentiary findings made at an administrative hearing not be reversed unless these findings are clearly wrong. Randolph County Board of Education v. Scalia, 387 S.E.2d 524 (W.Va. 1989) On legal issues or the application of the law to facts, decisions are reviewed *de novo*. Martin v. Randolph County Bd. of Education, 465 S.E.2d 399

(W.Va. 1995) The issues involved in this appeal relate to the application of the law to the facts. Hence, a *de novo* review is in order.

STATUTORY CONSTRUCTION

The long-standing rule regarding statutory construction of laws and regulations dealing with school personnel is that such laws and regulations are to be strictly construed and in favor of the employee(s) that the law or regulation is designed to protect. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979).

Now let us proceed to the specific issue raised by this appeal. The administrative law judge held that Petitioner had established nonuniformity and discrimination/favoritism and entitlement to a 261-day employment term contract. The circuit court reversed this part of the decision. The administrative law judge also denied Petitioner retroactive and prospective relief. The circuit court affirmed this part of the decision. In the present appeal Petitioner asserts that the circuit court erred as a matter of law in holding that uniformity did not have to be maintained between Petitioner and Mr. French. Consistent with the relief accorded the other litigants, Petitioner only seeks relief for the 2007-2008 school year.

PETITIONER HAS ESTABLISHED RIGHT TO UNIFORMITY WITH WILLIAM FRENCH FOR THE 2007-2008 SCHOOL YEAR

Respondent has consistently contended that since Mr. French was employed and held the benefit of a 261-day contract prior to the enactment of West Virginia Code §18A-4-5b, Mr. French could not be deprived of that benefit by operation of West Virginia Code §18A-4-5b.⁵

⁵ This section provides:

The county board of education may establish salary schedules which shall be in excess of the state minimums fixed by this article.

These county 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 requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits,

Petitioner has no quarrel with this assertion, though he notes that the case law does not *consistently* bear out that proposition.⁶ However, Respondent's further proposition that it is thereby exempted from maintaining uniformity between Petitioner and Mr. French is a *non sequitur*. Nevertheless, the circuit court adopted Respondent's position and reversed the administrative law judge on this issue.

In Crock v. Harrison County Board of Education, 560 S.E.2d 515 (W.Va. 2002) this court stated that employees hired prior to enactment of the uniformity provision may not lose a benefit to achieve uniformity. However, this should not exempt boards of education from maintaining uniformity between employees performing like duties and assignments on the basis that some were employed prior to enactment of the uniformity provision and other after it. The language of West Virginia Code §18A-4-5b does not state that uniformity need not be maintained between personnel employed prior to 1985 and those employed thereafter. The statutory language is obviously intended to guarantee equality of treatment of employees. It would take a perverse reading of the language of the statute to create two *unequal* classes of employees, i.e., pre- and post-1985 employees. Petitioner concedes that there is *dicta* to that effect in Crock. Appellant contends that what the court actually did in Crock is critical and not at what it hinted. This court actually left the "post-1985" employee in possession of the same benefit as the "pre-1985

increments or compensation for all persons regularly employed and performing like assignments and duties within the county: **Provided**, That in establishing such local salary schedules, no county shall reduce local funds allocated for salaries in effect on the first day of January, one thousand nine hundred ninety, and used in supplementing the state minimum salaries as provided for in this article, unless forced to do so by defeat of a special levy, or a loss in assessed values or events over which it has no control and for which the county board has received approval from the state board prior to making such reduction.

Counties may provide, in a uniform manner, benefits for service personnel which require an appropriation from local funds including, but not limited to, dental, optical, health and income protection insurance, vacation time and retirement plans excluding the state teachers retirement system. Nothing herein shall prohibit the maintenance nor result in the reduction of any benefits in effect on the first day of January, one thousand nine hundred eighty-four, by any county board of education.

(Emphasis Added)

⁶ See Lucion v. McDowell County Board of Education, 446 S.E.2d 487 (W.Va. 1994). In Lucion the board of education was permitted to reduce the contract terms of quite a number of employees who had been employed prior to the enactment of West Virginia Code §18A-4-5b.

employee” in Crock. Notably, this court did the same thing in Ricky Dillard v. The Board of Education of the County of Raleigh, Appeal No. 10121.

Petitioner also notes that though the Respondent has raised this argument at every level, all of the employees originally in this grievance have received compensation for the 2007-2008 school year either by decision of the circuit court or in the case of Ricky Dillard, by the memorandum decision of this court.

PETITIONER IS ENTITLED TO COMPENSATION FOR LOST WAGES AND BENEFITS. FOR THE 2007-2008 SCHOOL YEAR.

The administrative law judge denied retroactive back pay and benefits to Petitioner on the basis of a similar denial of back pay in Board of Education v. Airhart, 569 S.E.2d 422 (W.Va. 2002) and Durig v. Board of Education, 599 S.E.2d 667 (W.Va. 2004). Like the present case, both Airhart and Durig involved litigation by 240-day employees who contended that they were similarly situated with 261-day employees and were entitled to the same compensation and benefits. The administrative law judge cited reasoning from those cases in which boards of education were relieved from the obligation of back pay because:

(a) the acceptance by the employee of a 240-day employment term contract indicated a general satisfaction with the contract; and,

(b) the absence of uniformity may have been accidental.⁷

She also noted that these decisions were issued subsequent to Flint v. Board of Education, 531 S.E.2d 76 (W.Va. 1999). Contrary to Airhart and Durig, in Flint the court awarded back pay for a year prior to the initiation of the grievance. Without explicitly stating so, it is obvious that the

⁷ Level III decision, pp. 10-11.

administrative law judge felt that Airhart and Durig implicitly overruled Flint with regard to the issue of back pay in such circumstances.

Petitioner contends this reasoning is flawed. First, Petitioner would challenge the idea that Airhart and Durig are the last word on the issue of the entitlement of 240-day term employees to the same compensation and benefits as 261-day employees. Subsequent to Airhart and Durig, the West Virginia Supreme Court of Appeals issued Board of Education v. White, 605 S.E.2d 814 (W.Va. 2004). This case also involved a 240-day employee who contended that she was similarly situated with a 261-day employee and was entitled to the same compensation and benefits. In White the West Virginia Supreme Court awarded the employee back pay for a period of one-year preceding the initiation of the grievance. The court stated:

We decline to disturb the relief awarded to Ms. White by the Grievance Board. The award is consistent with our decision in Flint, supra, in which we ruled that the grievants' 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 the cases were pending. Flint is based on W.Va. Code § 18-29-3(v) (1992), which 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." Also, Airhart was decided after the Grievance Board granted back pay to Ms. White.⁸

The circuit court and the administrative law judge doubtless seized upon the last sentence in the footnote to distinguish the current case from White. For the undersigned the application is not so clear. The statutory language in question, i.e. West Virginia Code §18-29-3(v), remained the same from the time of the Flint litigation through Airhart, Durig, and White. All these cases were decided pursuant to the same statutory language. Accordingly, it would appear to the

⁸ Footnote 9, Board of Education v. White, 605 S.E.2d 814 (W.Va. 2004).

undersigned that the current interpretation of the statutory language should be applicable to every case in litigation at that time, regardless of the stage of the litigation. If the court's interpretation of a particular piece of statutory language changes, then that change would seem to then apply to all cases still in litigation. This provides a good point at which to move the discussion to the next point at which the Petitioner challenges the reasoning of the administrative law judge, which the circuit court affirmed.

In the present case, there *has* been a change in the statutory language from what it was when Flint, Airhart, Durig, and White were decided. When those cases arose and throughout the time of the litigation process, West Virginia Code §18-29-3(v) provided:

The 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.

The current litigation arose under West Virginia Code §6C-2-3(c)(2), which provided, at that point in time, the following:

Back Pay. A one-year statute of limitations applies to the recovery of back pay. In the case of a willful violation by the employer in which it can be shown by a preponderance of the evidence that the employer acted in bad faith in concealing the facts giving rise to the claim for back pay, an eighteen-month statute of limitations applies. Further, a grievant's right to back pay tolls from the time that the grievant has actual or constructive knowledge of his or her right to back pay.

Although the administrative law judge is correct that this language is similar to the language in effect for Flint, Airhart, Durig, and White, it is not the identical and arguably has a different effect. The former language limited the use of the defense of laches to periods of time more than one year prior to the initiation of a grievance that was based upon a continuing

practice. It did not appear to affect other defenses nor to apply to grievances based on an isolated definable event or those based upon the discovery of such an event.

The language of the provision in effect at the time the grievance was initiated is difficult to apply.⁹ It is clear that it creates a limitation of one-year on back pay or in the case of bad faith concealment, eighteen months. The first question is: From what date do these limitations apply? Because of the use of the phrase “statute of limitations”, Petitioner asserts that the limitations apply backward in time from the date that the grievance is *initiated*. Petitioner reasons as follows:

A statute of limitations requires a potential litigant to file a suit within a specified length of time after the occurrence of the event. Hence, if an employee seeks to a rectify an instance of nonuniformity and/or discrimination/ favoritism which occurs on January 1, 2008, the individual has until January 2, 2009 to do so. An instance occurring on January 2, 2008 must be challenged by initiation of litigation, i.e. a grievance, on or before January 2, 2009. Consequently a limitation of back pay by one year, would apply backwards a year from the date the grievance was initiated.

The fact that a six-month extension of the time period in which an employee is entitled to back pay is granted when the employer has been guilty of concealing the facts is significant in searching for meaning in this statutory language. It lends strength to the argument that the limitation applies backward from the date of initiation of the grievance. Concealment of the facts giving rise to a grievance would naturally be designed to delay or prevent altogether the date upon which a grievance is issued. Extending the time period back from the date of the initiation of the grievance would be an appropriate remedy to a tactic to delay initiation of a grievance.

⁹ The language in question has since been amended.

The final sentence in section 3(c)(2) is also a little difficult to understand. In legal terms, to “toll” is to delay, suspend or hold off the effect of a statute. Since the effect of the statute is to limit the right of back pay, does knowledge of the grievable event or constructive knowledge delay the twelve-month window from going into effect until the grievance is filed? If so the third sentence is meaningless. On the other hand, does it mean that if an employee become aware of a situation, the twelve or eighteen month limitation is fixed at that point to twelve or eighteen months prior to that date? If so, could an employee then wait another two years before initiating a grievance and still recover back pay back to a point a year or year and one-half prior to the point he/she became aware of the situation? Even as an advocate of employees, the undersigned would find such an interpretation to lead to an absurd result. It would reward or at least not penalize an employee for setting on his/her rights.

The undersigned is really hard put to come up with a third interpretation of this language. Certainly, there is nothing in the statutory language that in anyway ties the twelve or eighteen month limitation to the date of disposition of the grievance, be that at level III, circuit court or before the West Virginia Supreme Court of Appeals. Consequently, there is nothing in the statutory language that would in any way bar Petitioner from receipt of relief for the school year after the filing of the grievance on or about July 2, 2007, i.e., the 2007-2008 school year.

In the current appeal Petitioner seeks back pay *prospective* from the time of initiation of the grievance. He seeks back pay for the school year *following* the filing of the grievance, the 2007-2008 school year, but prior to issuance of the decision at level III. This is essentially the relief awarded by the various circuit judges to seven of the eight other employees who were originally part of the grievance with Petitioner and by this court to the eighth, Ricky Dillard.¹⁰

¹⁰ The seven cases in which the circuit court awarded the employee back pay for 2007-2008 school year are Scarbro v. The Board of Education of the County of Raleigh, Civil Action No. 09-AA-19; Rice v. the Board of Education of

Petitioner also notes that one of these cases, Crouch v. Raleigh County Board of Education, Civil Action No. 09-AA-26, involved not only a similar, but an almost identical factual pattern as his case.¹¹

Finally, the two reasons for denial of back pay in Airhart and Durig are not found in this case. Any impression of general satisfaction with Petitioner's contract term would be completely dispelled by the filing of a grievance on July 2, 2007. Hence any defense based upon this impression of satisfaction, to the extent this is a recognizable defense in equity, should not apply to the period after July 2, 2007, i.e., the 2007-2008 school year. At least from that date forward, Respondent cannot seriously contend that it was relying upon the impression that Petitioner was satisfied. As indicated previously, it is relief for the year after the grievance was initiated that Petitioner seeks.

Second, there is no indication that the nonuniformity between 240-day and 261-day custodians was accidental. To the contrary, Respondent made a conscious decision to cease issuing 261-day contracts at a certain point in time. The replacement of 261-day positions with 240-day positions by attrition was a part of the plan as was the unavoidable coexistence of 240-day and 261-day employees in similar circumstances.

CONCLUSION

the County of Raleigh, Civil Action No. 09-AA-24, Cozart v. the Board of Education of the County of Raleigh, Civil Action No. 09-AA-27; Cella v. The Board of Education of the County of Raleigh, Civil Action No. 09-AA-25; Gunnoe v. The Board of Education of the County of Raleigh, Civil Action No. 09-AA-20; Pannell v. The Board of Education of the County of Raleigh, Civil Action No. 09-AA-22 and Crouch v. The Board of Education of the County of Raleigh, Civil Action No. 09-AA-26. In Dillard v. The Board of Education of the County of Raleigh, Civil Action No. 09-AA-21, the circuit court denied any monetary relief to the employee. However, this court awarded Mr. Dillard back pay for the 2007-2008 school year on February 11, 2011 by memorandum decision. Dillard v. The Board of Education of the County of Raleigh, Appeal No. 101221. The circuit judge in the current case was notified of the outcome of these other similarly situated employees.

¹¹ A copy of this order is appended hereto as Attachment A and is hereby incorporated by reference as if fully and textually setout herein.

Petitioner is entitled to uniformity with Mr. French at least until the time that Mr. French retired. Therefore, Petitioner is entitled to back pay from the date he initiated a grievance until the retirement of Mr. French. In other words, he is entitled to back pay for the 2007-2008 school year, which is the relief received by the other employees originally part of this grievance.

LARRY PATTERSON, Petitioner
By counsel,



John Everett Roush, Esq.

Legal Services

West Virginia School Service Personnel Association

1610 Washington Street East

Charleston, WV 25311

Telephone # 304-346-3544

State Bar ID # 3173

CERTIFICATE OF SERVICE

I, John Everett Roush, Esq., counsel for the Petitioners, hereby certify that I have filed the original and nine copies of the foregoing "Petition of Appeal to the West Virginia Supreme Court of Appeals Filed on Behalf of Petitioner Larry Patterson" on the following by hand delivery, this the 3rd day of February 2012 to:

Rory L. Perry, II, Clerk of the Court
West Virginia Supreme Court of Appeals
State Capitol Complex
1900 Kanawha Boulevard East
Charleston, WV 25305

Further, I John Everett Roush, Esq., counsel for Petitioner, certify that I have served a true copy of the foregoing "Petition of Appeal to the West Virginia Supreme Court of Appeals Filed on Behalf of Petitioner Larry Patterson" on the following by placing the same in a properly addressed envelope, First Class Postage Prepaid, in the United States Mails, on this the 6th day of February 2012, to:

Greg Bailey, Esq.
Bowles, Rice, McDavid, Graff & Love, LLP
7000 Hampton Center
Morgantown, WV 26505



John Everett Roush, Esq.

Legal Services

West Virginia School Service Personnel Association

1610 Washington Street East

Charleston, WV 25311

Telephone # 304-346-3544

State Bar ID # 3173

State of West Virginia
Supreme Court of Appeals

Ricky Dillard,
Petitioner

vs) No. 101221 (Kanawha County 09-AA-21)

The Board of Education of the County of Raleigh,
Respondent

FILED

February 11, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Ricky Dillard timely appeals the Circuit Court of Kanawha County's May 10, 2010, order affirming the December 31, 2008, decision of the West Virginia Employees Grievance Board. Respondent Board of Education of the County of Raleigh has filed a timely response. The entire record was designated on appeal.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this case is appropriate for consideration under the Revised Rules. Upon consideration of the record on appeal, the parties' briefs, and the circuit court's order, this Court is of the opinion that the decisional process would not be significantly aided by oral argument and that a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner is employed by the respondent as a Custodian III with a 240-day contract and no paid vacation days. In July 2007, petitioner and other employees classified as Custodian III pursued a joint grievance asserting that respondent violated the uniformity provisions in West Virginia Code §18A-4-5b and the discrimination prohibition of West Virginia Code §6C-2-2(d) by employing a similarly situated Custodian III, Harold French, with a 261-day contract that included paid vacation days. The Grievance Board concluded that petitioner and certain of the 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, the Grievance Board denied them any relief. The Grievance Board found that the grievants were not entitled to reinstatement to a 261-day contract because Mr. French retired on June 30, 2008, and no other Custodian III holds a 261-day contract, thus there is no longer any illegal discrimination or favoritism. The Grievance Board denied back pay after finding that the evidence did not establish intentional discrimination by the respondent, that the grievants knew of

this situation for many years, and that the grievants had accepted their contracts without complaint. Petitioner appealed, and the circuit court herein affirmed the Grievance Board's decision.

Petitioner explains 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 and the discrimination and favoritism continued to exist. In this appeal, petitioner seeks the same relief that was given to the other five grievants who appealed. He raises 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.

When denying any back pay award, the grievance board 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 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, this Court 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.

Considering the Grievance Board's findings and applying the reasoning in *Airhart* and *Durig*, this Court concludes that the lower tribunals' decision to deny petitioner back pay for the 2007-2008 school year was arbitrary and capricious and characterized by an abuse of discretion. Although petitioner had accepted his contract in prior years, any indication of satisfaction with the offered terms was dispelled when he filed this grievance in July 2007. The Grievance Board found that unlawful discrimination and favoritism existed until the end of the 2007 - 2008 school year, when Mr. French retired. Accordingly, this Court concludes that petitioner is entitled to the difference between his 240-day contract and a 261-day contract for the 2007 - 2008 school year.

We find no error or abuse of discretion in the remainder of the circuit court's and Grievance Board's orders. For the foregoing reasons, we affirm in part and reverse in part.

Affirmed in part, reversed in part.

ISSUED: February 11, 2011

CONCURRED IN BY:

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh

Chief Justice Margaret L. Workman voluntarily disqualified